STATEMENT OF JURISDICTION

With complete diversity between the parties, the district court had jurisdiction over this case pursuant to 28 U.S.C. § 1332. On September 27, 2006, the district court properly certified interlocutory appeal of its order denying State Farm's motion to dismiss. 28 U.S.C. § 1292(b). R.E. Tab 2. State Farm timely filed its petition for interlocutory appeal on October 11, 2006. The Tuepkers timely filed their cross-petition on October 12, 2006. F.R.A.P. 5(b)(2). Both parties' petitions for interlocutory review were granted by this court on November 21, 2006. R.E. Tab 3. Appellate jurisdiction to review the order on the motion to dismiss therefore exists under 28 U.S.C. § 1292(a)(1). U.S. ex rel. Bain v. Georgia Gulf Corp., 386 F.3d 648 (5th Cir.2004).

STATEMENT OF THE ISSUES

1. Does the Hurricane Deductible Endorsement to the Tuepker's policy create a reasonable expectation of coverage for "hurricane" perils described by the National Hurricane Center and the National Weather Service?

2. Does the Hurricane Deducible Endorsement's adoption of "hurricane" as defined by the National Hurricane Center and the National Weather Service override any reading that "flood" is the same as "storm surge" for purposes of the "water damage" exclusion in the policy?

3. Does State Farm's policy's "anti concurrent cause" exclusion make the policy and Endorsement ambiguous or illusory in the context of hurricanes?

4. In finding the "anti concurrent cause" clause to be ambiguous in a hurricane endorsed policy, should the lower court have found that the clause's subordinate, dependant "water exclusion" ambiguous *a fortiori*?

5. Did the district court err in interpreting the law of proximate causation that applies to this case?

6. What burden of proof does each party bear?

STATEMENT OF THE CASE

John and Claire Tuepkers' residence in Long Beach, Mississippi, was completely destroyed by Hurricane Katrina on August 29, 2005. They timely filed a claim for their loss with their homeowners' insurance carrier, State Farm Fire and Casualty Company. State Farm denied their claim, relying on a provision known as an "anti-concurrent cause clause" and its subordinate "water damage" exclusion. The Tuepkers filed suit in the United States District Court for the Southern District of Mississippi, Southern Division, on November 21, 2005, alleging that the relevant policy provisions fully covered them for loss caused by a hurricane. They further alleged that State Farm and its agent expressly and/or impliedly bolstered their reasonable expectation of coverage under the words of the policy. State Farm

responded with a motion to dismiss filed pursuant to Fed.R.Civ.P. 12(b)(6) and 9(b). The district court denied the motion on May 24, 2006. The district court certified its order for interlocutory appeal on September 27, 2006. This Court granted State Farm's petition and the Tuepkers' cross-petition on November 21, 2006.

STATEMENT OF FACTS

The following are the factual allegations and policy provisions pertinent to this appeal:

A. The insurance policy – The denial of coverage – The lawsuit

This case arises from State Farm Fire and Casualty Company's ("State Farm") denial of benefits under a standard homeowner's policy, Number 24100401-1which named John and Claire Tuepker ("the Tuepkers") as the insured. R.E. Tab 8, p. 808. The policy covered: the Tuepkers' residence in Long Beach, Mississippi, for $189,200.00; the extension to their residence for $18,920.00; the Tuepkers' personal property for approximately $141,900.00; and loss of use for actual loss sustained. *Id.* The policy was in effect from August 9, 2005, to August 9, 2006. *Id.*

There are two relevant coverage provisions in the original policy. "COVERAGE A – DWELLING" insured the Tuepkers for "accidental direct physical loss" to their residence. R.E. Tab 8, p. 818. As State Farm points out in its brief, this provision constituted an "all risk" (or "open peril") policy. "COVERAGE B –

PERSONAL PROPERTY" insured damage to or loss the contents of the Tuepkers' home when it was caused by "windstorm or hail" as well as "when the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening." *Id.* As State Farm points out in its brief, this constituted a "named peril" policy.

The Tuepkers also agreed to a "Hurricane Deductible Endorsement" (hereinafter "the Endorsement") that by its own terms applied to "loss caused by each hurricane occurrence." R.E. Tab 8, p. 837. The Endorsement incorporated the National Hurricane Center's definition of "hurricane:"

> As used in this endorsement **hurricane** means a storm system that has been declared to be a **hurricane** by the National Hurricane Center of the National Weather Service.

R.E. Tab 8, p. 837 (boldface in original). The Endorsement went on to circumscribe the kinds of damage to which the deductible percentage would be applied, expressly restricting the policy's *deductible* – but not the policy's *coverage* – to

> physical loss or damage to covered property caused by wind, wind gusts, hail, rain, tornadoes, or cyclones caused by or resulting from a **hurricane** as defined above. The deductible for loss caused by each **hurricane** occurrence is the amount determined by applying the deductible percentage (%) shown in the **Declarations** to the **COVERAGE A - DWELLING** limit shown in the **Declarations**.

R.E. Tab 8, p. 837 (boldface in original).

The policy purported to exclude coverage through the following clauses:

SECTION I - LOSSES NOT INSURED

* * *

2. 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:[1]

* * *

c. **Water damage**, meaning:

(1) flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, whether driven by wind or not;

* * *

3. We do not insure under any coverage for any loss consisting of one or more of the items below. Further, we do not insure for loss described in paragraphs 1. and 2. immediately above regardless

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[1] This entire provision (Paragraph 2) is known in the insurance industry as an "anti-concurrent cause clause." The parties to this litigation have adopted that moniker, and it is used in this brief to refer to the controversial provision, relied upon by State Farm, to deny coverage where there is "water damage," regardless of the presence of wind damage, which is indisputably covered. As discussed more fully below, the district court nullified the anti-concurrent cause clause because it could not be reconciled with other parts of the policy.

> of whether one or more of the following: (a) directly or indirectly cause, contribute to or aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss:
>
> * * *
>
> c. weather conditions.

R.E. Tab 8, p. 821 (boldface in original).

The Tuepkers allege that they purchased this policy from State Farm for the express and primary purpose of insuring against any property damage that would normally result from a hurricane, including any damage from wind, rain or storm surge caused by a hurricane. Complaint, ¶ 10, R.E. Tab 6, p. 17. They allege that State Farm, acting through its agent, Elvis Gates, expressly and/or impliedly represented to the Tuepkers that they would have comprehensive coverage for any and all damage caused by a hurricane. *Id.* at ¶ 11. The Tuepkers allege that the coverage provisions in the original policy, cited above, purported to give full and comprehensive coverage for losses proximately and efficiently caused by hurricane wind and storm surge. *Id.* at ¶ 12. They also allege that the Hurricane Deductible Endorsement bolstered their reasonable expectation that the policy covered them against any and all damage that might be caused by a storm system designated a "hurricane" by the National Hurricane Center and/or the National Weather Service. *Id.* at ¶ 13, R.E. Tab 6, p. 18.

On August 29, 2005, the Tuepkers' residence and all of the personal property inside it were completely destroyed by the wind and/or storm surge caused by Hurricane Katrina. Complaint, ¶ 15, R.E. Tab 6, p. 18. All that remained of the Tuepkers' property was a slab of concrete. *Id.* Shortly after the hurricane had passed, the Tuepkers acted in accordance with the subject policy and notified State Farm of their loss. *Id.* at ¶ 16. On October 6, 2005, State Farm denied the Tuepkers' claim *in toto*. The letter informing the Tuepkers of the denial stated that

> [b]ased on the site visit and other facts, our investigation showed that your property was damaged as a result of storm surge, wave wash and flood. Unfortunately, that damage is not covered under [your policy].

Id. at ¶ 17; R.E. Tab 7, p. 181. State Farm went on to cite the policy provision, quoted above, that defines the different, excluded causes of "water damage" but makes no mention of the "storm surge" or "wave wash" that State Farm used to deny the Tuepkers any coverage at all. R.E. Tab 7, p. 182.

The Tuepkers have sued State Farm on numerous causes of action, including, *inter alia*: (1) a declaratory action seeking a ruling that, based on representations by State Farm, the policy's coverage provisions and the Hurricane Deductible Endorsement, the Tuepkers are entitled to full coverage for all property damage and

use of loss;[2] and (2) specific performance of the insurance contract because it is properly read to "provide insurance coverage for physical loss to property and loss of use proximately and efficiently caused by a hurricane," especially in light of the Hurricane Deductible Endorsement. Complaint, ¶ 43, R.E. Tab 6, p. 24.

State Farm first responded with a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). State Farm argued, *inter alia*: (1) that "[t]he water damage exclusion in Plaintiffs' policy applies to water damage from a 'hurricane' and 'storm surge;'" (2) that the Endorsement "does not provide coverage for hurricane damage not covered under the policy, including 'storm surge' damage, nor does it render the policy ambiguous;" and (3) "Mississippi courts have repeatedly recognized that hurricane losses are subject to water damage exclusions." 1R.49-50.

