



Corban v. USAA: Reinterpreting the Anti-Concurrent Causation Clause

October 15, 2009

On October 8, 2009, the Mississippi Supreme Court, in a unanimous decision, held that a homeowner's insurer may be liable for a portion of the plaintiffs' more than \$1 million estimated cost for storm damages to their home from Hurricane Katrina. The decision addressed two important issues regarding post-Katrina claims. In favor of insurers, the decision approved a lower court and prior federal decisions that held that a "water damage" exclusion precludes coverage for hurricane-driven water (also known as "storm surge"). However, the Supreme Court, contrary to two decisions of the United States Court of Appeals for the Fifth Circuit, determined that the "anti-concurrent causation" clause in the policy in question was ambiguous and did not preclude coverage for hurricane losses due to wind damage that happened in sequence with water damage.

BACKGROUND

On August 29, 2005, plaintiff homeowners the Corbans incurred physical damage to their Mississippi home from Hurricane Katrina. At the time the plaintiffs suffered the harm, they owned a homeowner's policy and a flood policy from defendant United Services Automobile Association Insurance Agency ("USAA"). See *Corban v. United Servs. Auto. Ass'n* ("Corban"), No. 2008-IA-00645-SCT, slip op. at 1-2 ¶ 1 (Miss. Oct. 8, 2009). USAA paid the Corbans the limits of liability under the flood policy for loss to the Corbans' dwelling and loss to contents. *Id.* at 4 ¶ 7. USAA also paid the Corbans amounts under the homeowner's policy that USAA attributed solely to wind damage. *Id.* at 5 ¶ 9. However, USAA denied coverage for most of the Corbans' claimed losses based on USAA's determination that the majority of the physical damage to the Corbans' home was the result of a combination of flood in conjunction with wind. *Id.* at 2 ¶ 2.

The circuit court entered an order granting partial summary judgment to USAA and denied partial summary judgment to the Corbans regarding the "anti-concurrent causation" clause and storm surge issues. The lower court found that "storm surge" was an excluded peril within the water damage definition of the Corbans' policy and that the "water damage" exclusion and "anti-concurrent causation" clause were unambiguous. Significantly, although questioning the interpretation of the policy language in two prior decisions of the United States Court of Appeals for the Fifth Circuit, the circuit court applied the "anti-concurrent causation" clause to bar coverage under the Corbans' homeowner's policy for any damage caused by water and wind concurrently or in sequence. *Id.* at 2-3 ¶ 4.

The Corbans sought an interlocutory appeal of the circuit court's rulings, which the Mississippi Supreme Court granted. *Id.* at 3 ¶ 4. Three insurance companies and the National Association

of Mutual Insurance Companies filed amicus curiae briefs. *Id.* at 3 n. 1. The parties agreed that under Coverages A, B and C of the homeowner's policy, any loss caused solely by wind is covered, while any loss caused by "water damage," as defined, is excluded, *id.* at 11 ¶ 22, although the Corbans disputed that the "water damage" exclusion included "storm surge."

THE "WATER DAMAGE" EXCLUSION APPLIES TO "STORM SURGE"

"Storm surge," a phenomenon associated with hurricanes, occurs when atmospheric conditions and wind forces combine to force tidal waters ashore and temporarily inundate areas of normally dry land. *Id.* at 12 ¶ 25 (citing *Leonard v. Nationwide Mut. Ins. Co.*, 438 F. Supp. 2d 684, 692 (S.D. Miss. 2006)).

The homeowner's policy at issue in *Corban* expressly excluded, in relevant part, "[w]ater damage, meaning: (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind" *Id.* at 11 ¶ 23. Plaintiffs argued that "storm surge" was a covered peril because the policy defines "water damage" and does not include storm surge within that definition. *Id.* at 11 ¶ 23. USAA countered that "storm surge" was obviously an excluded peril under the "water damage" exclusion. *Id.* at 12 ¶ 23.

