A CONCURRENT MESS AND A CALL FOR CLARITY IN FIRST-PARTY PROPERTY INSURANCE COVERAGE ANALYSIS

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This article clearly and plainly describes the genesis and history of the doctrine of "concurrent causation" and the development of anti-concurrent policy exclusions in first-party property insurance coverage cases. After describing this unique history, the article argues that it is time to create a new lexicon for "concurrent causation" issues and advocates for a new deliberate, categorical approach for addressing "concurrent causation" questions.

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I. INTRODUCTION

Insurance coverage questions for "all-risk" policies are conceptually simple. If a peril is excluded, there is no coverage; if a peril is not excluded, there is coverage.[1] While this analysis seems conceptually simple, it becomes complicated in practice when multiple perils combine to cause a loss.

The complications are most acute when non-excluded, covered perils combine or operate in conjunction with excluded, non-covered perils to cause a loss. When covered and non-covered perils are connected to a

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[1] This central tenant of insurance, however, is slowly being eroded as well. Mold exclusions are beginning to deny the result—mold—irrespective of what caused the mold. Historically, insurers excluded perils, but it seems that insurers are slowly beginning to exclude results. *See* J. Kent Holland Jr., *Mold from a Covered Concurrent Cause Still Excluded*, IRMI.COM (Nov. 2010), http://www.irmi.com/expert/articles/2010/holland11-insurance-law-environmental.aspx.

loss, it may be unclear from the policy whether the entire loss should be covered, whether the entire loss should be excluded, or whether the loss and resultant damages should be bifurcated to indemnify the insured for losses caused by covered perils while denying indemnity for losses caused by excluded perils.

Many courts and commentators refer to the process of multiple covered and excluded perils combining to cause a loss as "concurrent causation".[2] It goes without saying, but nevertheless needs to be said, that the phrase "concurrent causation" presents a definitional problem. While the common definition of "concurrent" implies a degree of temporal simultaneity,[3] courts and commentators have routinely used the term "concurrent" to refer to sequential chains of events;[4] independent, unrelated events acting in conjunction;[5] and even events that undoubtedly operated in succession.[6] These types of events patently contradict the term "concurrent"; thereby turning "concurrent causation" into a definitional misnomer.

In addition to these definitional inconsistencies, courts have complicated the issues by developing a patchwork of interpretations of concurrent causation and relevant anti-concurrent causation policy exclusions.[7] This resultant patchwork has operated to deprive policyholders

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[2] William Conant Brewer, Jr., *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141, 1145 (1961). As will be discussed *infra*, the term "concurrent" has become imprecise, but it is used here as background. The term "concurrent" can have two distinct meanings. Today, concurrent either describes multi-cause losses operating or occurring at the same time or refers generically to a web of events having some interrelation among them.

[3] *See, e.g.,* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 383 (Joseph P. Pickett et al. eds., 4th ed. 2000) ("adj. Happening at the same time as something else."); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 239 (Frederick C. Mish et al. eds., 10th ed. 2001) ("adj. operating or occurring at the same time."); WEBSTER'S NEW WORLD COLLEGE DICTIONARY 303 (Michael Agnes et al. eds., 4th ed. 2001) ("occurring at the same time; existing together.").

[4] Churchill v. Factory Mut. Ins. Co., 234 F. Supp. 2d 1182, 1187 (W.D. Wash. 2002).

[5] David P. Rossmiller, *Katrina in the Fifth Dimension: Hurricane Katrina Cases in the Fifth Circuit Court of Appeals*, NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW 71, 77 (2008).

[6] Peter Nash Swisher, *Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation "Riddles,"* 43 TORT TRIAL & INS. PRAC. L.J. 1, 4 (2007).

[7] Douglas G. Houser, *The Rise and Fall of Concurrent Causation: Background and Current Trends Affecting Property Insurance Coverage*, 44 FED.

of their reasonable expectations and has prevented insurers from maintaining contract certainty when drafting insurance policies.[8]

Analyzing this patchwork of interpretations has left one commentator to explain, "[b]ecause causation as a theory or doctrine is so elusive, *inconsistent outcomes must be tolerated*."[9] As stated by this commentator, "[s]ometimes the different outcomes will turn on subtle factual distinctions, but sometimes the different outcomes will be based on an utterly irreconcilable view of policy text and principles of interpretation."[10]

This article argues that inconsistent outcomes need not be tolerated, provides definitional clarification for the relevant elements of the concurrent causation phenomenon, and proposes a revised analytical framework to minimize the inconsistent outcomes. The article provides both a history of concurrent causation and a history of anti-concurrent policy exclusions. Using that history, the article proffers new definitions to address multi-cause losses,[11] and advocates for a more methodical, categorical analysis for addressing "concurrent causation" questions.[12]

II. BACKGROUND OF CONCURRENT CAUSATION

Courts have struggled with the question raised in the introduction on the best way to deal with losses caused by multiple perils. To address the issue, courts have typically employed one of four approaches to "concurrent" losses:[13] the pro-policyholder approach, the pro-insurer approach, the dominant-cause approach, and the apportionment approach.[14]

OF INS. & CORP. COUNSEL Q. 3, 3 (1993).

[8] *See* Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385, 387-88 n.8 and accompanying text (1985).

[9] ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 560 (4th ed. 2007) (emphasis added).

[10] *Id.*

[11] As discussed *infra* p. 21-22, this article advocates that the phrase concurrent causation should be replaced with the more accurate term "multi-cause loss".

[12] A flow chart setting out the interpretive mechanism is attached as Appendix A.

[13] Peter Nash Swisher, *Insurance Causation Issues: The Legacy of* Bird v. St. Paul Fire & Marine Ins. Co., 2 NEV. L.J. 351, 366-68 (2002).

[14] Conventional scholarship does not typically refer to them by these names, but the names provided herein more adequately and easily describe the relevant categories. For the traditional names, *see* JERRY & RICHMOND, *supra* note 9, at

Interestingly, and generating further confusion, courts routinely refer to each approach as the "concurrent cause doctrine."[15]

A. PRO-POLICYHOLDER APPROACH[16]

Under the pro-policyholder approach, if multiple perils combine to create a loss, the full amount of the loss is covered, so long as part of the loss was caused, even if insignificantly, by a covered cause of loss.[17] This approach has also been referred to by courts as the "concurrent causation" doctrine or approach.[18]

The California Supreme Court in *State Farm v. Partridge* was one of the first courts to adopt this approach for **liability** policies.[19] The

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560-61.