B. The district court's opinion and order

The district court issued its memorandum opinion and order on the motion to dismiss on May 24, 2006. *See* R.E. Tabs 4, 5. The court cited the well-established rules of contract interpretation and construction applicable to insurance policies in Mississippi and went on to make the following findings:

(1) that "[l]osses directly attributable to water in the form

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[2] Complaint, ¶ 27, R.E. Tab 6, p. 21. The same count seeks a ruling that coverage for loss caused by "storm surge" is not excluded and that the "flood" exclsuion is not applicable. *Id.* at ¶ ¶ 29-30, p. 22.

of 'storm surge' are excluded from coverage because this damage was caused by the inundation of plaintiffs' home by tidal water... [and] [t]his is water damage within the meaning of that policy exclusion;"[3]

(2) that "to the extent State Farm contends that the hurricane itself, i.e. the hurricane winds and rain, would constitute a weather condition that would completely relieve State Farm of liability for damage to insured property (under Provision 3(c) of SECTION I – LOSSES NOT INSURED), I find that the policy is ambiguous and its weather exclusion therefore unenforceable in the context of losses attributable to wind and rain that occur during a hurricane."[4]

(3) that "[u]nder applicable Mississippi law, where there is damage caused by both wind and rain (covered losses) and water (losses excluded from coverage) the amount payable under the insurance policy becomes a question of which is the proximate cause of the loss" – effectively decreeing that the Tuepkers' losses can be apportioned between those caused by wind and rain and those caused by "water damage;"[5]

(4) that the anti-concurrent cause clause "creates ambiguities in the context of damages sustained by the insured during a hurricane. ... I find that **these... exclusions are ambiguous in light of the other policy provisions granting coverage for wind and rain damage and in light of the inclusion of a 'hurricane deductible' as part**

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[3] R.E. Tab 5, p. 668.

[4] *Id.* at 669.

[5] *Id.*

of the policy."[6]

Both parties have appealed parts of the court's order. For their part, the Tuepkers argue that the district court correctly found the anti-concurrent language ambiguous in the context of damages sustained during a hurricane; the court was likewise correct that the clause is ambiguous in light of the dual coverage granted for wind and rain damage and in light of the Hurricane Deductible Endorsement. The Tuepkers also argue, however, that the court erred when it did not take that finding of ambiguity to its fullest logical extension and instead parsed between wind damage as a covered loss and water damage as an excluded one. The Tuepkers further argue that the court erred in assuming that "storm surge" was subsumed in the "water damage" exclusion. Finally, the Tuepkers argue that the district court erred in interpreting and applying the principles of proximate causation appropriate for hurricane cases in Mississippi.

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[6] *Id.* at 669-70 (emphasis added).

SUMMARY OF THE ARGUMENT

> One need not be a cynic to observe that attempts by insurers to limit their liability by placing exceptions to or exclusions from coverage in so-called "omnibus" policies, while at the same time representing to the public at large that there is comprehensive coverage, is, at the least, inconsistent. It is not surprising, therefore, that courts regard these attempted exemptions from liability with disfavor, and construe them narrowly, often explicitly invoking both longstanding principles of interpretation and construction as well as public policy when refusing to enforce them.[7]

Principles of interpreting insurance policies fix the risk of ambiguous expression on one party at all times: "[a]mbiguity in terms is at the risk of the drafter of the policy, namely, the insurance company." Lynch v. Mississippi Farm Bureau Cas. Ins. Co., 880 So.2d 1065, 1070 (Miss.App.2004). State Farm's policy – with its Hurricane Deductible Endorsement – either provides coverage for losses incurred in a hurricane or it is craftily ambiguous. It is crafted to take advantage of the trust generally placed in insurance agents and the difficulty in parsing the concurrent or sequential causes of property damage in the aftermath of a catastrophic hurricane. The provisions at issue in this appeal are woven so as not to give away their true intent – to seem reassuring to policyholders that "hurricane" coverage exists when State

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[7] 17 Williston on Contracts § 49:111 (4th ed.).

Farm intended to preserve and disguise a most counter-intuitive and aggressively advantageous interpretation of causes of damage that, when combined in a every "hurricane occurrence," are inseparable when the covered structure is destroyed. For each of these reasons, the policy interpretation that State Farm used to deny the Tuepkers' claim is untenable.

"A condition tending to defeat a policy 'must be expressed or so clearly implied that it cannot be misconstrued.'" Provident Life & Accident Ins. Co. v. Goel, 274 F.3d 984, 991 (5th Cir.2001)(applying Mississippi law)(citation omitted). A recent opinion from the Mississippi Supreme Court nodded to the pragmatic interests of the policyholder, not the policy writer, that are upheld by enforcing the duty of an insurer to make its policy language easily understood. First, "a policy should be drafted to accommodate the average person who will give its terms a general reading." Mississippi Farm Bureau Mut. Ins. Co. v. Walters, 908 So.2d 765, 768 (Miss.2005). The Walters court added that "accommodation through a general reading" should be consistent with (though not exceed) "the intent or expectations with which the parties entered the contract." Walters, 908 So.2d at 768-69. As a result,

> "intent" is an important consideration when interpreting policy provisions. This Court has noted that it must "inquire [into] what the parties [] meant. **Practical**

> **considerations must be given play**, interpreted in the light of the purpose of the policy provision." **Reviewing the intent and expectations of the parties is necessary considering the policy implications of allowing insurance companies to set their own interpretations because of the unique dynamic of disparate bargaining power between insurance companies and consumers.**

Id. at 769 (citations omitted)(brackets in original)(emphases added). Prior to Walters, another opinion from Mississippi had already recognized some of the "practical considerations" that policyholders expect from their insurers beyond financial reimbursement for a loss: "insureds bargain for such intangibles as risk aversion, peace of mind, and certain and prompt payment of the policy proceeds upon submission of a valid claim." Andrew Jackson Life Ins. Co. v. Williams, 566 So.2d 1172, 1179 n.9 (Miss.1990).

Although this case was appealed from an early stage below, the intent and expectations of the parties has already been established. The Tuepkers have specifically alleged that their reading of the policy gave them "the reasonable expectation that the subject policy would provide full and comprehensive coverage for any and all hurricane damage to the insured residence." Complaint, ¶ 14, R.E. Tab 6, p. 18. For its part, State Farm has stated what it intended to do in drafting the provisions that it has used to deny any coverage for the damage done to the Tuepkers' residence by the hurricane:

> in the context of hurricanes... the anti-concurrent cause language addresses and specifies the scope and application of exclusions when covered and excluded perils combine to cause damage that is not separable or divisible into distinct losses attributable to one cause or the other.[8]

State Farm's Brief, p. 8.[9] Yet even this generic explanation, submitted some eighteen months after Katrina, falls short of the explicitness the law requires of insurers. State Farm begins where it must, framing the application of its exclusionary language "in the context of hurricanes," but in the above passage it still fails to name straightforwardly what combination of "covered and excluded perils" are contemplated in that context. That is not to say that the "wind vs. water" dichotomy is any secret; no doubt the Court took judicial notice of that now infamous distinction well before this case was appealed. Indeed, since Katrina, it has become painfully obvious that, in anticipating the risk posed by a powerful hurricane, State Farm intended all along to exclude damage ostensibly caused by a combination of wind and water, the one-two punch without which a meteorological event is something other than a "hurricane." State Farm studiously avoided using that word in its policy until

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[8] It follows from State Farm's own description, then, that if the anti-concurrent cause clause is unenforceable, the "water damage" exclusion cannot be applied at all. Although the court did not make this next logical step against the "water damage" exclusion (an oversight that the Tuepkers contend was error), State Farm still complains that the district court erred in holding its "contractual standard" ambiguous in the context of hurricanes. State Farm's Brief, p. 7.

[9] The Tuepkers hereinafter cite to State Farm's brief by the shorthand, "SF Brief, p. ___."

it appended the "Hurricane Deductible Endorsement," a document that uses comprehensive phrases like "loss caused by each hurricane occurrence" and further blurs State Farm's intent to exclude comprehensive wind-plus-water losses "in the context of hurricanes." R.E. Tab 8, p. 837.

State Farm's post-Katrina statement of its intentions in writing the policy gives us the gravamen of the Tuepkers' argument: **there was no practical difficulty in drafting language that would have made State Farm's intention clear in the policy**. State Farm found no difficulty in specifying the much more unlikely perils of "tsunami" and "seiche," even though few of its customers on the Mississippi Gulf Coast feared the former or had ever heard of the latter. The peril of paramount concern to the Tuepkers and other State Farm policyholders on the Mississippi Gulf Coast was a hurricane, especially the acute threat posed by every hurricane's signature aquatic element, storm surge. Nearly every summer, they were made aware of a hurricane scare and were willing to accept higher deductibles and premiums for coverage of "loss caused by each hurricane occurrence." R.E. Tab 8, p. 837. But instead of giving the Tuepkers a clear statement of its intent to exclude damage caused in whole or part by "storm surge" or using any other term that would unmistakably flag the limited scope of coverage "in the context of a hurricane," State Farm gave them an "anti-concurrent cause clause" and a subordinate "water damage"

exclusion that is silent on the status of "storm surge" under the policy.

It bears saying forthrightly: in a policy with a Hurricane Endorsement, the language of the anti-concurrent cause clause reads like it is designed to fool rather than accommodate "the average person who will give its terms a general reading." Walters, 908 So.2d at 768. Under Mississippi law, State Farm had to do better – indeed, it had to know better – if it wanted to exclude damage caused by a combination of the primary hazards of "a storm system that has been declared to be a hurricane by the National Hurricane Center of the National Weather Service." Hurricane Deductible Endorsement, R.E. Tab 8, p. 837. State Farm had to be straightforward in expressing that intent. It chose not to be.

Having failed to meet its legal duty to communicate its intent straightforwardly, State Farm is left with the legal consequences of intended ambiguity in an insurance policy: *omnia praesumuntur contra proferentum* – "all things are construed against the offeror." J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So.2d 550, 552 (Miss.1998).

