# COVERAGE IN A TIME OF STORMS

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Sherilyn Pastor
McCarter & English, LLP
Newark, NJ
spastor@mccarter.com

William Berk
Berk, Merchant & Sims, PLC
Miami, FL
www.berklawfirm.com

Neil Rambin
Drinker Biddle & Reath LLP
Dallas, TX
neil.rambin@dbr.com

Following storm events, disputes can arise over the cause and amount of covered loss. It may be that a loss involved both a covered and excluded cause of loss. In *Bayrock/Sapir Org. LLC v. Affiliated FM Ins. Co.*, No. 652014/2013 (N.Y. Sup. Ct. 2013), for example, the policyholder alleged that power interruption, causing it loss, was covered because it was caused by an explosion at substation and flying debris. The insurer disagreed, urging that the policyholder's loss was caused by flooding and therefore excluded from coverage. Whether there is coverage when a claim involves covered and excluded causes of loss will depend on the facts, the terms of the involved policy, and whether the controlling jurisdiction's law follows the efficient proximate cause doctrine or the concurrent cause doctrine.

The law on causation varies from state to state, with courts fashioning competing doctrines to address circumstances where property loss results from a combination of covered and excluded causes. Under the concurrent cause doctrine, as long as there is a covered "but for" cause of the loss – no matter how insignificant in the chain of causation – the excluded cause cannot be used to defeat coverage. Other courts, seeking to better balance insurer's and insured's interests, apply some form of the efficient proximate cause doctrine, which focuses on whether the covered cause was the predominant or driving cause of the loss.

New York applies a proximate, efficient and dominant cause of loss test. Meaning, when a loss is caused by covered and excluded causes, the policyholder is entitled to coverage if the covered peril is the "dominant and efficient cause" of the loss. *See, e.g.*, *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 431 (5th Cir. 2007). The efficient proximate cause of the loss is the one that sets the other causes in motion that, in an unbroken sequence, produce the result for which recovery is sought. *See McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1004 (Wash. 1992).

By way of illustration, in *Sabella v. Wisler*, 377 P.2d 889 (Cal. 1963), a homeowner purchased a home that it turns out was negligently built on an improperly compacted lot. When a sewer line under the home leaked several years later, water weakened the unstable land beneath the home's foundation, causing it to settle (but not collapse). The policyholder sought coverage for the damage. Its insurer denied the claim, citing to an exclusion for loss caused by "settling, cracking, shrinkage, or expansion of pavements, foundations, walls, floors, or ceilings; unless loss by . . . collapse of buildings ensues." The California Supreme Court held there was coverage as a matter of law because an insured peril, negligence in the installation of the sewer pipe, was the efficient cause of the loss.

Although seemingly straightforward, the efficient proximate cause doctrine's analysis and accompanying coverage determinations can be complex. In *First Special Ins. Corp. v. American Home Assur. Co.*, 558 F.3d 97, 104 (1st Cir. 2009), the First Circuit Court of Appeals held that the efficient proximate cause doctrine is applicable only where two distinct perils exist, each of which is independently capable of inducing damage. Meaning, the doctrine applies only in a fact-specific situation, namely "where the causes are independent." *Id*. at 104-05. Other courts applying the doctrine have made clear that when an insured cause sets excluded causes in motion in an unbroken sequence between the insured risk and ultimate loss, the insured risk is regarded as the proximate cause of the entire loss. This is true even if an event in the chain of causation was specifically excluded from coverage. *See, e.g., Kelly v. Farmer's Ins. Co.*, 281 F.Supp. 2d 1290, 1296 (W.D. Okla. 2003); *Bowers v. Farmers Ins. Exch.*, 991 P.2d 734, 738 (Wash. Ct. App. 2000).

Some courts instead apply the concurrent causation doctrine, or some variation of it. These jurisdictions conclude that there is coverage whenever two or more causes contribute to a loss, and

at least one of the causes is a covered peril. *E.g., American Home Assur. Co. v. Sebo*, 141 So. 3d 195141 So. 3d 195 (Fla. 2016) ("when independent perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurring cause doctrine"). *Accord Curtis v. State Farm Lloyds*, 2004 U.S. Dist. LEXIS 29887, at *29 (S.D. Tex. 2004).

New Jersey, by contrast, considers whether the first or last step in the chain of causation resulting in the loss was a covered event. If it was, there is coverage. *See, e.g., Simonetti v. Selective Ins. Co.*, 859 A.2d 694, 700 (N.J. App. Div. 2004). Texas also applies a concurrent causation analysis. In *Farmers Group Ins., Inc. v. Poteet*, 434 S.W. 3d 316 (Tex. App. 2014), for example, a policyholder's home sustained damage as a result of a central heating and air-conditioning system's discharge of smoke and soot. The insurer, however, refused to pay the entirely of the claim, alleging that the soot resulted from a culmination of covered and uncovered perils. The Texas Court of Appeals held that under the doctrine of concurrent causation, when covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril.