[15] *See e.g.,* Wallis v. United Services Auto Ass'n, 2 S.W.3d 300, 302-03 (Tex. App. 1999) (applying the "concurrent cause doctrine" to the apportionment approach: "Texas recognizes the doctrine of concurrent causes. This doctrine provides that when, as in the instant case, covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril(s)."); Allstate Ins. Co. v. Watts, 811 S.W.2d 883, 886 (Tenn. Ct. App. 1991) (a third-party case applying the "concurrent cause doctrine" to the dominant cause approach: "The Court also opined that insurer was liable under 'the concurrent cause doctrine' which provides that coverage under a liability policy is equally available to an insured whenever an insured risk constitutes a concurrent proximate *cause* of the injury."); Farmers Ins. Exch. v. Adams, 170 Cal. App. 3d 712 (Cal. Ct. App. 1985) (applying the "concurrent cause doctrine" to the pro-policyholder approach); Wallach v. Rosenberg, 527 So.2d 1386 (Fla. Dist. Ct. App. 1988) (same result in first-party context); Phillips & Coplin, *infra* note 87, at 33 ("A minority follows the doctrine of concurrent causation where coverage is afforded as long as a covered cause of loss contributes in a meaningful way to the insured's damages."). In this author's opinion, the pro-policyholder use is the most accurate explanation of the "concurrent causation doctrine" because it was first and it spawned the anti-concurrent causation clauses proliferating property insurance policies today. *See infra* Part IV.

[16] Throughout this article, when the term "post-*Partridge*" is used, it is in reference to the proliferation of the pro-policyholder approach.

[17] For further discussion of the policy rationales supporting this approach, *see infra* note 114 and accompanying text.

[18] *See, e.g.*, Allstate Ins. Co. v. Watts, 811 S.W.2d 883, 886 (Tenn. 1991) ("[T]he 'concurrent causation doctrine' . . . provides that coverage under a liability policy is equally available to an insured whenever an insured risk constitutes a concurrent proximate cause of the injury.").

[19] State Farm Mut. Auto. Ins. Co. v. Partridge, 514 P.2d 123 (Cal. 1973). For further discussion, *see infra* Part III.B.

California Court of Appeals attempted to also adopt this approach for **property** policies in *Farmers Insurance Exchange v. Adams*.[20] In *Adams*, the court held that if third-party negligence (a covered loss) contributes in any respect to the loss, the entire loss is covered even if the efficient proximate cause of the loss would be excluded.[21] While *Adams* was later overruled by the California Supreme Court, it demonstrates how courts analyze cases under the pro-policyholder approach.

In arguing for the pro-policyholder approach, courts reason that public policy militates in favor of the pro-policyholder approach.[22] For instance, because ambiguities in insurance contracts of adhesion are generally interpreted strictly against the insurer and in favor of the insured, courts reason that when the loss is caused at least in part by a covered peril, the exclusion should be interpreted against the insurer.[23] Accordingly, under the pro-policyholder approach, when non-excluded perils and covered perils act in conjunction to cause the loss, the loss is covered.[24]

B. PRO-INSURER APPROACH

The pro-insurer approach applies the opposite view of the pro-policyholder approach. Under the pro-insurer approach, if one of the causes of loss is excluded, the entire loss is excluded. While no domestic jurisdictions have entirely adopted this approach, British courts apply the pro-insurer approach with some uniformity.[25]

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[20] 170 Cal. App. 3d 712 (Cal. Ct. App. 1985).

[21] *Id*. This case was later expressly rejected by the California Supreme Court in *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989).

[22] Premier Ins. Co. v. Welch, 189 Cal. Rptr. 657, 660-62 (Cal. Ct. App. 1983).

[23] This is generally referred to as *contra proferentem* and applies in contracts of adhesion. For large commercial entities creating and negotiating manuscript policies, the same application may not apply. *See* JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS § 4.11[F] (3d ed. 2006 & Supp. 2011) ("If the [manuscript policy] is essentially drafted by the policyholder, a weak version of *contra proferentem* should apply in reverse.").

[24] This can also be attributed, at least in part, to California's Insurance Code, which provides additional protections to policyholders. CAL. INS. CODE §§ 530, 532 (West 2011).

[25] *See* Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 972-73 (2010). Some may argue that *Lydick v. Insurance Co. of North America*, 187 N.W.2d 602 (Neb. 1971) stands for the proposition that Nebraska follows this approach, but that case, and more recent cases in Nebraska indicate that the court was actually applying the dominant-cause

The British case, *Wayne Tank*, provides the quintessential example of this approach.[26] The Wayne Tank factory suffered a fire caused by two concurrent perils: "[F]ailure to install proper equipment (an excluded cause) and employee negligence in leaving the factory unattended (a covered cause)."[27] The *Wayne Tank* court held that even if the employee negligence was the predominant factor in the loss, the loss would still be excluded because the failure to install the proper equipment concurrently acted to cause the loss.[28] Thus, the entire loss was excluded because at least part of the loss was excluded.

It is unclear exactly why British courts have taken this approach, but perhaps it can be explained, at least in part, by the history of insurance in the United Kingdom and the remnants of a time when the insurer had less influence and control over the policy-making process. The roots of modern insurance date back to the United Kingdom and the shipping industry.[29] One of the first insurers, Lloyd's of London, insured ships and their cargo and provides a fundamental building block for insurance interpretation in the United Kingdom.[30]

In these pre-modern transactions, the insurer was at an information disadvantage to the shipper. The shipper had a better understanding of his skills and the unique challenges presented by his specific cargo, and also had significant control over his risks and potential losses. The insurer, conversely, was often at the mercy of the shipper and had to rely on the shipper providing truthful and accurate information to make its underwriting determinations. Because of this information asymmetry in favor of the shipper, Lloyd's policies were often interpreted strictly against the shipper.[31] For instance, if the shipper issued a warranty and that warranty was even partially breached, the entire loss was excluded.[32] Accordingly, the British courts' comparatively stern treatment of the policyholder may be rooted in this specific anachronism.