> A corollary to this rule is the principle that, where there is no practical difficulty in making the language of an insurance contract free from doubt, doubtful provisions in the policy should be construed against the insurer. . . . [S]ince the insurer drafted the policy, it should not be allowed, by the use of obscure or ambiguous language, to

defeat the purpose for which the policy was sold.[10]

The district court was therefore correct to hold that the anti-concurrent cause clause "creates ambiguities in the context of damages sustained by the insured during a hurricane." R.E. Tab 5, p. 669. The district court erred, however, in not imposing the consequences of that ruling – *i.e.*, that since the anti-concurrent cause language, which on State Farm's own account "*introduces and governs the scope and application of the water damage exclusion,*"[11] is ambiguous and unenforceable, its subordinate "water damage" provision must be inapplicable as well. The district court also erred in finding the specific meteorological phenomenon "storm surge" to have been contemplated under the equally specific "water damage" exclusion. Finally, the district court wrongly interpreted Mississippi case law on the correct principles of proximate causation as they apply to cases for the recovery of windstorm and hurricane damage.

ARGUMENT

I. Standards of review: interlocutory appeals, motions to dismiss, insurance contracts

Once an interlocutory appeal is granted, "[the Court's] review is not limited to

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[10] 5 Encyclopedia of Mississippi Law § 40:8 (citing State Farm Mut. Auto. Ins. Co. v. Scitz, 394 So.2d 1371, 1372-73 (Miss.1981); Universal Underwriters Ins. Co. v. Buddy Jones Ford Lincoln-Mercury, Inc., 734 So.2d 173, 176 (Miss.1999)(footnotes omitted)).

[11] State Farm's Petition for Interlocutory Appeal, p. 6 (emphasis added).

the particular question identified by the district court, but may extend to 'any issue fairly included within the certified order[s].'" Reserve Mooring, Inc. v. Am. Commercial Barge Line, 251 F.3d 1069, 1070 n. 4 (5th Cir.2001)(citation omitted). As the leading treatise on federal procedure explains,

> [t]he court may... consider any question reasonably bound up with the certified order, whether it is antecedent to, broader or narrower than, or different from the question specified by the district court. Jurisdiction extends to the order, not the question alone, and includes cross-petitions if they be deemed necessary.

16 Charles Alan Wright & Arthur R. Miller, et al., Federal Practice and Procedure Juris.2d § 3929.

Rulings on a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) are subject to appellate review *de novo*. U.S. ex rel. Bain, 386 F.3d at 653. A district court cannot dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief." U.S. ex rel. Bain, 386 F.3d at 653-54 (internal quotation marks and citation omitted). Motions to dismiss are therefore viewed with disfavor and are rarely granted. Test Masters Educ. Services, Inc. v. Singh, 428 F.3d 559, 570 (5th Cir.2005). Review is limited to the facts alleged in the plaintiffs' complaint, which the court must take as true. Morin v. Caire, 77 F.3d 116, 120 (5th Cir.1996). However, as State Farm points out, the court may take judicial notice of factual

information on a government agency's website or of a governmental agency's records and reports. SF Brief, p. 12 (citations omitted). State Farm is likewise correct that the court may consider documents specifically mentioned in or attached to the complaint. *Id.* (citations omitted).

Contract interpretation is a question of law, subject to full appellate review, including a determination as to a contract's ambiguity. Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir.1986). In Mississippi, "[w]e begin with the basic principles in analyzing contracts between individuals and insurance companies." J & W Foods Corp., 723 So.2d at 552. A court reviewing an insurance policy should look at the policy as a whole, considering all relevant portions together. *Id.* Mississippi gives the plain wording of insurance policies their intended application and effect. Farmland Mut. Ins. Co. v. Scruggs, 886 So.2d 714, 717 (Miss.2004). At the same time, the burden is on the insurance company to phrase its policy in clear an understandable language. Burton v. Choctaw County, 730 So.2d 1, 9 (Miss.1997). Mississippi courts therefore construe policies "liberally in favor of the insured." J & W Foods Corp., 723 So.2d at 552. "Where a clause of an insurance policy subject to dispute involves exceptions or limitations on the insurer's liability under the policy, [the court] construes the policy even more stringently." *Id.*

"It is also bedrock law 'that ambiguous terms in an insurance contract are to

be construed most strongly against the preparer, the insurance company.'" Scruggs, 886 So.2d at 717 (citation omitted). "Ambiguity, in its simplest form, is the state of having multiple interpretations." Walters, 908 So.2d at 769. If a policy is subject to two or more reasonable meanings, "that which gives the greater indemnity to the insured should be adopted." State Farm Mut. Auto. Ins. Co. v. Scitzs, 394 So.2d 1371, 1372 (Miss.1981). The Mississippi Supreme Court recently elaborated on what can constitute ambiguity in an insurance policy:

> internal conflict or uncertainty can provide the necessary condition precedent to find ambiguity. For instance, if one section of the policy conflicts with another, the inherent uncertainty within the policy creates an obscurity and thus an ambiguity. This step of the analysis is important because the contract must be viewed as a whole. All parts must be harmonized as much as reasonably possible, and no part or word can be stricken unless the result is fairly inescapable.

Walters, 908 So.2d at 769. Where an endorsement conflicts with a provision in the original policy, the law is settled that "the endorsement would control." Turbo Trucking Co., Inc., v. Those Underwriters at Lloyd's London, 776 F.2d 527, 530 (5th Cir.1985)(citing Stewart v. American Home Fire Ins. Co., 52 So.2d 30 (Miss.1951)). As a result, if a policy term is ambiguous because it conflicts with an endorsement, the original policy term is effectively nullified and the words of the endorsement prevail.

Whichever way it may arise, ambiguity in an insurance policy no more obtains in a vacuum than does the plain meaning of the policy's text. "[T]he correct inquiry is whether the insurance policy exclusion is unambiguous when applied to the facts and circumstances of the particular case." Red Panther Chem. Co. v. Ins. Co. of the State of Pennsylvania, 43 F.3d 514, 519 (10th Cir.1994)(applying Mississippi law); *see also* Lumbermen's Mut. Cas. Ins. Co. v. Randle, 370 F.2d 68, 72 (5th Cir.1966)(applying Mississippi law)(stating that ambiguous policies are "to be interpreted in light of the circumstances in which they were issued and with due deference to common usage and understanding"). It follows that the same policy language can be unambiguous when applied to certain facts but ambiguous when applied to others. *See, e.g.,* World Trade Center Properties, L.L.C. v. Hartford Fire Ins. Co., 345 F.3d 154, 184 (2nd Cir.2003). "Context is often central to the way in which policy language is applied: the same language may be found both ambiguous and unambiguous as applied to different facts. We will apply the ordinary meaning of particular terms to the facts of the case to determine if it is ambiguous as to those facts." Highwoods Properties, Inc. v. Executive Risk Indem., Inc., 407 F.3d 917, 923 (8th Cir.2005).

In order to reverse the district court and find that State Farm owes nothing on the Tuepkers' policy, this Court must find that both the Tuepkers' and the district

court's interpretations are unreasonable in light of the facts as pled in the Tuepkers' complaint. If the Court finds the Tuepkers' interpretation to be reasonable, one fundamental precept of contract interpretation favors the Tuepkers' position that they are fully covered under the policy: where an insurance policy is susceptible of two or more reasonable interpretations, "that which gives the greater indemnity to the insured should be adopted." Scitzs, 394 So.2d at 1372. Under that basic rule of policy interpretation, reversal on some of the district court's conclusions (though not all of them) is appropriate.

II. The Tuepkers' interpretation of their policy as providing full coverage for a "loss caused by each hurric ane occurrence" is reasonable.

State Farm has taken the position that it had no intention, when it wrote its policy, of covering a slab case like the Tuepkers' "in the context of hurricane loss." SF Brief, p. 8. In order for that intent to be effective against the Tuepkers, it must have been "expressed or so clearly implied that it cannot be misconstrued." Goel, 274 F.3d at 991 (citation omitted). When the Tuepkers bought their policy from State Farm, they intended and expected to get full coverage for any damage caused by a "hurricane occurrence," including the total loss that occurs in a slab case. Hurricane Deductible Endorsement, R.E. Tab 8, p. 837. The text of their policy, read together with the Hurricane Deductible Endorsement, supports the Tuepkers' expectation as

a reasonable one. Here is why:

A. The Tuepkers' interpretation takes the policy at its word.

The Tuepkers' interpretation of their policy, which necessarily includes a reading of the Hurricane Deductible Endorsement, is not only the most reasonable reading; it is also the most literal. Since this is a case of total property loss caused by a hurricane, the appropriate place to start is the only place in the policy where any mention of "hurricane" appears: the Hurricane Deductible Endorsement. State Farm drafted the Hurricane Deductible Endorsement to increase the deductible "for loss caused by each **hurricane** *occurrence*." R.E. Tab 8, p. 837 (boldface in original, italics added). Now that State Farm has taken the position that the policy actually precludes coverage for "loss caused by [a] hurricane occurrence," that phrase stands, on the Tuepkers' reading, as the single most misleading string of words in the entire policy. Indeed, if an illusion of coverage in the eyes of a policyholder can be said to be a reasonable one, this is it. Here, the illusion comes not from a broad interpretation of what the Tuepkers wish their policy had said; it comes from a close reading of the definitions that State Farm gave them – of "hurricane" as defined in the Endorsement and "occurrence" as defined in the "Definitions" section of the original policy. The Tuepkers' interpretation is thus an attempt to read the policy and the Endorsement literally and as a whole – an approach that State Farm shrinks from

taking.

1. The Tuepkers read "hurricane occurrence" to mean what it says.

According to the Endorsement, "**hurricane** means a storm system that has been declared to be a **hurricane** by the National Hurricane Center of the National Weather Service." R.E. Tab 8, p. 837 (boldface in original).[12] A storm system is declared to be a hurricane if it meets the "Category One" threshold of the Saffir-Simpson Hurricane Scale used by the NHC and NWS. This is the same scale that has made "Category Five" a commonplace term describing the most destructive magnitude of hurricane. According to a recent NWS publication on hurricanes, the Saffir-Simpson Scale "estimates potential property damage" in declaring that a particular storm belongs to one of the five categories of hurricane.[13] The same publication offers a chart describing the different categories of hurricane in more detail, listing each by "types of damage due to hurricane winds and storm surge."[14] Having been directed straight to the NHC and NWS for the factors that go into "declaring" a storm system a "hurricane," a policyholder who accessed the information on hurricanes provided

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[12] In this brief, the Tuepkers refer occasionally to the National Hurricane Center as "NHC" and the National Weather Service as "NWS."

