Opening REMARKS:

Dear Committee Members:

Mr. Chairman thank you for allowing me to address your committee. My name is Kevin Buckel of Long Beach MS. I lost my home in Hurricane Katrina and my homeowners claim was denied after the storm without any engineering report. I am before you today to ask for a vote and support on SB2225.

SB2225 is proposed legislation based on the rulings of the courts, including the 5th Circuit and MS Supreme Court. By adopting the courts rulings in to law you will forever end the "burden of proof" debate for all homeowner's in the state. This will allow better protection for homeowners who pay their homeowner premiums faithfully month after month and has no input on how their claim outcome is decided.

History:

In Commercial Union Ins. Co. v. Byrne, the insurer denied an insurance claim for damages to plaintiff's home resulting from Hurricane Camille. The insurer claimed the damage was caused by flooding and therefore excluded under the terms of the insurance policy, which specifically excluded damages resulting from "flood... whether driven by wind or not." The court recognized the insurers' contention as an affirmative defense, placing upon the insurer the burden of proving the defense. Thus, while the insured has the burden of proving the damage was caused by a covered cause, the insurer often has the burden of proving the damage was caused by an excluded cause.

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-IA-00645-SCT
MARGARET CORBAN AND MAGRUDER S. CORBAN
v.
UNITED SERVICES AUTOMOBILE ASSOCIATION a/k/a USAA INSURANCE AGENCY

This Court finds that with respect to the "all-risk" coverage of "Coverage A - Dwelling" and "Coverage B - Other Structures," the Corbans are required to prove a "direct, physical loss to property described." Thereafter, USAA assumes the burden to prove, by a preponderance of the evidence, that the causes of the losses are excluded by the policy, in this case, "[flood] damage." 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." "Contributed to" comes into play only when "[flood] damage" is a cause or event *contributing concurrently* to the loss.

These decisions suggest that in slab cases, as long as the insured presents evidence making a prima facie showing that wind caused substantial damage to their home, *the insured will not be required to present further evidence negating the possibility that the damage was caused by water and the burden will instead shift to the insurer to prove the extent of damage caused by water. This, in turn, will make it easier for the insureds to recover under their homeowner's policies, and more difficult for the insurers to avoid coverage under their policy exclusions.*

1. **As you can see the courts ruled on this after Hurricane Camille and then reaffirmed the ruling after Katrina.**
2. **By adopting the court's ruling in to law you will remove a tool from the insurance industry tool box to deny claims as they did after Katrina.**
3. **Additionally, as Commissioner Chaney stated, this will allow for swifter justice for the homeowners after a catastrophic event.**
4. **This would also prevent the insurance industry of recycling this "ruling" with the hope of over turning it or weakening the language.**
5. **Perhaps the best reason to support SB2225 is this will protect the poor and elderly homeowners who have limited resources to fight back when their claim is wrongly denied.**
6. **THE AVERAGE HOMEOWNER CLAIM PAID IN MISSISSIPPI AFTER KATRINA WAS $15,915 per claim**
7. **Over 20,000 homes were reduced to a slab in Mississippi after Katrina**

In Texas the legislature adopted the following language to protect their homeowners:

BURDEN OF PROOF. **If you sue to recover under your insurance policy, the insurance company has the burden of proof as to any application of an exclusion in the policy and any exception to or other avoidance of coverage claimed by the insurer.**

Some quotes from the State Farm Conduct Exam:

The investigation also revealed a few instances where claims representatives advised policyholders that "State Farm had informed him that it would be the company policy to deny wind coverage to every policy holder in MY GENERAL AREA" or "if water touched it, we were told not to pay for wind." These quotes came directly from the Company's claims files or from specific complaints filed by policyholders with the MID.

Failure To Pay When There Were Indications of Wind Damage

There were numerous claims within our sample where policyholders were not paid for wind damage even though there were indications of wind in the file. These indications were noted in photographs, witness statements, adjuster comments, insured comments, engineer reports, engineer photographs, and/or adjuster inspection notes. As mentioned under the caption "Lack of Documentation to Support a Full Investigation", these indications range from specific references to "possible", "probable", or "likely" wind damage noted in engineer reports to actual evidence in the claim files determined by the examiners to be indications of damage caused by wind.

The above referenced comments as well as a discussion of allegations of fraud and abuse are addressed in more detail under the following sections of the report. Additionally, to address many of the comments above and various concerns of the MID, the Company agreed to re-evaluate hundreds of claims, at which point over $88 million was paid to policyholders by State Farm. The resolution process is discussed in more detail below as well.

Rulings on Burden of Proof:

Tuepker v. State Farm

On May 24, 2006, Judge Senter issued a ruling in Tuepker v. State Farm Fire & Cas. Co., 2006 U.S. Dist. LEXIS 34710 denying State Farm's motion for judgment on the pleadings. The Tuepkers owned a residence in Long Beach, Mississippi insured under a State Farm homeowners policy at the time it was completely destroyed by Hurricane Katrina. Approximately one month later, State Farm denied the Tuepker's claim on the grounds that the destruction of the property was a result of "storm surge, wave wash and flood." As is the case with most standard homeowners policies, State Farm specifically excludes coverage for "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."

Based on this exclusion, State Farm sought a motion for judgment on the pleadings. Judge Senter denied State Farm's motion based on the inference from Plaintiffs' Complaint that destruction of the property was attributable, at least in part, to covered wind and rain damage. The Court also held that State Farm's water damage exclusion was valid, but constituted an affirmative defense to insureds' claims. Therefore, State Farm bore "the burden of proving the exclusion applies to the plaintiffs' claims." The Court went on to clarify that if the evidence indicates some portion of the damages were caused by the covered wind and rain and some portion caused by the excluded floods/storm surge, the determination of which was the proximate cause of the damage to the insured's property or the proportion of the damage caused by each phenomenon would be a question of fact for the jury.

Broussard v. State Farm

A little over six months after he issued his opinion in Tuepker, and just a few weeks before State Farm filed its brief to the Fifth Circuit in that case, Judge Senter appeared to have again shifted the burden of proof in the Hurricane Katrina claims further onto the insurer. In Broussard v. State Farm Fire & Cas. Co., 2007 U.S. Dist. LEXIS 2611, Judge Senter entered a directed verdict in favor of the insureds, stating that a "mere scintilla of evidence" regarding the extent of uncovered water damage is insufficient to submit an issue to a jury. After hearing the arguments of both sides at trial, Judge Senter did not allow the issue of liability to be submitted to the jury, instead awarding the insureds the full limits of their homeowners policy ($212,222) as a matter of law. However, he did allow the jury some participation, as he permitted them to rule on punitive damages against State Farm (the jury awarded $2.5 million, which was later reduced to $1 million).