In the United States today, unlike the United Kingdom hundreds of years ago, insurance policies are contracts of adhesion and the justification

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approach to the loss.

[26] *Id.* at 973 (citing Wayne Tank & Pump Co. Ltd. v. Empr'r's Liab. Assurance Co., Ltd., [1973] 3 W.L.R. 843 (Eng.)).

[27] *Id*. at 973.

[28] *Id.*

[29] *See* JERRY & RICHMOND, *supra* note 9, at 560-61 (citing Shinrone Inc. v. Ins. Co. of N. Am., 570 F.2d 715 (8th Cir. 1978)).

[30] *Id.* at 561.

[31] *Id.* at 749-50.

[32] *Id.*

for strict interpretation of insurance policies against the insured no longer remains an attractive option. Today, insurers have the negotiating leverage, which is why United States' jurisdictions read ambiguities broadly against the insurer and read exclusions narrowly.[33] For this reason, American courts have been reluctant to follow the British, pro-insurer approach.

C. THE EFFICIENT PROXIMATE CAUSE RULE OR DOMINANT-CAUSE APPROACH

The dominant-cause approach attempts to strike a balance between the pro-policyholder and pro-insurer approaches and relies on equitable principles of fairness and the parties' reasonable expectations.[34] Under this approach, the court attempts to ascertain which cause, among the various concurrent causes of loss—or which link in the chain of events—was the most important, substantial, or responsible factor in the loss. This approach is also commonly referred to as the efficient proximate cause approach.[35]

Shinrone Inc. v. Insurance Co. of North America demonstrates how courts apply the dominant-cause approach.[36] *Shinrone* involved a coverage dispute when cattle were killed during a storm with intense winds, damp snow, muddy land, and extremely cold temperatures.[37] The policy in question provided coverage for death by windstorm, but excluded death caused by "dampness of the atmosphere or extremes of temperature".[38] The testimony in the case conflicted and experts concluded that the cattle died due to a combination of factors including wind, cold temperatures, snow, the size and age of the cattle, conditions of the land, and the lack of adequate wind protection.[39] Analyzing these factors, the jury determined that the windstorm was the most important or "efficient proximate cause" of the loss.[40] The jury reasoned that "extreme temperature" could not be the efficient proximate cause of the loss because without the wind, the cattle

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[33] Travelers Ins. Co. v. Aetna Cas. & Sur. Co., 491 S.W.2d 363, 366 (Tenn. 1973).

[34] *See, e.g.*, Allstate Ins. Co. v. Watts, 811 S.W.2d 883, 886-88 (1991).

[35] Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 974-75 (2010).

[36] JERRY & RICHMOND, *supra* note 9, at 561 (citing Shinrone Inc. v. Ins. Co. of N. Am., 570 F.2d 715, 716 (8th Cir. 1978)).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

may have survived the extreme cold.[41]

The dominant cause approach has been adopted by the majority of U.S. jurisdictions because many consider it intuitively fair: decisions whether coverage should be afforded depend on which cause most significantly contributed to the loss.

D. THE APPORTIONMENT APPROACH

The final available approach is the apportionment approach, which Texas has adopted.[42] Under the apportionment approach, the "insured must attempt to segregate the loss caused by the covered peril from the loss caused by the uncovered peril and secure a jury finding on the amount of damage attributable to the different causes."[43] The approach follows traditional tort apportionment doctrines. As is the case with comparative negligence, there are two potential sub-approaches to the apportionment approach: pure apportionment and modified comparative apportionment.[44]

Under a pure apportionment approach, the policyholder would receive the apportioned percentage of the damages caused by the covered losses. For instance, if 30% of the loss was caused by a covered peril, then the insured would receive 30% of the total value of the loss—or 30% of the policy limit if the limits were an issue.[45]

Under a modified apportionment approach, the policyholder would receive the percentage of the loss so long as the efficient proximate cause was a covered peril.[46] Thus, if only 30% of the loss were caused by a covered cause of loss, the insured would not receive any recovery since the efficient proximate cause would have presumably been some other cause.

This approach inevitably leads to greater litigation and provides an

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[41] *Id.* This does impliedly reject the converse—that without the cold the wind could not have killed the cattle—but the jury did not address that issue.

[42] Wallis v. United Serv.s Auto Ass'n, 2 S.W.3d 300 (Tex. App. 1999) (requiring insured to carry burden of proof for what portion of loss is covered). For an interesting discussion of Texas's approach to anti-concurrent exclusions, *see* Comment, Amber L. Altemose, *The Anti-Concurrent Clause and its Impact on Texas Residents after Hurricane Ike*, 16 TEX. WESLEYAN L. REV. 201 (2010).

[43] *Id*. (citing Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 162 (Tex. 1971)).

[44] Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 977-78 (2010).

[45] *See* Randall L. Smith & Fred A. Simpson, *Causation in Insurance Law*, 48 S. TEX. L. REV. 305, 322 (2006).

[46] *Id.*

incredibly complex method for analysis. Rare is the case when it is clear the precise percent of the loss attributable to a particular peril. For this reason, and others, courts are reluctant to adopt this approach.

III. DEVELOPMENT OF THE APPROACHES IN THE UNITED STATES

In many ways, California is the grandfather of concurrent causation jurisprudence.[47] A trilogy of California Supreme Court cases has spawned and inspired the jurisprudence throughout the country. *Sabella v. Wisler*, *State Farm v. Partridge*, and *Garvey v. State Farm Fire & Casualty* form the California trilogy. While California would certainly like to disclaim paternity status, the fact remains that other jurisdictions have followed California's lead on many concurrent causation issues.[48]

A. *SABELLA V. WISLER* (EFFICIENT PROXIMATE CAUSE/ DOMINANT CAUSE APPROACH)

In much the same way that California is the grandfather of concurrent causation analysis, *Sabella v. Wisler* is the grandfather of first-party property coverage analysis.[49] In *Sabella*, a home was damaged by extensive settling, and the settling was caused by a leak in a sewer pipe.[50] The leaking pipe saturated the fill material surrounding the foundation.[51] The leak was caused by contractor negligence, and more specifically, caused by the contractor inadequately compacting fill material and improperly sealing the sewer pipe joints.[52] Under the policy, settling was excluded but contractor negligence was covered, and the court was faced with the classic "concurrent causation" question.[53] The court reviewed the

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[47] California has certainly tried—and justifiably so—to distance itself as the genesis of concurrent causation. *See* Joseph Lavitt, *The Doctrine of Efficient Proximate Cause, the Katrina Disaster, Prosser's Folly, and the Third Restatement of Torts: Cracking the Conundrum*, 54 LOY. L. REV. 1, 7 (2008) (citing Julian v. Hartford Underwriters Ins. Co., 110 P.3d 903, 906 (Cal. 2005)). *See also* Mark D. Wuerfel & Mark Koop, *Efficient Proximate Causation in the Context of Property Insurance Claims*, 65 DEF. COUNS. J. 400, 401 (1998)).