[13] National Oceanic and Atmospheric Administration/National Weather Service Publication 94050, Hurricanes... Unleashing Nature's Fury 4, *available at* http://www.nws.noaa.gov/om/brochures.shtml.

[14] *Id.*

by those agencies would reasonably interpret these elements of a "storm system that has been declared to be a hurricane" as having been expressly incorporated into his policy through the Hurricane Deductible Endorsement.

As for the definition of "occurrence," a policyholder seeking a precise definition would not have to look quite so far. The "Definitions" section of the original policy states:

> 7. "**occurrence**", when used in Section II of this policy, means an accident, including to exposure to conditions, which results in:
>
> a. **bodily injury**; or
>
> b. **property damage**;
>
> during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one **occurrence**.

R.E. Tab 8, p. 813 (boldface in original). "When properly incorporated into the policy, the policy and the rider or endorsement together constitute the contract of insurance, and are to be read together to determine the contract actually intended by the parties." 2 Couch on Insurance § 18:17. Therefore the restriction of this definition to Section II of the policy is of no moment to the meaning of "occurrence" in the Endorsement. The meaning is the same.

With these plain definitions in hand, the Tuepkers' interpretation of their policy

is straightforward: the use of the word "occurrence" modified by "hurricane" in the Endorsement makes it entirely reasonable to interpret "loss caused by each hurricane occurrence" as a statement of coverage for any loss caused by the "[r]epeated or continuous exposure to the same general conditions" that appear in "a storm system declared to be a hurricane by the National Hurricane Center of the National Weather Service." The fit between the definition of "hurricane occurrence" and the Tuepkers' expectation and intent in buying this insurance policy loss could hardly be closer. First, considering that the Tuepkers' policy is also supposed to have anticipated the "potential for property damage" under various scenarios, the Endorsement's explicit incorporation of the National Hurricane Center's system for "declaring" a tropical storm a hurricane according to the same criteria is consistent with the overall purposes of the policy. More importantly, the National Hurricane Center appears not to indulge in any wind vs. water dichotomies in its grading of a hurricane's "potential for property damage." In fact, it does the opposite, listing each category of storm by "types of damage due to hurricane winds *and storm surge.*"[15] Furthermore, this integrated and widely understood definition of a hurricane squares with the policy's definition of "occurrence" that "continuous exposure to the same general conditions

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[15] National Oceanic and Atmospheric Administration/National Weather Service Publication 94050, Hurricanes... Unleashing Nature's Fury 4, *available at* http://www.nws.noaa.gov/om/brochures.shtml. (Emphasis added.)

is considered to be one **occurrence**." The same general conditions of *every* hurricane – indeed, the conditions by which every hurricane is categorized by the NHC – are "hurricane winds and storm surge." Given the use of the plural form "conditions" in the definition of "occurrence," there is no reason to think that a separation of wind and water conditions might determine coverage or that an indivisible combination of those forces might defeat coverage. To the contrary, the literal meanings of these uncomplicated words come together to state – or at least give the illusion – that the "continuous exposure to the general conditions of hurricane winds and storm surge is considered to be one 'hurricane occurrence.'" That is what the Tuepkers thought, and that is what happened to their home. That is why, in other words, they bought this insurance and thought they were covered. The policy and the Endorsement reflected their intent.

2. The "water damage" exclusion does not include "storm surge."

The Tuepkers take the policy at its word as to another important provision, the "water damage" exclusion. As that provision is written, the specific peril of "storm surge" falls outside it. The Tuepkers read the "water damage" exclusion under the interpretive maxim *expressio unius est exclusio alterius*:

> Expression of one thing is the exclusion of another. . . . When certain persons or things are specified in a law, contract, or will, an intention to exclude all others may be

inferred.

Black's Law Dictionary 692 (Revised 4th ed. 1968). This is an appropriate principle of contract interpretation in this case because in Mississippi, "[w]here a clause of an insurance policy subject to dispute involves exceptions or limitations on the insurer's liability under the policy, this Court construes the policy even more stringently." J & W Foods Corp., 723 So.2d at 552. Indeed, the leading authority on insurance has articulated a combined version *expressio unius* and the presumption against exclusions that speaks directly to the Tuepkers'' interpretation of State Farm's "water damage" exclusion:

> A policy may cover or exclude various natural water-related forces, such as tidal waves, rain, flood, surface water, and subsurface water. Because exclusions are read narrowly, a policy excluding damage from some natural water-related perils may cover damage from other natural water phenomena. Therefore, the definition and scope of the various terms is often disputed.

11 Couch on Insurance § 153:48 (3d ed. 2006).

State Farm drafted a list of excluded "water damage" perils, which according to the policy has a particular "*meaning*: flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not[.]" R.E. Tab 8, p. 821 (emphasis added). The Tuepkers emphasize the word "meaning" at the beginning of this exclusion because the word

restricts the scope of the exclusion to the phenomena named in it. One of the earth movement cases on which State Farm heavily relies, Rhoden v. State Farm Fire and Casualty Co., 32 F.Supp.2d 907 (S.D.Miss.1998), supports this reading. There, the court declined to adopt an interpretation of the policy's "earth movement" exclusion that limited the excluded perils to those expressly named in the policy. The court focused closely on "the clear language of the exclusion, which states that 'earth movement includes *but is not limited to*' the listed natural disasters." Rhoden, 32 F.Supp.2d at 912 (italics in original). Here, State Farm did not draft its exclusion to say that "water damage includes but is not limited to" the things listed in the exclusion. It drafted the exclusion to tell the policyholder that "water damage" has a certain "meaning" and followed that meaning with a determinate list. Under the maxim *expressio unius* and the general rule that exclusions are to be read stringently and the reasoning employed in Rhoden, this "meaning" closes the construction of the "water damage" exclusion to anything other than the phenomena listed. "Storm surge" is not on the list; therefore it is not excluded from the policy's coverage.

The Tuepkers' reading of the "water damage" exclusion is consistent with the Endorsement's incorporation of "hurricane occurrence." The Tuepkers again look to the National Hurricane Center and the National Weather Service for direction on the distinct elements of "water damage" in a hurricane to see if, as State Farm contends,

"'storm surge' falls within the meaning of the policy terms 'flood,' 'tidal water,' 'waves' and overflow of a body of water.'" SF Brief, p. 48. Those agencies' usage of "storm surge" indicates that it does not. The Saffir-Simpson Scale published by the National Weather Service expressly uses an estimate of "storm surge" height in ranking a hurricane in one of its five categories and does not refer to "flooding" at all.[16] That is not to say that flooding is not a peril of hurricanes; it is only to point out that the federal agencies that monitor hurricanes consider storm surge to be a distinct element of a hurricane. The National Hurricane Center's website on hurricane preparedness states that ""[h]urricane hazards come in many forms: storm surge, high winds, tornadoes, and flooding."[17] The National Weather Service distinguishes among storm surge, wind and squalls, inland flooding, flash flooding, urban/area floods, river flooding and tornadoes as discrete "Tropical Cyclone Hazards."[18] The first sentence of the NWS's discussion of flooding associated with hurricanes indicates a clear division between storm surge and flooding in the context of a

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[16] National Oceanic and Atmospheric Administration/National Weather Service Publication 94050, Hurricanes... Unleashing Nature's Fury 4, *available at* http://www.nws.noaa.gov/om/brochures.shtml

[17] "Hurricane Preparedness," http://www.nhc.noaa.gov/HAW2/english/intro.shtml.

[18] http://www.srh.noaa.gov/srh/jetstream/tropics/tc_hazards.htm. The NWS makes a point to distinguish among different types of flooding – "inland," "urban/area," etc. – a taxonomy that suggests that storm surge does not belong to the "flood" family of hurricane hazards. *See also* http://www.fema.gov/hazard/flood/index.shtm (stating that "all floods are not alike").

hurricane:

> *In addition to the storm surge* and high winds, tropical cyclones threaten the United States with their torrential rains and flooding. Even after the wind has diminished, the flooding potential of these storms remains for several days.[19]

Similarly, the Federal Emergency Management Agency ("FEMA"), which State Farm cites to support its broad interpretation of the "water damage" exclusion, lists "flooding" and "storm surge" separately on its website.[20] FEMA states that "[a]s [hurricanes] move ashore, they bring with them a storm surge of ocean water along the coastline, high winds, tornadoes, torrential rains, and flooding."[21] FEMA singles out storm surge from this list of hurricane perils, warning that "storm surge *alone* poses the highest threat to life and destruction in many coastal areas throughout the United States and territories."[22]

The inclusion of "tsunami" and "seiche" as within the "meaning" of "water damage" further contradicts State Farm's broad reading that "'storm surge' falls within the meaning of the policy terms 'flood,' 'tidal water,' 'waves' and overflow

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[19] *Id.* (emphasis added)

[20] http://www.fema.gov/hazard/hurricane/hu_hazard.shtm.