The *Corban* Court held that "storm surge" is an excluded peril under the homeowner's policy because it is contained unambiguously within the "water damage" exclusion. The Court cited with approval similar cases from the U.S. District Court for the Southern District of Mississippi and the U.S. Court of Appeals for the Fifth Circuit in support of its holding that "storm surge" was included within a comparable "water damage" exclusion. See, e.g., *Leonard*, 438 F. Supp. 2d at 693, and *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 353 (5th Cir. 2007). The *Corban* Court held that "storm surge" is plainly encompassed within the "flood" or "overflow of a body of water" portions of the "water damage" definition, and no other logical interpretation exists. *Slip op.* at 13-14 ¶ 26.

THE MISSISSIPPI COURT'S INTERPRETATION OF THE "ANTI-CONCURRENT CAUSATION" CLAUSE

The "anti-concurrent causation" clause in the policy at issue in *Corban* stated: "Section I – Exclusions: 1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." *Id.* at 15 ¶ 28 (emphasis added). The lower court had held that, based upon the persuasive authority of federal appeals court decisions in *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007) and *Tuepker*, the "anti-concurrent causation" clause applied to bar the Corbans from recovering from any damage caused by water as defined in the policy or a combination of water and wind. *Corban*, *slip op.* at 14-15 ¶ 27.

As with the *Corban* case, *Leonard* involved two Mississippi homeowners' claim for Hurricane Katrina-related damages to their home. Another similarity was that the *Leonard* plaintiffs had purchased an "all-risk" homeowner's insurance policy to cover their home. *Leonard*, 499 F.3d at 424. The *Leonard* Court noted that the plaintiffs' residence had suffered only "modest" wind

damage and “extensive” water damage. *Id.* at 426. The relevant “anti-concurrent causation” clause in Leonard stated as follows:

1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss

Id. at 425 (emphasis in original). The Fifth Circuit Court of Appeals held that the anti-concurrent causation language was unambiguous and that “[t]he only species of damage covered under the policy is damage caused exclusively by wind. But if wind and water synergistically caused the same damage, such damage is excluded.” *Id.* at 430 (emphasis in original).

The Fifth Circuit in Tuepker, which was also factually similar to Corban and Leonard, found unambiguous an “anti-concurrent causation” clause that stated as follows:

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.

Tuepker, 507 F.3d at 351. Finding that the Leonard decision governed, the Tuepker Court held that “the ACC Clause in combination with the Water Damage Exclusion clearly provides that indivisible damage caused by both excluded perils and covered perils or other causes is not covered.” *Id.* at 354.

The Corban Court rejected the Fifth Circuit’s holdings in Leonard and Tuepker by analyzing the clause’s use of the terms “loss,” “concurrently,” and “in any sequence.” Slip op. at 15 ¶ 28.

With respect to the “anti-concurrent causation” clause’s “loss” provision, the Court held that, based upon policy usage and the “ordinary and popular meaning,” “loss occurs at that point in time when the insured suffers deprivation of, physical damage to, or destruction of the property insured.” *Id.* at 16 ¶ 31. The Court further held that “[a]n insurer cannot avoid its obligation to indemnify the insured based upon an event which occurs subsequent to the covered loss. The insured’s right to be indemnified for a covered loss vests at time of loss. Once the duty to indemnify arises, it cannot be extinguished by a successive cause or event.” *Id.* at 17 ¶ 32.