[48] Lavitt, *supra* note 47, at 7.

[49] 377 P.2d 889 (Cal. 1963).

[50] *Id.* at 892.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 890.

causes of loss and held that the leaking pipe was the efficient proximate cause of the loss because it set the other events in motion.[54] The court reasoned that because the efficient proximate cause of the loss was a covered peril, the entire loss was covered.

B. *STATE FARM MUTUAL INSURANCE V. PARTRIDGE* (PRO-POLICYHOLDER/CONCURRENT CAUSATION APPROACH)

The second case in the trilogy is not a property-insurance case, but a liability case.[55] While it is plainly not a property case, it is included in this discussion because of the confusion generated by the case.[56]

In *Partridge*, the insured was covered by separate automobile and homeowner's insurance policies.[57] The homeowner's policy provided a much larger coverage amount but excluded losses "arising out of the use" of an automobile.[58] The facts in Partridge were unique: the insured had filed a hair-trigger on a rifle allowing the rifle to be discharged at the slightest touch of the trigger.[59] The insured and some friends were off-roading hunting jackrabbits when the insured hit a bump; causing the hair-trigger rifle to fire.[60] The shot hit one of the passengers and caused significant injuries.[61] The trial court found that the insured had committed two negligent acts: the negligent act of filing the hair trigger and the negligent act of driving off-road.[62] The homeowner's policy covered

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[54] It is important to note the proximate causation issue here and how tort and insurance proximate causation apply. Under tort theories, the loss was proximately caused by the contractor's negligence. This differs under the scope of insurance law, where the goal is to determine the proximate cause of the loss, rather than which culpable party proximately caused the injury.

[55] State Farm Mut. Auto. Ins. Co. v. Partridge, 514 P.2d 123 (Cal. 1973).

[56] The confusion stems from the misapplication of third-party insurance principles to first-party claims. This is not the only time this issue has confounded courts. *See, e.g.,* Ernest Martin, Jr. & Britton D. Douglas, *The* Montrose *Case—A Model Loss in Progress Rule Analysis*, *available at* http://165.97.89.22/files/Uploads/Documents/Attorney%20Publications/Montrose_Case_Progress_Rule_Analysis.pdf (describing the misapplication of the loss in progress rule to first-party losses).

[57] *Id.*

[58] *Id.* at 125.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Martin & Douglas, *supra* note 56, at 127.

general negligence but excluded damages arising out of the use of the automobile.[63]

Faced with these multiple perils, the California Supreme Court was again faced with a classic concurrent causation question. The court elected not to follow the precedent in *Sabella* because "the 'efficient cause' language is not very helpful, for here both causes were independent of each other: the filing of the trigger did not 'cause' the careless driving, nor vice versa."[64] Recognizing *Sabella's* inapplicability to the question at issue, the court developed a new standard for liability losses independent of an analysis of efficient causation. The court held that the fact that "coverage under a liability insurance policy is equally available to an insured *whenever an insured risk constitutes simply a concurrent proximate cause of the injuries*."[65] Thus, under *Partridge*, so long as a covered peril substantially contributed to the loss, coverage would be afforded.

While the plain language of *Partridge* clearly limits the case to third-party liability claims, courts began to extend the "concurrent causation" approach to property insurance losses.[66] For instance, in *Safeco v. Guyton*, the Ninth Circuit analyzed concurrent causation questions after Hurricane Kathleen using the pro-policyholder approach.[67] The court found that there were two concurrent causes of loss: (a) third-party negligence (a covered loss) in maintaining flood control plans and (b) flood loss (an excluded loss).[68] The court held that because third-party negligence contributed to the loss, the entire loss was covered, even though the loss was unequivocally caused by flood.[69]

C. *GARVEY V. STATE FARM FIRE & CASUALTY*

Sixteen years, and a mountain of confusion later, the California

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[63] *Id.* at 126.

[64] *Id.* at 130 n.10.

[65] Partridge, 514 P.2d at 130 (emphasis added).

[66] Douglas G. Houser & Christopher H. Kent, *Concurrent Causation in First-Party Insurance Claims: Consumers Cannot Afford Concurrent Causation*, 21 TORT & INS. L.J. 573, 573 (1986).

[67] Safeco Ins. Co. of Am. v. Guyton, 692 F.2d 551 (9th Cir. 1982).

[68] *Id*. at 554. For a reincarnation of the *Guyton* case post-Hurricane Katrina, see *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182, 2007 WL 496856, at *2 (E.D. La. Feb. 12, 2007) (holding that losses post-Katrina were not flood losses within the meaning of the water exclusion but, rather, losses resulting from negligence and the breach of the levies).

[69] These cases were compiled in Houser & Kent, *supra* note 66, at 577-78.