[21] *Id.*

[22] *Id.* (emphasis added)

of a body of water.'" SF Brief, p. 48. There is no qualitative difference among "storm surge," "tsunami" and "seiche"[23] under the dictionary definitions of "flood" that State Farm would now use to subsume "storm surge" into the exclusion. *See* SF Brief, p. 46. All four of those dictionary entries use either "overflow" or "overflowing" in their definitions, wording that applies as aptly to "tsunami" and "seiche" as it does to "storm surge." If "storm surge" is the same as "'flood,' 'tidal water,' 'waves' and overflow of a body of water,'" then so must "tsunami and "seiche," yet the latter two were expressly written into the exclusion. There would be no reason to include these most unlikely carriers of "water damage" in the provision – unless, of course, State Farm thought that the exclusion did not clearly express its intent not to cover those specific events and therefore wrote them into the exclusion.[24]

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[23] **seiche** (sāsh, sēch) *n.* A wave that oscillates in lakes, bays, or gulfs from a few minutes to a few hours as a result of seismic or atmospheric disturbances. [Dial. Fr.] *The American Heritage Dictionary* 1111 (2d ed. 1982).

[24] Another exclusion in the policy suggests that State Farm wanted to be doubly clear about its intent not to cover damage caused by a tsunami – the "earth movement" exclusion. According to the same FEMA resource cited by State Farm on the subject of storm surge, "[t]sunamis... are a series of enormous waves created by an underground disturbance such as an earthquake, landslide, volcanic eruption, or meteorite." http://www.fema.gov/hazard/tsunami/index.shtl. Except for meteorites, all of these causes of tsunamis are expressly mentioned in the "earth movement" exclusion in the Tuepkers' policy. R.E. Tab 8, p. 821. Being a sophisticated drafter of insurance contracts, State Farm apparently saw fit not to rely prospectively on this exclusion as an indirect expression of its intent to exclude coverage for tsunamis. It chose instead to address that intent directly and listed the word "tsunami" as a form of "water damage." The Tuepkers submit that the same directness was required to exclude damage caused by storm surge, especially in light of the Endorsement's incorporation of "loss caused by each hurricane occurrence" and the NHC's criteria for

Under the analysis given the "earth movement" exclusion in Rhoden, if State Farm wanted to make sure that "storm surge" fell within the meaning of the exclusion, it should have put that term in there. By failing to insert the term, State Farm at the very least left the exclusion ambiguous as to whether or not storm surge was an excluded peril. "Where there is no practical difficulty in making an insurance contract free from doubt, any doubtful provision in the policy should be construed against the drafter." Scitzs, 394 So.2d at 1372. *See also* Evana Plantation v. Yorkshire Ins. Co., 58 So.2d 797, 800 (Miss.1952)(reasoning that, in a policy that covered damage caused by "hail," excluded damage by "ice" and did not mention "sleet" at all, damage by sleet was not excluded because "[i]f [the insurance company] had desired to exclude sleet from coverage, it would have been a simple matter to do so, since both sleet and hail are ice, and sleet is neither specifically included or excluded"). State Farm encountered no practical difficulty drafting "tsunami" and "seiche" into the exclusion, even though, under the broad reading it now gives "flood," "tidal water," "waves" and "overflow of a body of water," there was absolutely no reason to do so.

The contrast between the specificity (if not obscurity) of "tsunami" and "seiche" and the generality that State Farm gives to "flood" and other terms fairly

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"declaring" a storm a "hurricane."

raises the question of why "tsunami" and "seiche" were written into the Tuepkers' exclusion and "storm surge" was not. The application of *expressio unius* to the exclusion gives half the answer: "[w]hen certain persons or things are specified in a law, contract, or will, *an intention to exclude all others may be inferred.*" Black's Law Dictionary 692 (Revised 4th ed. 1968)(emphasis added). It is fair for the Tuepkers to infer that "storm surge" was left out on purpose. For Mississippi Gulf Coast residents, "storm surge" is the signature water-borne agent of "loss caused by each hurricane occurrence." The Tuepkers have specifically alleged that they bought this policy for the primary purpose of insuring their property against "damage that could possibly result from hurricanes... including any and all damage proximately, efficiently and often caused by hurricane wind, rain, and 'storm surge'. . . ." Complaint ¶ 10, R.E. Tab 6, p. 517. They have also alleged that State Farm and its agent expressly and/or impliedly confirmed that this policy would give them that coverage. *Id.* at ¶ 11. If the "water damage" exclusion had included the term "storm surge," the Tuepkers' reading of the policy may have suggested to them that their intent to cover themselves against hurricane damage and the promises State Farm made to them had not been fully realized in the policy. But since the term was not part of any exclusion, and since the Endorsement expressly referred to "loss caused by each hurricane occurrence," there was no reason to read the policy that way.

Even now, after having their claim for hurricane damage denied, the Tuepkers' fair inference about the omission of "storm surge" is the same, and *expressio unius* gives the other half of the answer: it was left out on purpose. What has changed is the Tuepkers' understanding of State Farm's intent in not drafting that familiar term into the policy. Instead of clearly excluding coverage for "storm surge" or using any other term that would have flagged its intent to re-allocate the risk of this "all peril" policy in the context of a hurricane, State Farm relied instead on the byzantine operation of the anti-concurrent cause clause to deny coverage. The unenforceability of that ambiguous clause is discussed below, but, even if it were clearly worded, cohesive with the Endorsement and fully operable, it would not apply in this case because State Farm did not draft it to control the specific peril of "storm surge." The Tuepkers submit that it is worth pausing on the irony that the unheard of threats of seiches and tsunamis are explicitly addressed in a policy sold across the Mississippi Gulf Coast while the annual threat of storm surge, unique to hurricanes, never found its way into the same exclusion. The Court needn't pause too long, though, as the legal effect of the omission is clear: it was left out on purpose.

III. The policy's dual grant of "all peril" coverage and "named peril" coverage for wind is illusory under State Farm's application of the anti-concurrent cause clause.

State Farm expresses some mystification at the district court's reasoning that

the anti-concurrent cause clause is ambiguous, arguing that the district court "did not identify what other provisions or language in the hurricane deductible endorsement could render State Farm's anti-concurrent cause language ambiguous." SF Brief, p. 14. State Farm's incredulity about the reasoning in the court's order is not borne out by the court's analysis. The district court stated that "[a]s to damage caused by wind, there is coverage... because destruction of the insured dwelling by a windstorm, including a hurricane, would constitute an accidental direct physical loss." R.E. Tab 5, p. 667. This is a clear invocation of the language of the "all risk" provision found in COVERAGE A – DWELLING, a clause that the court had cited in full earlier in its order. *Id.* at 665. The court added that "[t]his is also true of damage to personal property inside the insured dwelling caused by rain that entered plaintiff's home through breaches in walls or in the roof caused by hurricane winds." *Id.* at 667. This is a clear invocation of the "named risk" provision for "windstorm" found in COVERAGE B – PERSONAL PROPERTY, a clause that the court also cited in full. R.E. Tab 5, p. 665. These two grants of coverage – one for any "accidental direct physical loss" and the other for "windstorm" – were the basis for the court's conclusion that the anti-concurrent cause clause and the "weather conditions" provision "are ambiguous in light of the other policy provisions granting coverage for wind and rain damage and in light of the inclusion of a hurricane deductible as part

of the policy" *Id.* at 669-70.

A. The district court was correct to find the anti-concurrent cause clause ambiguous in light of coverage for wind and the Hurricane Deductible Endorsement.

The district court's very straightforward finding that the anti-concurrent cause clause is unenforceable because it conflicts with other express grants of coverage for wind damage in the policy was correct and squarely within the basic precepts of what can constitute an ambiguity in an insurance policy. "[I]nternal conflict or uncertainty can provide the necessary condition precedent to find ambiguity. For instance, if one section of the policy conflicts with another, the inherent uncertainty within the policy creates an obscurity and thus an ambiguity." Walters, 908 So.2d at 769; *cf.* Allstate Ins. Co. v. Stone, 863 P.2d 1085, 1088 (N.M.1993)(stating that "we are not so much construing an ambiguity in the policy as we are refusing to give effect to the irreconcilable exclusionary language in the policy"). This part of the district court's order should be affirmed. As shown below, however, the district court erred in not following the unenforceability of the anti-concurrent cause clause to its logical (and reasonable) conclusion that the subordinate "water damage" exclusion must be unenforceable as well.

B. The district court erred in its construction of the "water damage" exclusion as a stand-alone provision.

State Farm describes the anti-concurrent cause as the provision that "introduces and governs the scope and application of the water damage exclusion." SF Brief, p. 6. Given this description, State Farm should be somewhat perplexed (and relieved) that the district court applied the "water damage" exclusion at all. The Tuepkers respectfully submit that the court's failure to take the logical step from its ruling that the lead-in language is ambiguous to the concomitant ruling that the "water damage" exclusion is inoperable in this case amounts to a failure to read the policy as a whole – a principle of contract interpretation that the district court cited but did not fully carry out. *See* R.E. Tab 5, p. 667 (stating that "[a]n insurance contract is to be considered as a whole, and each of its provisions should be given a reasonable interpretation that is, to the extent possible, consistent with other terms of the contract")(citing Glantz Contracting Co. v. General Electric Co., 379 So.2d 912). In its order certifying this appeal, the district court accurately described the issues raised by the parties as "revolv[ing] around the *interrelation* of several provisions of the subject policy, and their interpretation." R.E. Tab 2, p. 886 (emphasis added). The Tuepkers fully concur that these provisions are to be considered in their interrelation with each other, not in isolation from each other, as State Farm's interpretation assumes. Indeed State Farm contradicts its own position that the "water damage" exclusion can stand alone regardless of whether the anti-concurrent cause clause is

ambiguous by occasionally (and accurately) referring to the anti-concurrent cause clause as the "water damage" exclusion's "lead-in language." The Tuepkers also concur with the aptness of that term, and they submit that it highlights the district court's error: if the anti-concurrent cause clause "leads in" to the exclusions below it, a showing that the "lead-in" language is ambiguous means those exclusions cannot be applied to deny coverage. Negated, the language leads nowhere.