Regarding “concurrently,” the Court held that the claim sub judice was not “indivisible” and concurrent. The Court reasoned that, based on the record, the wind and flood acted in

sequence, not concurrently, causing different damage and resulting in separate losses. *Id.* at 19 ¶ 37. As applied to the facts of the instant case, if the wind peril had caused damage resulting in a loss either before or after the water peril caused damage resulting in a loss, the losses would not be considered “concurrent.” *Id.* at 19 ¶ 37. However, the Court acknowledged that the “anti-concurrent causation” clause would apply to exclude coverage if the wind and water perils “contemporaneously converged, operating in conjunction to cause loss.” *Id.*

In terms of the “in any sequence” language in the “anti-concurrent causation” clause, the Court found the phrase to be ambiguous as applied to the water peril because of (i) its location in the policy within an exclusion dealing solely with water damage; and (ii) provisions in the policy providing that indemnity is payable when loss happens and thus cannot be defeated by a subsequent event such as water damage following wind damage. Accordingly, following Mississippi precedent, the Court interpreted the exclusion language in favor of the nondrafting, insured party. *Id.* at 21 ¶ 41.

The Mississippi Supreme Court found that the proper reading of the anti-concurrent causation clause at issue was the following:

1. We do not insure for loss caused directly or indirectly by [water damage]. Such loss [from water damage] is excluded regardless of any other cause or event [wind damage] contributing concurrently or in any sequence to the loss [from water damage].

Id. at 22 ¶ 42. In interpreting the language in this manner, the Court cited *Dickinson v. Nationwide Mutual Fire Insurance Co.*, No. 1:06CV198 LTS-RHW, 2008 WL 1913957 (S.D. Miss. Apr. 25, 2008), a Mississippi federal district court opinion that postdated the Fifth Circuit decisions in *Leonard* and *Tuepker*. Based on its analysis, the Mississippi Supreme Court concluded that, notwithstanding the “anti-concurrent causation” clause: “If the property suffered damage from wind, and separately was damaged by flood, the insured is entitled to be compensated for those losses caused by wind.” *Id.* at 23 ¶ 44.

The Corban Court approvingly cited the following passage from the *Dickinson* opinion:

[i]t is clear to me that storm surge flooding cannot be a cause (directly or indirectly) of damage that occurs before the storm surge flooding reaches the insured property, i.e. before the excluded peril of flooding occurs. . . .

Wind damage that precedes the arrival of the storm surge and damage that happens after the storm surge arrives are separate losses from separate causes, and not concurrent causes or sequential causes of the same loss[.] . . .

Id. at 24 ¶ 47 (citing *Dickinson*, 2008 WL 1913957 at *2-3).

BURDEN OF PROOF

The Corban Court also addressed the issue of which party bears the burden of proof on remand for determining whether a loss was covered or excluded when there was both wind and flood damage. The policy at issue provided “all-risk” coverage as to “Coverage A – Dwelling” and “Coverage B – Other Structures,” and “named perils” coverage as to “Coverage C – Personal Property.”

With respect to the “all-risk” coverage of “Coverage A – Dwelling” and “Coverage B – Other Structures,” the Court held that the insureds had to prove a “direct, physical loss to property described.” *Id.* at 27 ¶ 51. However, once the Corbans have satisfied their burden of proof, the burden then shifts to USAA to prove, by a preponderance of the evidence, that the causes of the losses (i.e., flood damage) are excluded by the policy. *Id.* at 27 ¶ 51. The Court held that “USAA is obliged to indemnify the Corbans for all losses under “Coverage A - Dwelling” and “Coverage B - Other Structures” which USAA cannot establish, by a preponderance of the evidence, to have been caused or concurrently contributed to by “[flood] damage.”” *Id.* at 27 ¶ 51.

With respect to the “named perils” coverage of “Coverage C – Personal Property,” the Corbans must prove, by a preponderance of the evidence, that the “direct physical loss” to the property described in Coverage C was caused by wind. *Id.* at 28 ¶ 53.

EVALUATION

The Corban case is difficult to distinguish factually from its federal appellate predecessors Leonard and Tuepker. The Mississippi Supreme Court simply applied a much stricter standard to interpreting the “anti-concurrent causation” clause language than did the Fifth Circuit. As a practical matter, the proof problems in establishing what damage was caused by water in a storm event as opposed to prior or subsequent wind damage could prove challenging. It remains to be seen the extent to which the Corban decision will influence the decisions in other state and federal courts involving hurricane-related claims.

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