Supreme Court eventually revisited the pro-policyholder concurrent causation approach developed in *Partridge* and rebuked the lower courts for misapplying *Partridge* to property insurance coverage litigation.[70]

Garvey v. State Farm Fire & Casualty involved facts eerily similar to *Sabella*. In the late 1970s the Garveys noticed that an addition to their house was beginning to separate from the main property.[71] The Garveys alleged that the contractor's negligence was the proximate cause of the loss and the loss should be covered.[72] State Farm responded that settling was the efficient proximate cause of the loss and that any negligence by the contractor was negligible and should not affect coverage.[73] Even though the facts were entirely analogous to *Sabella*, the trial court relied on *Partridge*—rather than *Sabella*—and held that the contractor's negligence was a contributing cause, but settling was the dominant cause.[74] The court held even though negligence was a minor cause and not the efficient proximate cause, the policy should cover the loss because the policy covered negligence.[75]

The California Supreme Court rejected the trial court's application of *Partridge* to property insurance questions.[76] In first-party property losses, a loss is not necessarily covered just because a covered peril contributes to the loss. Rather, first-party insurance coverage questions require the reviewing court to look at the facts of the case and determine which among the various contributing perils is the "efficient proximate cause" of the loss. The efficient proximate cause has been referred to as "the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster."[77] Under the efficient proximate cause analysis, if the predominant factor in the loss is covered, the loss is covered even if excluded perils also contribute to the loss. Similarly, if the predominant factor in the loss is excluded, the loss is excluded even if covered perils contribute to the loss.

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[70] Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704 (Cal. 1989).
[71] *Id.* at 705.
[72] *Id.* at 706.
[73] *Id.* at 705-06.
[74] *Id.* at 704.
[75] *Id.*
[76] *Garvey*, 70 P.2d at 713.
[77] *Id.* at 707 (quoting Sabella v. Wisler, 377 P.2d 889, 895 (Cal. 1963) (quoting 6 COUCH ON INS. § 1463 (1930))).

D. SPAWN OF THE TRILOGY AND RAMIFICATIONS

Before *Garvey* could clarify concurrent causation principles, the insurance industry became fearful of the impending onslaught of claims that could be brought as a result of the *Partridge* decision. As discussed above, under some jurisdictions' reading of the policies, if 99.9% of the loss was excluded but 0.01% of the loss was covered, the entire loss could be covered.[78] Indeed, the insurance industry was justifiably concerned as a broad reading of *Partridge* would prevent insurers from ever excluding certain perils.

As a result of the insurance industry's fears, the industry modified its standard policies in the mid-1980s.[79] The industry offered revamped standard commercial general liability and commercial property policies, at least in part, to address the concurrent causation decisions spawned by courts applying *Partridge* to property policies.[80] In order to avoid future *Partridge*-like decisions, the insurance industry included a new exclusion in its standard form contracts.[81] Policies began excluding "loss or damage caused directly or indirectly by any of the following [exclusions]. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[82] This language has been referred to generally as the "anti-concurrent" policy exclusion.[83]

IV. COURTS INTERPRETATION OF ANTI-CONCURRENT POLICY EXCLUSIONS

Even though *Garvey* presumably would have corrected the *Partridge*-progeny problems, the anti-concurrent causation exclusions have been interpreted broader than even the insurance industry could have initially imagined.[84] The development of anti-concurrent causation

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[78] *See supra* Part III.C.

[79] *See* Bragg, *supra* note 8, at 392.

[80] *Id*. at 394.

[81] *See id.*

[82] *See, e.g.*, Colo. Intergovernmental Risk Sharing Agency v. Northfield Ins. Co., 207 P.3d 839, 841 (Colo. App. 2008) (citing standard ISO policy language).

[83] Again, there is a definitional problem here. The clauses are colloquially referred to as anti-concurrent causation clauses, yet they refer to both simultaneous and subsequent causes of loss. *See supra* Part II for further discussion.

[84] Mark M. Bell, Christopher S. Dunn & James C. Costner, *Confronting Conventional Wisdom on Builders Risk: From Named Insured Status to Concurrent Causation*, 31-Fall CONSTRUCTION LAW 15, 20-21 (2011).

exclusions has proved an especially powerful device for claims denials.[85] In dealing with anti-concurrent causation exclusions, courts have typically followed one of three approaches: (1) the "freedom of contract" approach, (2) the substantial factor approach, or (3) the Rossmiller/Blue-Pencil approach.[86]

A. FREEDOM OF CONTRACT APPROACH

The freedom of contract approach is probably the most prevalent of the approaches to anti-concurrent causation clauses.[87] Although many courts have followed this approach, one of the earliest adopters, and one of the clearest analyses on point is found in *Alf v. State Farm Fire and Cas. Co.*[88]

Alf presented the classic chain-of-events concurrent causation question.[89] The parties agreed that the loss was caused when a pipe on the Alfs' property ruptured due to unusually low temperatures.[90] Water then escaped from the ruptured pipe and caused extensive flooding and soil erosion.[91]

If *Alf* were decided prior to the 1980s-insurance policy revisions, the policy would have clearly provided coverage. Utah follows the dominant approach to concurrent causation issues, which seeks to find the efficient proximate cause of the loss.[92] Here, the parties agreed that the efficient proximate cause of the loss was the ruptured pipe—just as in the case of *Sabella*.[93] Under the Dominant Cause analysis, which seeks to determine the cause that set the others in motion, the policy would clearly provide coverage.

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[85] Cases expanding on *Partridge* and applying *Partridge* to property insurance questions are colloquially referred to herein as post-*Partridge* decisions.

[86] No court has actually referred to its approaches by any of these names. But, for clarification and categorization purposes, these names accurately reflect the various approaches taken by U.S. jurisdictions.

[87] *See* Michael C. Phillips & Lisa L. Coplen, *Concurrent Causation versus Efficient Proximate Cause in First-Party Property Insurance Coverage Analysis*, 36 BRIEF 32, 35 (2007) (compiling cases throughout the United States).

[88] 850 P.2d 1272 (Utah 1993); *see also* Kane v. Royal Ins. Co. of Am., 768 P.2d 678 (Colo. 1989).

[89] *Alf*, 850 P.2d at 1272.

[90] *Id.* at 1273.

[91] *Id.*

[92] *See supra* Part II.

[93] *See supra* Part III.A.