The district court correctly found that the anti-concurrent cause clause conflicted with the provisions granting coverage for wind damage, but it missed the second part of the analysis, which is as much a structural interpretation of the policy as it is an examination of the words themselves. That is, the subordination of the "water damage" exclusion to its "lead-in" language is part of the plain meaning of the policy. The Tuepkers submit that this is a perfectly reasonable way to read the "interrelation" of the two provisions that State Farm invoked to deny the Tuepkers' claim. Because it is the reading that "gives the greater indemnity to the insured," it should have been adopted. Scitzs, 394 So.2d at 1372. The Tuepkers respectfully submit that the district court's failure to do so constituted a clear mistake of law and reversible error.

C. The district court erred in its assumption that "storm surge is nothing more than a flood."

The district court's other error also concerns the "water damage" exclusion. The Tuepkers admit to being somewhat perplexed by the short shrift given by the district court to their argument that according to the National Hurricane Center and the National Weather Service – to which State Farm expressly defers in defining what comprises a "hurricane" – "storm surge" is something decidedly other than a flood. The Tuepkers were able to give the district court even more evidence of the difference between those two phenomena than space allows here. *See* 1R.206-214. Nor was that evidence restricted to definitions given by the NHC and NWS. The Tuepkers referenced a report issued by the Congressional Budget Office on September 6, 2005, regarding the macroeconomic impact of the areas hit by Hurricane Katrina. The analysis of Mississippi's damage begins:

> **Mississippi.** The Gulf Coast areas sustained major damage, but more from wind and storm surges than flooding.

1R.273 (boldface in original). The Tuepkers also submitted the following excerpt from a study of NWS data on floods over a seventy-four year period:

> The NWS includes damage from most types of flooding listed above, but excludes ocean floods caused by severe wind (storm surge) or tectonic activity (tsunami). These are excluded because, although they result in water inundation, they are not hyrdometeorological events. In addition, the NWS excludes damage that results from mudslides because, though they are caused by excess precipitation, they are considered primarily a geologic

hazard.[25]

The Tuepkers respectfully submit that this evidence, along with their foregoing discussion of the omission of "storm surge" from the meaning of "water damage" in their policy,[26] shows the district court's quick conclusion that "storm surge is nothing more than a flood"[27] to be an unsupported, erroneous and reversible assumption.

IV. The anti-concurrent cause clause is irreconcilable with the Hurricane Deductible Endorsement

The anti-concurrent cause clause thwarts any attempt to read this insurance policy as a fully coherent one in the context of a hurricane loss. No one, including State Farm, has yet read the anti-concurrent cause clause, its subordinate "water damage" exclusion, the provisions granting coverage for wind as an "open peril" or "named peril," and the Hurricane Deductible Endorsement together and left all of them fully intact. There is, in other words, no harmony to be found among all of the policy provisions relevant to this case. The Tuepkers have offered the best attempt to reconcile them, relying on the plain meaning of "loss caused by a hurricane occurrence" and the omission of "storm surge"from a determinate list of causes of

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[25] 1R.211 (citing Roger A. Pielke, Jr., Mary W. Downton & J. Zoe Barnard Miller, *Flood Damage in the United States, 1926-2000: A Reanalysis of National Weather Service Estimates* 2 (2002), *available at* http://www.flooddamagedata.org.)

[26] *See* Section II.A.2, *supra*.

[27] R.E. Tab 2, p. 886.

"water damage." For its part, the district court found its own "middle way": it ruled that the anti-concurrent cause language is "ambiguous in light of the other policy provisions granting coverage for wind and rain damage and in light of the inclusion of a 'hurricane deductible' as part of the policy,"[28] but it did not take the next logical step that the "water damage" exclusion, which State Farm says is "governed" by the anti-concurrent clause, is ineffective under that interpretation. The district court's enforcement of the "water damage" exclusion thus failed to give the correct legal effect to its finding of ambiguity – i.e., that between two or more reasonable interpretations of a policy, "that which gives the greater indemnity to the insured should be adopted." Scitzs, 394 So.2d at 1372. Finally, State Farm's approach has been to insist that the anti-concurrent cause clause is self-affirming without reference to any other part of the original policy (including, incredibly, the "water damage" exclusion that it admittedly "governs") or to the Hurricane Deductible Endorsement. As shown in more detail below, State Farm's position works only if we rip the lead-in language from the factual context in which it has been invoked and consider it in a vacuum – if we ignore, in other words, the nature of insurance policies, the nature of hurricanes and the nature the anti-concurrent cause clause itself. Neither the law or commentary on interpreting insurance policies supports such an approach.

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[28] R.E. Tab 5, pp. 669-670.

The Tuepkers do not concede that State Farm's position is a particularly reasonable one, but, assuming *arguendo* that it is, there is nothing to show it is the only reasonable one. The judicial task of contract interpretation is not a grading system; neither side need show its interpretation is the best. Instead, it is enough for the Tuepkers to show that the relevant policy provisions are susceptible of two or more reasonable interpretations. In fact, the Tuepkers' case comes to this Court having been interpreted at least three ways – by the district court, by State Farm and by the Tuepkers themselves. In certifying this case for interlocutory appeal, the district court recognized as much, stating that

> [w]hile this Court believes in the correctness of its decisions and their analysis, the various contract provisions... arguably possess the potential of multiple plausible interpretations; in light of their complexity (or confusion), there is substantial ground for difference of opinion.

R.E. Tab 2, p.888.[29] The district court ably explained why State Farm's interpretation of the anti-concurrent cause clause conflicts with the provisions granting coverage for wind damage. The following discussion shows why State Farm's interpretation of the anti-concurrent cause clause is inconsistent with other terms of the policy.

A. State Farm's interpretation of the anti-concurrent cause clause ignores the Hurricane Deductible Endorsement

[29] This finding alone establishes the ambiguity inherent in the provisions at issue.

Despite repeated attempts to explain what the anti-concurrent cause language is supposed to mean in general, State Farm gives only conclusory assertions that the anti-concurrent cause language is valid in *this case*. Nowhere in State Farm's brief is there any serious appraisal of the interrelation of the anti-concurrent cause clause, which State Farm invoked to deny the Tuepkers' coverage, and the Hurricane Deductible Endorsement, which both the Tuepkers and the district court invoked to find that the anti-concurrent cause clause is ambiguous in this case. Indeed, State Farm commits a fundamental error of policy interpretation when it contends that its "anti-concurrent cause language is not... affected in any way [] by the policy's Hurricane Deductible Endorsement or by other policy provisions granting coverage for wind and rain damage." State Farm's Brief, p. 9. If that were true, the Endorsement's statement that "all other policy provisions apply" would be, on State Farm's reading, either redundant or a nullity. In any event, the law addressing endorsements makes it clear that they should be read in accord with the original policy. *See* 2 Couch on Insurance § 18:17, cited at page 25, *supra*. But where an endorsement conflicts with a provision in the original policy, the law is equally settled that "the endorsement would control." Turbo Trucking Co., Inc., v. Those Underwriters at Lloyd's London, 776 F.2d 527, 530 (5th Cir.1985)(citing Stewart v. American Home Fire Ins. Co., 52 So.2d 30 (Miss.1951)). State Farm is quite wrong,

therefore, to dismiss the import of the Hurricane Deductible Endorsement by arguing that courts "have consistently held that deductibles do not create or alter coverage or affect the meaning of other policy provisions." SF Brief, pp. 9-10. Deductibles may not have that effect – *but endorsements do*.[30]

State Farm's insistence on referring to the Hurricane Deductible Endorsement as "the Deductible" and not "the Endorsement" in its brief is a telling effort to draw attention away from the nature of that document: "[a] rider or endorsement is a writing added or attached to a policy or certificate of insurance *which expands or restricts its benefits or excludes certain conditions from coverage*." 2 Couch on Insurance § 18:17 (italics added). Even assuming that State Farm's only intent in adding the Endorsement was to alter the calculation of the policy's deductible, State Farm had to take care, in writing the Endorsement, not to incorporate into its policy words that might reasonably be interpreted to contradict State Farm's intent to use the anti-concurrent cause language and its subordinate "water damage" exclusion to deny coverage in the context of a hurricane. It would have been an easy and clear matter simply to increase the deductible for a "windstorm" in coastal counties without

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[30]*See also* 16 Williston on Contracts § 49:23 (4th ed.)(stating that "when a court construes an insurance policy, it considers the policy's meaning in light of all riders and endorsements attached to it, and when a conflict arises between an endorsement and another policy provision, the endorsement controls")

resorting to highly suggestive phrases like "loss caused by each hurricane occurrence" and "[i]n the event of a hurricane loss," phrases whose ordinary meanings and definitions in the policy create the reasonable perception that full coverage in the context of a hurricane exists.

State Farm's interpretation of the anti-concurrent cause clause would undo the consistency seen in the Tuepkers' literal interpretation of "hurricane occurrence." The singular event described by "hurricane occurrence" in the Endorsement directly conflicts with the attempt purportedly memorialized in the anti-concurrent cause clause to exclude all coverage "when covered and excluded perils combine to cause damage that is not separable or divisible into distinct losses attributable to one or the other." SF Brief, p. 8. Indeed, the plain meaning of the most important words in the Endorsement – "*loss* caused by each *hurricane occurrence*" – shows how brazenly self-contradictory it is for State Farm now to use nearly the *same words* to argue that "no language in the Deductible suggests that damage due to a combination of wind and water that would not have occurred in the absence of water (clearly excluded under the policy) becomes a covered *loss* simply because it *occurs* during a *hurricane*." SF Brief, p. 25 (italics added). Having unilaterally inserted "loss caused by a hurricane occurrence" into its policy, State Farm's dismissive statement about the irrelevance of whether "the combination of wind and water... becomes a covered

loss simply because it occurs in a hurricane" is not a credible one.