There is no uniformity regarding the burden of proof in causation disputes. In *Jones v. Federated National Insurance Company*, 2018 WL 443892, (Fla. Ct. App. Jan. 17, 2018), a Florida appellate court recently held that after the insured proves it sustained loss during the policy's period, the burden is on the insurer:

> 1. The insured has the initial burden of proof to establish that the damage at issue occurred during a period in which the damaged property had insurance coverage. If the insured fails to meet this burden, judgment shall be entered in favor of the insurer.
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> 2. If the insured's initial burden is met, the burden of proof shifts to the insurer to establish that (a) there was a sole cause of the loss, or (b) in cases where there was more than one cause, there was an "efficient proximate cause" of the loss.

> 3. If the insurer meets the burden of proof under either 2.(a) or 2.(b), it must then establish that this sole or efficient proximate cause was excluded from coverage by the terms of the insurance policy. If the insurer does so, then judgment shall be entered in its favor. If the insurer establishes that there was a sole or efficient proximate cause, but fails to prove that this cause was excluded by the all-risk insurance policy, then judgment shall be entered in favor of the insured.
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> 4. If the insurer fails to establish either a sole or efficient proximate cause, and there are no applicable anti-concurrent cause provisions, then the concurrent cause doctrine must be utilized. Applying the concurrent cause doctrine, the insurer has the initial burden of production to present evidence that an excluded risk was a contributing cause of the damage. If it fails to satisfy this burden of production, judgment shall be entered in favor of the insured.
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> 5. If the insurer does produce evidence that an excluded risk was a concurrent cause of the loss, then the burden of production shifts to the insured to present evidence that an allegedly covered risk was a concurrent cause of the loss at issue. If the insured fails to satisfy this burden of production, judgment shall be entered in favor of the insurer.
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> 6. If the insured produces evidence of a covered concurrent cause, the insurer bears the burden of proof to establish that the insured's purported concurrent cause was either (a) not a concurrent cause (i.e., it had no (or a de minimis) causal role in the loss), or (b) excluded from coverage by the insurance policy. If the insurer fails to satisfy this burden of proof, judgment shall be entered in favor of the insured.

*Id*. at *3.

Texas courts, however, place the burden of proof on the insured. *In Certain Underwriters at Lloyd's of London v Lowen Valley View LLC,* 2017 WL 3115142 (N.D Tex. July 21, 2017), the court explained that an insured must establish that it sustained damages covered by its insurance policy to recover under its contract. When covered and excluded perils combine to cause damage, the insured therefore must present sufficient evidence affording a jury a reasonable basis on which to segregate those damages caused by covered perils from those caused by uncovered perils. The court concluded that failure to meet such burden may be fatal to an insured's claim. *Id*. at *8.

Some insurance policies now contain what are described as anti-concurrent causation ("ACC") provisions. These clauses purport to exclude coverage any loss caused in part by any

excluded peril. One such provision provides: "We will not pay for loss or damage caused directly or indirectly by any of the following … such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." ISO Form CP 00 99 02 00 (ISO Properties, Inc. 2007).

ACC provisions have been met with mixed responses by courts and insurance regulators. A number of courts have upheld their enforcement. *E.g., Iroquois on the Beach, Inc. v. General Star Indem. Co.,* 550 F.3d 585, 588 (6th Cir. 2008); *Artic Slope Regional Corp. v. Affiliated FM Ins. Co.*, 564 F.3d 707, 711 (5th Cir. 2009). These states conclude that the parties have a right to contract what an insurance policy will and will not cover. *See JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597 (Tex. 2015).

Some states, however, have refused to enforce ACC provisions, or have passed or introduced legislation banning their enforcement. *E.g.,* NY Assembly Bill No. A7455A. California's Insurance Code, in fact, codifies the efficient proximate cause doctrine, and California courts have made clear that insurers cannot "contract around" this statutory mandate. *E.g., Julian v. Hartford Underwriters Ins. Co.*, 35 Cal.4th 747 (2005); *Garvey v. State Farm Fire & Cas. Co.,* 48 Cal.3d 395 (1989).

Some courts disfavor ACC clauses, giving them limited effect -- applying them to events that happen at the same time (concurrently), and not to sequential events, or declining to enforce them as vague or contrary to policyholders' reasonable expectations. *See, e.g., Safeco Ins. Co. of Am. v. Hirschmann,* 112 Wash. 2d 621, 773 P.2d 412 (1989) (ACC clause unenforceable, reasoning that it would defeat the policyholder's reasonable expectation that it was entitled to recover for all losses set in motion by a covered cause of loss. *Accord Fruit & Vegetable Supreme Inc. v. The Hartford Steam Boiler Insp.,* 28 Misc.3d 1128 (N.Y. Sup. Ct. 2010) (food spoilage and

loss of income not recoverable because service interruption coverage was excluded, but pre-black out damages were unrelated and constituted covered loss). *See also Western Nat'l Mut. Ins. Co. v. University of No. Dakota*, 653 N.W.2d 4 (N.D. 2003); *Wright v. Safeco Ins. Co.*, 109 P.3d 1 (Wash. Ct. App. 2004); *Murray v. State Farm Fire and Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998).

The law relating to causation and the enforceability of ACC provisions continues to develop. Following a loss, insurers and insureds should therefore carefully consider the specific facts and policy provisions implicated, and the controlling jurisdiction's statutory and case law.