Alf, however, was not decided under the pre-1980s insurance policy revisions, and the Utah Supreme Court was faced with the question of whether an insurer could contractually avoid the efficient proximate cause rule. The court held that the efficient proximate cause rule is not an immutable rule of insurance in Utah, but rather, operates as a default rule "only when the parties have not chosen freely to contract out of it."[94]

The court held that the parties had chosen to contract around the efficient proximate cause rule and that the parties were entitled to do so.[95] The court reasoned that the anti-concurrent causation language in the policy did not upset norms of reasonable expectations of insureds, and therefore, the contractual modification was permissible.[96]

It is interesting to note that under this interpretation, insurers have essentially turned the tables of *Partridge* on insureds. Courts used *Partridge* as a shield to protect policyholders by granting coverage when there was an argument that the policy should cover the loss.[97] The freedom of contract approach, conversely, denies coverage when there is an argument that the policy should not cover the loss. This expansion goes far above and beyond the intent of the insurers when they instituted anti-concurrent exclusions.[98]

Today, if the insurer can point to some event in the chain of events that was excluded, the insurer can deny coverage in freedom-of-contract-approach jurisdictions like Utah.[99] As currently applied, if the insured could argue that 99% of the loss was caused by covered losses, but 1% of the losses was excluded, then the entire loss will be excluded.[100] Additionally, the possibility exists that insurers can modify policies and begin excluding Negligent Acts and Decisions, as an example, in all-risk policies, and thereby effectively prevent coverage for all losses where the loss can be at least partially attributed to someone's negligence.

In addition to exceeding the insurance industry's original intent in authoring the exclusions, the expansive scope of the anti-concurrent exclusions is also problematic when considering the nature of the insurance industry. Most insurance policies are contracts of adhesion incapable of

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[94] *Alf*, 850 P.2d at 1277.

[95] *Id.* at 1272.

[96] *Id.* at 1278.

[97] Houser & Kent, *supra* note 66, at 575-77.

[98] *See supra* note 79-83 and accompanying text.

[99] Davidson Hotel Co. v. St. Paul Fire and Marine Ins. Co., 136 F. Supp. 2d 901 (W.D. Tenn. 2001).

[100] *See* Chattanooga Bank Assoc. v. Fid. & Deposit Co., 301 F. Supp. 2d 774 (E.D. Tenn. 2004).

modification by individual policyholders. These disperse policyholders do not possess the lobbying powers or the contractual capacity or influence to cause ubiquitous changes across all policy lines of insurance, which is why the policies remain as they are today. The insurance industry can effectively modify the policy in response to negative precedent; whereas the diverse policyholders do not possess similar power. Accordingly it should be incumbent on either the courts or legislature to prevent over-expansive use of the anti-concurrent exclusions—especially when the interpretations exceed the intended purpose of the exclusions.

B. SUBSTANTIAL FACTOR APPROACH

Recognizing the various problems associated with the freedom-of-contract approach, some courts have held that in order for anti-concurrent exclusions to apply, the excluded loss must be a substantial factor or the efficient proximate cause of the loss.[101] There are four states that have followed this approach and expressly rejected the freedom of contract approach. California[102] and North Dakota[103] have done so by code and Washington and West Virginia have done so by case law.[104]

The first case to reject the freedom-of-contract approach without relying on insurance code regulations was *Safeco Insurance Co. v. Hirschmann*.[105] In *Hirschmann*, severe winds were followed by heavy rains

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[101] Phillips & Coplen, *supra* note 87, at 35 (compiling cases throughout the United States).

[102] CAL. INS. CODE §§ 530, 532 (West 2005) ("An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.").

[103] N.D. CENT. CODE § 26.1-32-01 (2010) ("An insurer is liable for a loss proximately caused by a peril insured against even though a peril not contemplated by the insurance contract may have been a remote cause of the loss. An insurer is not liable for a loss of which the peril insured against was only a remote cause. The efficient proximate cause doctrine applies only if separate, distinct, and totally unrelated causes contribute to the loss.").

[104] At the time of this writing, the Colorado Supreme Court has granted certiorari to determine whether a loss is covered where 90% of the loss was covered and 10% was excluded. Colo. Intergovernmental Risk Sharing Agency v. Northfield Ins. Co., 207 P.3d 839 (Colo. App. 2008), *cert. granted*, No. 08SC907, 2009 WL 1485804 (Colo. May 26, 2009).

[105] 773 P.2d 413 (Wash. 1989). For a recent example, *see* Sprague v. Safeco Ins. Co. of Am., 241 P.3d 1276, 1278 (Wash. Ct. App. 2010) ("In analyzing coverage, Washington follows the efficient proximate cause rule. Under this rule,

and landslides.[106] The Hirschmanns' home was pushed from its foundation and completely destroyed because of strong winds and water saturation of the soil.[107] According to one expert, the primary cause of the hillside's collapse was the heavy rainfall.[108]

Safeco denied coverage and conceded during the proceedings that if the policy had been interpreted prior to the 1980 policy revisions, then the loss would have been covered in Washington.[109] Safeco argued that even though Washington adheres to the dominant-cause approach, the post-1980s policy revisions overcome the dominant-cause approach.[110] Safeco argued that it should be able to exclude coverage since at least part of the loss was excluded.[111]

The court in *Hirschmann* rejected Safeco's argument and held that the efficient proximate cause rule represents an immutable principle of Washington insurance law, and that the parties cannot contract around it.[112] The court held that because the primary causes of the loss included the covered perils of wind and rain, the entire loss was covered.[113]

Murray v. State Farm Fire & Cas. Co. provides a thorough primer on concurrent causation including a description of the resulting disproportionate forfeiture if the efficient proximate cause rule is ignored.[114] In *Murray*, State Farm argued that its anti-concurrent clause "operates to defeat the efficient proximate cause doctrine."[115] Further, State Farm "argue[d] that if earth movement *in any way contribute[d]* to a loss, regardless of the proximate cause, then under the lead-in [anti-concurrent] clause the entire loss is excluded from coverage."[116]

The court in *Murray* rejected State Farm's contention and captured the essence of potential problems associated with abandoning the efficient

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the predominant cause of the loss determines coverage.") (footnotes omitted); *but cf.* City of Everett v. Am. Empire Surplus Lines Ins. Co., 823 P.2d 1112, 1115 (Wash. Ct. App. 1991) (holding that insurance policies that use the phrase "arising out of" do not warrant efficient proximate cause analysis).

[106] *Hirschmann*, 773 P.2d at 413.

[107] *Id.* at 414.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* at 413-14.

[112] *See Hirschmann*, 773 P.2d at 415-16.

[113] *Id.* at 417-18.