In fact, once we read the relevant provisions as a whole, it is apparent that absolutely none of State Farm's argument about the Endorsement is correct. First, by writing the phrase "hurricane occurrence" into its policy, State Farm inserted a succinct antonym to the anti-concurrent cause clause – a contractual provision that, whatever its effectiveness in other contexts (earth movement cases and so on), proved oppressively evasive in defining coverage in the context of Hurricane Katrina. Second, State Farm's broad assertion that "water" by itself is "clearly excluded under the policy" is impeached by the inclusion of "tsunami" and "seiche," the former as unlikely as the latter is exotic on the Mississippi Gulf Coast. Less would have been more in writing the exclusion: if State Farm meant simply to exclude damage done by water in any of its forms, the simple words "water damage" without more would have clearly stated that intent.[31] Third – and this is the dispositive point, since it follows from the first two – the well-known, distinct water-borne phenomenon called "storm surge" is a covered cause of loss in this case *precisely because it only occurs during a "hurricane occurrence" and is not included with the other types of "water damage" specifically named in the policy.*

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[31] "[T]he expression in a contract of things of a class implies the exclusion of all not expressed, even though all would have been implied had none been expressed." 17A C.J.S. Contracts § 327.

One of two conclusions can be drawn from State Farm's assertion that "no language in the Deductible suggests that damage due to a combination of wind and water that would not have occurred in the absence of water (clearly excluded under the policy) becomes a covered loss simply because it occurs during a hurricane": either (1) "hurricane occurrence" does not mean what the literal terms of the policy say it means, or (2) it outright conflicts with the anti-concurrent cause clause and its subordinate "water damage" exclusion. It really is of little moment which conclusion we choose, since, under the law controlling the drafting of insurance policies, either conclusion means that State Farm failed the task of clearly and unambiguously stating its intent to divide wind and water from the "[r]epeated or continuous exposure to the same general conditions" of "hurricane winds and storm surge" that, by the Endorsement's incorporation of the National Hurricane Center's system of defining such things, comprise a hurricane.

The Tuepkers respectfully submit, however, that it is of some moment to ask why State Farm drafted the anti-concurrent cause clause, its subordinate "water damage" exclusion and the Hurricane Deductible Endorsement the way that it did. When it wrote "loss caused by a hurricane occurrence" into its policy, State Farm for the first time used language that clearly referenced damage caused by the most widely feared force of nature on the Mississippi Gulf Coast. If State Farm meant to exclude

coverage for damage done by the combination of meteorological forces that define a hurricane, "loss caused by a hurricane occurrence" was the kind of language it should have used to write its exclusion clearly, "so... that it cannot be misconstrued.'" Goel, 274 F.3d at 991. Instead, State Farm takes the position that its clearest language on the subject of hurricanes means nothing at all.

The law and commentary on interpreting insurance policies is shot with "the intent of the parties" as the touchstone of the inquiry. However, there is some conflict in Mississippi on whether discerning the parties' intent is for the court or for the finder of fact. Either way, it is well established that the predicate inquiry into the clarity or ambiguity of the policy as applied to the facts of the case is a legal one. It is equally well established that, upon a finding of ambiguity, "we must necessarily find in favor of coverage." J & W Foods Corp., 723 So.2d at 552. With multiple interpretations of the Tuepkers' policy in hand, the ambiguity of the policy is apparent. Coverage goes to the insured.

V. The district court erred in interpreting the law of proximate causation that applies to this case.

The district court was right to state that "under applicable Mississippi law, where there is damage caused by both wind and rain (covered losses) and water (losses excluded from coverage) the amount payable under the insurance policy

becomes a question of which is the proximate cause of the loss." R.E. Tab 5, p. 669. It was also correct in saying that "[t]o the extent that the State Farm policy is inconsistent with this settled rule of Mississippi law, the exclusionary language is invalid." *Id.* The court was also right to look to the Hurricane Camille cases for the rule governing questions of causation where different forces in one hurricane combine to produce a loss. However, the district court erred in interpreting those cases' treatment of "proximate causation" in a windstorm or hurricane case as requiring an absolute apportionment between wind and water damage.

In Grace v. Lititz Mut. Ins. Co., 257 So.2d 217 (Miss.1972), the Mississippi Supreme Court prefaced its opinion by describing the issue before it as "dealing with the question of whether the destruction of a building was caused by the wind forces of Hurricane Camille or whether tidal water contributed to or aggravated the loss." Grace, 257 So.2d at 219. The court gave a detailed recitation of the testimony and evidence presented at trial; then it gave the following discussion of causation in the context of damage done by Hurricane Camille:

> The rule is well established in this state that where the question presented to the jury was whether the loss was due to windstorm or to water, the entire question of proximate cause is treated as one of fact independent of the explicit application of any rule of law. It is sufficient to show that wind was the proximate or efficient cause of the loss or damage notwithstanding other factors contributed to the

loss.

Grace, 257 So.2d at 224 (citations omitted). This passage immediately precedes the sentence relied upon by State Farm for the proposition that the jury could only have found a "sole cause of loss." SF Brief, p. 54. Contrary to State Farm's reading, then, there must be some implication of the principles of proximate causation in Grace's conclusion that "the jury had ample testimony to sustain the appellants' contention that their office building was destroyed by wind before the tidal waters reached the property." Grace, 257 So.2d at 224. The Tuepkers respectfully submit the following analysis as the correct reading of that implication.

The Grace court had before it an exclusion substantially similar to State Farm's anti-concurrent cause clause. In Grace, the policy purported to exclude loss "[c]aused by, resulting from, contributed to, or aggravated by" the flood that came into the claimant's building. The court gave no effect to that exclusion, ruling instead that "the *entire* question of proximate cause is treated as one of fact independent of the explicit application of *any* rule of law." Grace, 257 So.2d at 224 (italics added). Given the clear attempt by the insurance company in that case to avoid any liability through its own anti-concurrent cause language, this ruling must mean that the entire question of proximate cause in a hurricane is properly treated as one independent of the explicit application of any rule of contract law. If so, State Farm's attempt to

contract out of liability for concurrent causation in a hurricane, even if it were expressed with perfect clarity in the policy, is unenforceable.

This reading is supported by the first of the trio of Hurricane Camille cases referenced in Grace, Commercial Union Ins. Co. v. Byrne, 248 So.2d 777 (Miss.1971).[32] In Byrne, the court enumerated four categories of cases involving the cause of loss under a policy that covers "windstorm."

> The categories of cases are (1) those holding that if a windstorm is the dominant and efficient cause of loss the insured may recover notwithstanding that another cause or causes contributed to the damage suffered; (2) cases holding that if a windstorm combines with a hazard expressly excluded from the policy coverage to produce the loss the insured may not recover. This rule is based upon the reasoning that the insurer cannot be held liable for any part of the damage caused by the excluded hazard, and where the damage attributable to windstorm and the damage attributable to the excepted peril cannot be separated and the amount of the loss due to each ascertained and apportioned, the total loss resulting from the combined action of the two falls outside the policy coverage; (3) cases holding that the insured may recover notwithstanding the loss was brought about by the combined action of a windstorm and an excluded hazard if the part of the damage attributable to the windstorm can be separated from the part of the loss due to the action of the excluded peril; (4) it has been held in some cases that where the question presented was whether the loss was due to [windstorm] or to water, the entire question of proximate

[32] Lititz Mut. Ins. Co. v. Boatner, 254 So.2d 765 (Miss.1971), was the second case; Grace was the third.

> cause was treated as one of fact independent of the explicit application of any rule of law.

Byrne, 248 So.2d at 780-81. This is an exceptionally important passage to this and any other Hurricane Katrina case from Mississippi in which a policy purporting to exclude coverage under an anti-concurrent cause clause has been used to deny an insured's claim for property damage. Immediately after it summarized the four categories of "windstorm" cases, the Byrne court noted that a previous Mississippi case, New Hampshire Fire Insurance Co. v. Kochton Plywood and Veneer Co., 134 So.2d735 (Miss.1961), "support[s] the last category of cases." Byrne, 248 So.2d at 781.[33] The court followed that with its express approval of the jury's finding "that wind was the proximate or efficient cause of the loss or damage notwithstanding other factors contributed to the loss." *Id.*

Aside from their express re-affirmation of Mississippi's law of proximate causation in hurricane or windstorm claims, there is another important implication from the Hurricane Camille cases. The Byrne court 's summary of the different "windstorm" cases and adoption of the last category implies a rejection of the second category cited in Byrne, "cases holding that if a windstorm combines with a hazard expressly excluded from the policy coverage to produce the loss the insured may not

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[33] In Grace, the court cited Byrne and New Hampshire Fire and again upheld that category of "windstorm" case as the controlling standard in Mississippi. *See* Grace, 257 So.2d at 224 .

recover." Byrne, 248 So.2d at 780. Byrne's description of this second category of cases is a perfect expression of what State Farm wants to do with the anti-concurrent cause here. (Indeed, it is a far clearer expression than the language that State Farm actually put in the Tuepkers' policy.) The correct reading of the Hurricane Camille cases, then, is this: in a case addressing property damage inflicted by an infamously catastrophic hurricane, the Mississippi Supreme Court had a chance to enforce a clause substantially similar to State Farm's anti-concurrent cause clause and ruled that Mississippi's law follows a different path. The anti-concurrent cause "category" of cases, in other words, is not viable in the law addressing hurricane-caused property damage in Mississippi.

VI. State Farm has the burden of proving the facts necessary to the operation of any exclusion.

Even assuming that the "water damage" exclusion applies to this case,[34] the issue of the parties' respective burdens in this case is not as complicated as State Farm would arrange it. State Farm's attempt to shift the burden back to the Tuepkers depends on a highly selective and advantageous reading of the basic rules governing the allocation of the burdens of proof between insurer and insured in a case such as this one, where the insured has suffered a total loss. State Farm extrapolates from the

[34] The Tuepkers deny that any exclusion applies; this section of their brief therefore respectfully proceeds on the contingency that the Court will disagree.

Fifth Circuit's statement that the "basic burden never shifts from the plaintiff"[35] the unlikely proposition that the Tuepkers must not only prove that they are covered, they must also prove that they are not *not* covered. State Farm goes so far as to argue (contrary to the "basic burden" phrase it borrows from Britt) that the *insurer* has "the initial burden of showing the applicability of the exclusion at issue, [and] it becomes the insured's burden to show the extent and amount of any covered damage...." SF Brief, p. 37. State Farm also suggests that since the Tuepkers have alleged that storm surge may have contributed to their loss, State Farm's "initial burden" is already met. *Id.* at n. 22. None of this is correct.

A. State Farm has the burden of showing that an excluded cause resulted in the loss.

The usual allocation of the initial burden of proof on the plaintiff in a civil case is not, as State Farm would have it, more oppressive because the plaintiff has sued an insurance company. In its entirety, the relevant passage from Britt shows that the burdens of proof borne respectively by the parties flows from the claims and defenses of the case:

> Under Mississippi law a plaintiff has the burden of proving a right to recover under the insurance policy sued on. That basic burden never shifts from the plaintiff. However, Mississippi has additional burden of proof rules which

[35] Britt v. Travelers Ins. Co., 566 F.2d 1020, 1022 (5th Cir.1978).

> apply in this insurance policy litigation. Although the insured retains the basic burden, the defending company is required to prove any affirmative defense it may raise.

Britt, 566 F.2d at 1022 (citations omitted). State Farm has pled the application of its "water damage" exclusion as its sixteenth affirmative defense. 3R.681. Assuming that that exclusion is in any way applicable to the Tuepkers' claim, State Farm has to do more than "adduce[] evidence"[36] of it, whatever that means. State Farm has to prove its case like any other civil litigant who avers an affirmative defense, and it has to do so by a preponderance of the evidence. Britt, 566 F.2d at 1023. *See also* Hertz Commercial Leasing Co. v. Morrison, 567 So.2d 832, 834 (Miss.1990)(stating that "[i]f a matter is an affirmative defense, the defendant bears the burden of production and the risk of nonpersuasion"); *accord* Brown v. PFL Life Ins. Co., 312 F.Supp.2d 863, 868 (N.D.Miss.2004)(stating that "the defendant will shoulder the burden of proving any affirmative defenses").

However, State Farm is correct to say that, with respect to the "all risk" (or "open peril") part of this policy, the Tuepkers' burden is slightly different from the one under the "named peril" portion. In fact, the Tuepkers' burden for proving coverage under the "all risk" part of the policy is lighter. Another authority on which State Farm relies clarifies the issue:

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[36] SF Brief, p. 35.

> Any showing of causation necessary to bring a loss within the broad grant of coverage under the terms of the policy must be shown by the insured or person seeking coverage. On the other hand, **the insurer bears the burden of showing the causation necessary to bring the case** within **an exclusion from coverage. Under the circumstances in which the policy at issue is an all risk policy, the insured's burden is merely showing that there was a fortuitous loss under the policy.** The insured does not need to prove the actual cause of the loss at issue.

7 Couch on Insurance § 101:60 (emphasis added). *See also* 44A Am.Jur.2d Insurance § 1965 (stating that "an insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion"). Since the Tuepkers' home is covered under the "all risk" part of the policy, the Tuepkers need only prove that "there was a fortuitous loss under the policy." Only with respect to the personal contents part of their claim, which is covered under the "named peril" part of the policy, would the Tuepkers have to prove the "windstorm" provision covers "the actual cause of loss."

There is no Mississippi authority conclusively adopting the burden shifting that State Farm advocates. Instead, the general rule appears to be that it only occurs after the insurer has met its burden of proving by a preponderance of the evidence facts that would trigger an exclusion and there is an *exception* to the exclusion that would allow the insured still to prevail. *See, e.g.,* Royal Surplus Lines Ins. Co. v.

Brownsville Indep. Sch. Dist., 404 F.Supp.2d 942, 950 (S.D.Tex.2005); 17A Couch on Insurance § 254:13. The Tuepkers have not outright claimed they fall within an exception to an exclusion; rather, they argue that the anti-concurrent cause clause and its subordinate "water damage" exclusion simply do not apply to their claim. However, State Farm's position that the burden shifts back to the Tuepkers is arguably consistent with the Tuepkers' position that "storm surge" does not belong in the "water damage" exclusion – that is, "storm surge," having been left out of the exclusion, constitutes an exception to the exclusion, and, if the Tuepkers can prove their loss falls within it, they should still recover. If so, the Tuepkers are entitled to make that showing to the trial court. That skips ahead by a couple of steps though; for now it is enough for the Tuepkers' pleadings to stand on their own. And since this is a total loss case, the Tuepkers will have proved everything they need to prove once they have shown (1) that the loss of their house was a "fortuitous loss" and (2) that a "windstorm" was responsible for the loss of their personal property. Assuming the "water damage" exclusion is applicable, it will be up to State Farm to show how much coverage should be subtracted from the Tuepkers' total loss.

B. The anti-concurrent cause clause cannot re-allocate the risk of indeterminate causation from State Farm to the Tuepkers.

State Farm says that the anti-concurrent cause clause excludes damage that "is

not separable or divisible into distinct losses attributable to one cause or the other." SF Brief, p. 8. To illustrate, State Farm uses the scenario of a roof being blown away first, then the lower story of the home being flooded second. In this "circumstance," says State Farm, "the roof damage would have 'occurred in the absence of' the water damage and is covered." *Id.*, n.4. This illustration is inapposite to the Tuepkers' slab case "circumstance," and it proves a bit too much: underlying State Farm's illustration is the practical possibility that the Tuepkers could recover under the policy by accounting for every penny of their loss as caused by either wind or water, not an indivisible combination of them.[37] According to State Farm, the anti-concurrent cause clause would not apply in that event. Instead, the anti-concurrent cause clause operates against the Tuepkers insidiously: with only a slab and no eyewitnesses, there is zero recovery for that loss, despite State Farm's recognition that the real truth of the "wind vs. water" matter (first the roof, then the frame) possibly exists, it is just unknowable as far as State Farm is concerned. Thus in a slab case like this one, the "water damage" provision is not being applied to an "excluded

[37] It is important for the Tuepkers to note that, even on State Farm's interpretation of the policy, the Tuepkers have the right to prove that the extent of wind damage is not unknowable and in fact accounts for all of the loss. Even on State Farm's tortured rendering of its policy and the burdens under it, that possibility precludes dismissal on the pleadings. For present purposes, however, it is enough for the Tuepkers to show that the district court should have ruled that neither the policy language nor the burden imposed on State Farm by Mississippi law requires the Tuepkers to prove what did not happen to their home during the worst of Hurricane Katrina.

event," as the lead-in language defines the scope of the exclusion. Instead, it operates as an exclusion of an ambiguous circumstance subsequent to that event – i.e., the causal indeterminancy inherent in a slab case.

State Farm effectively admits that it meant to re-allocate the burden of proving the unprovable in a very telling footnote on page 41 of its brief. State Farm complains that requiring it to prove the effect of the purportedly excluded peril (the combined effects of wind and water) and to quantify the scope and extent of any separate damage caused by the covered peril (windstorm) would be impossible. *See* SF Brief, p. 41 n.23. But the important passage from the Mississippi Supreme Court in Byrne, discussed at pages 51-54 above, cites reasoning very similar to State Farm's and rejects it as an acceptable way to address issues of causation in the aftermath of a hurricane. The Byrne court appears to have been unmoved by the difficulties encountered by an insurer "where the damage attributable to windstorm and the damage attributable to the excepted peril cannot be separated and the amount of the loss due to each ascertained and apportioned." Byrne, 248 So.2d at 780-81. State Farm cannot contract out of that ruling, nor can it re-allocate the burdens of proof and production imposed on it by law.

> The principle that the insurer bears the burden of establishing an affirmative defense of exception or exclusion is not altered by the fact that the policy at issue

> contains a provision that the burden of proof shall rest upon any claimant thereunder to prove that the loss or injury was covered by the policy.

17A Couch on Insurance §254:12 (3d ed. 2006). As the Fifth Circuit put it in Britt, "[p]leadings, not policy language, control." Britt, 566 F.2d at 1022, n.1.

Even if policy language did control, however, such a counter-intuitive exclusion required straightforward language that would have let the Tuepkers know that, should a "hurricane occurrence" make it prohibitively difficult to determine which part of the hurricane caused which part of a total loss, State Farm had no intent to cover any of it. State Farm should not be allowed to cover itself against what it anticipates will be an ambiguous problem of cause and effect by using equally ambiguous language. "Ambiguity in terms is at the risk of the drafter of the policy, namely, the insurance company." Lynch v. Mississippi Farm Bureau Cas. Ins. Co., 880 So.2d 1065, 1070 (Miss.App.2004).

CONCLUSION

The Tuepkers respectfully request that the Court affirm the district court's ruling that the insurance policy issued to them by State Farm is ambiguous and unenforceable for any or all of the reasons discussed above. The Tuepkers further request that the Court reverse the district court's rulings on (1) the applicability of the "water damage" exclusion to this case and (2) the interpretation and application of Mississippi's principle of proximate causation in the context of property damage inflicted by a hurricane. Should the Court find that the "water damage" exclusion applies to the Tuepkers' case, the Tuepkers respectfully request a ruling that State Farm bears the burden of proving any and all water damage by a preponderance of the evidence.