[114] 509 S.E.2d 1 (W. Va. 1998).

[115] *Id.* at 14.

[116] *Id.* (emphasis added).

proximate cause rule in the face of anti-concurrent causation clauses:

> Indeed if we were to give full effect to the State Farm policy language excluding coverage whenever an excluded peril is a contributing or aggravating factor in the loss, we would be giving insurance companies *carte blanche* to deny coverage in nearly all cases.[117]

Applying these principles, the West Virginia court rejected a broad reading of anti-concurrent clauses and held that the efficient proximate cause rule cannot be modified to abandon the reasonable expectations of the insured.[118] The court held that the reasonable insurer expects to have losses covered where the predominant cause of the loss is covered.[119]

One could certainly criticize the substantial factor approach because it essentially ignores the 1980s revisions to insurance policies and renders the anti-concurrent policy ineffective. As demonstrated by the Washington and West Virginia cases, these courts essentially apply the same analysis that they applied before the introduction of anti-concurrent causation clauses. Opponents to the approach, including insurers in general, argue that courts applying the substantial factor approach make anti-concurrent clauses superfluous and meaningless.

In this author's opinion, the criticism is unproblematic. Insurers introduced the anti-concurrent causation clauses to combat post-*Partridge* expansion of concurrent causation. Michael E. Bragg, assistant counsel for State Farm Insurance, wrote an article in the 1980s that discussed State Farm's specific attempts to draft policy language to avoid post-*Partridge* concurrent causation interpretations.[120]

> The difficulty of the industry's task in combating concurrent causation embraces two distinct but related issues intertwined in the court decisions. First, the courts are creating new "causes" of loss never contemplated by property insurance policy drafters. Most important of these causes are negligence and other human conduct. Such

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[117] *Id.* (emphasis added) (quoting Howell v. State Farm Fire & Cas. Co., 218 Cal. App. 3d 1446, 1456 n.6 (Cal. Ct. App. 1990)).

[118] *Id.* at 14-15.

[119] *Id.*

[120] Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385 (1985).

> conduct may be active, passive, willful, negligent, imprudent, untimely, or any other word which describes how people act or fail to act. Second, the courts are telling us that the proper causation standard is no longer to attribute the loss to a single proximate cause, but rather to grant coverage if *any* of the causes of the loss has not been specifically excluded.[121]

As demonstrated by this influential article, anti-concurrent causation clauses were not intended to impact the efficient proximate causation standard employed by post-*Sabella* interpretations. The *Sabella* analysis seems to offer a fair and reasonable interpretation from both the insurer and policyholder perspectives. Insurers intended to prevent post-*Partridge* interpretations where the loss was covered if the insured could point to a single factor that contributed to the loss. While the case has not yet arisen in any jurisdictions following the pro-policyholder approach, the case can be made that the anti-concurrent exclusions would be effective in those jurisdictions and would move those jurisdictions from a post-*Partridge* analysis to a post-*Sabella* analysis.

Accordingly, by applying the substantial factor approach, as Washington and West Virginia courts have, insurers are adequately safeguarded against post-*Partridge* interpretations. Additionally, the approach mitigates the potential for insurers to deny losses when the loss was proximately caused by a covered cause.

C. THE ROSSMILLER/BLUE PENCIL APPROACH

The third approach that courts have used employs a much more involved and detailed analysis of concurrent causation. It seems that *Corban v. USAA* is the only court to have used this approach to date, but I have included it as its own approach, because it is quite likely another court will follow Mississippi's lead. This approach has largely evolved from the work of concurrent causation scholar/practitioner David Rossmiller.[122]

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[121] *Id.* at 389.

[122] David P. Rossmiller, *Katrina in the Fifth Dimension: Hurricane Katrina Cases in the Fifth Circuit Court of Appeals*, *in* NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW 71, 86 (Matthew Bender ed., 2008) [hereinafter "Rossmiller, *Katrina"*]; David P. Rossmiller, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond*, *in* NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN

Rossmiller published two influential articles in 2007 and 2008, which cogently argue for a particular interpretation of "concurrent" when used in relation to concurrent causation.[123] Under Rossmiller's view, concurrent should either refer to perils (a) acting in coordination or (b) acting in sequence.[124] For instance, assume that a fire and earthquake both operated to cause a loss: (a) acting in coordination would occur if the earthquake worked in conjunction with the fire to cause the same damage; (b) acting in sequence would occur if the fire resulted from the earthquake; and (c) a non-concurrent result would occur if the fire merely occurred at the same time as the earthquake but was not brought about by the earthquake.[125]

According to Rossmiller, Hurricane Katrina did not actually involve concurrent causes of loss "not because they came at different times, but because each force acted separately to create unique damage"[126] – as in the third earthquake/fire example described above. Under Rossmiller's view, the fact that both wind and flood were "products of the same larger phenomenon, a hurricane, is irrelevant."[127] The argument follows that losses are concurrent only where multiple causes produce the same damage, and losses are not concurrent when multiple causes result in multiple losses.

While Rossmiller's articles have been cited by other courts,[128] the first court to adopt his approach was the Mississippi Supreme Court. The Mississippi Supreme Court addressed the concurrent causation question for the first time in *Corban v. USAA*[129] after several federal courts had provided *Erie*-guesses as to how Mississippi would analyze concurrent

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INSURANCE LAW 43, 65 (Matthew Bender ed., 2007) [hereinafter "Rossmiller, *Interpretation*"].

[123] *See generally* Rossmiller, *Katrina*, *supra* note 122; Rossmiller, *Interpretation*, *supra* note 122.

[124] *See generally* Rossmiller, *Katrina*, *supra* note 122; Rossmiller, *Interpretation*, *supra* note 122.

[125] The earthquake/fire analogy is used throughout this article. For references to insurance/earthquakes, the reader should ignore any potential differing results that would occur under an analysis of the New York Standard Fire Policy. For purpose of the analogy, assume that neither New York's nor any other state's standard fire policies apply.

[126] Rossmiller, *Interpretation, supra* note 122, at 65.

[127] *Id.*

[128] Colo. Intergovernmental Risk Sharing Agency v. Northfield Ins. Co., 207 P.3d 839, 842 (Colo. App. 2008).

[129] Corban v. United Servs. Auto Ass'n, 20 So. 3d 601 (Miss. 2009).

causation questions.[130]

The Corbans owned a two-story home that was damaged—but not destroyed—by Hurricane Katrina.[131] USAA inspected the home and determined that although the wind caused some damage to the roof and second floor, the majority of damage to the first floor was caused by flooding.[132] Accordingly, USAA paid the portion of damages to the roof and second floor related to the wind damage and denied coverage for the first floor because of the anti-concurrent flood exclusion.[133]

In order to determine whether the denial was proper, the court in *Corban* narrowly defined concurrent.[134] Although there are numerous definitions that the court could have used to define concurrent, *Corban* used the following narrow definition: the "exclusion applies only in the event that the perils [1] act in conjunction, [2] as an indivisible force, [3] occurring at the same time, [4] to cause direct physical damage resulting in loss."[135]

Additionally, the court held that the provision "in any sequence" irreconcilably conflicts with Mississippi law and is void and unenforceable.[136] By rejecting the "in any sequence language" in the anti-concurrent exclusion, the court also addressed questions brought up by federal courts and held that "[a]n insurer cannot avoid its obligation to indemnify the insured based upon an event which occurs subsequent to the covered loss."[137]

Under the narrow definition of concurrent, the insurer has the

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[130] For a fascinating history of the chronology of the federal courts *Erie*-guess analogies, *see* Rossmiller, *Katrina*, *supra* note 122; *see also* Bell et al., *supra* note 84, at 21-23.

[131] *See Corban,* 20 So. 3d at 605-06.

[132] *Id.* at 606.

[133] *Id.*

[134] *Id.* at 614.

[135] *Id.* (brackets added for clarity).

[136] *Id.* at 615. The court presumably could have declared the entire exclusion void as a result of this provision, but for reasons unexplained by the court, the court seems to have severed this provision from the rest of the exclusion.

[137] *Corban*, 20 So. 3d at 613. Indeed, USAA also rejected the Fifth Circuit's analogy when pressed during trial. According to USAA, "if an insured's roof is breached and rainwater comes in, damaging a carpet, USAA pays for rainwater damage to the carpet . . . even if storm surge subsequently. . . destroy[s] the carpet." *Id.* at 610; for additional discussion on indemnification and subrogation, *see* Jay S. Bybee, *Profits in Subrogation: An Insurer's Claim to be More than Indemnified*, 1979 BYU L. REV. 145 (1979).

burden of proving that two perils operate in conjunction and that the perils operated contemporaneously. In *Corban*, and likely the majority of Katrina claims, the wind and the flood did not operate contemporaneously or in conjunction because most experts estimate that the wind preceded the flooding by up to four hours.

Corban also established the relevant burdens of proof for insurance claims. Under an all risk policy, the insured has the burden to prove that a loss occurred. After proving that a loss occurred, the burden shifts to the insurer to prove an affirmative defense—for example, demonstrating that the peril is excluded under the policy. In *Corban*, it was clear that a loss occurred; therefore USAA had the burden of proving by a preponderance of evidence that the damages were caused by the excluded peril of flooding.[138]

I refer to this approach as the "blue pencil" approach because it strikes a portion of the anti-concurrent exclusion, but does not invalidate the entire clause. As stated previously, anti-concurrent exclusions generally exclude losses caused concurrently and "in any sequence." *Corban* held that the "in any sequence" language was unenforceable, but held that anti-concurrent clauses are enforceable. While this represents a more policyholder-friendly approach than the courts that simply enforce anti-concurrent causation clauses wholesale, it still leaves open the possibility that anti-concurrent causation exclusions can exclude losses where 99% of the loss is covered but 1% of the loss is excluded.

V. A CALL FOR CLARITY AND A REVISION OF THE TERMS OF INTERPRETATION

As stated at the outset, and as evidenced by the approaches to concurrent causation and anti-concurrent causation exclusions, the nomenclature of concurrent causation has become so bastardized that the concurrent and efficient proximate cause issues have become an untraceable mess.

To correct this mess, courts and commentators should re-visit concurrent causation to redefine the terms to more accurately reflect the underlying policies and provide additional clarity. In addition to redefining the relevant concurrent causation terms, courts, insurers, and policyholders, should take a new approach to analyzing concurrent causation questions.

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[138] *Corban*, 20 So. 3d at 618-19.

A. DEFINITIONAL CLARITY

There are two terms that proliferate "concurrent causation" analyses and courts continuously apply these definitions inappropriately: "concurrent causation" and "efficient proximate cause."

As currently defined, these terms are inexact and create confusion and result in inconsistent application. "Concurrent" is used (1) to refer to any multi-factor causation analysis,[139] (2) to refer to a particular type of multi-factor causation analysis,[140] and (3) as a method or approach to multi-cause losses.[141] Similarly, "efficient proximate cause" is used (1) as a method or approach to multi-cause losses,[142] (2) as the "moving cause of loss" when there is a chain-of-events preceding a loss,[143] and (3) as the "predominant" factor in non-chain-of-event losses when multiple perils combine to cause a loss.[144]

Given the conflation of terms, it is time to redefine these terms to allow greater accuracy and precision. Additionally, given the current confusion generated by the term "concurrent", courts, commentators, and insurers should drop the term "concurrent" from the insurance lexicon.[145]

In order to provide clarity on "concurrent causation" questions, the term concurrent causation must be addressed first. Although by definition concurrent requires temporal proximity,[146] the term has been eviscerated to the point that concurrent no longer has any definitional meaning. To demonstrate this point, Rossmiller, one of the most well-versed and persuasive writers on the subject, argues that temporal proximity—the essence of concurrence—is "irrelevant" to the question of whether a loss is concurrent.[147] If "concurrent" does not relate to temporal proximity, then no concurrent causation analysis can truly be said to be necessarily related to concurrence. Correspondingly, when courts attempt to define the term,

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[139] *See, e.g.*, Bragg, *supra* note 120, at 285.

[140] *See, e.g.*, Garvey v. State Farm Fire & Cas. Co, 770 P.2d 704, 709 (Cal. 1989).

[141] *See supra* Part II.

[142] *See, e.g.*, Lavitt, *supra* note 47, at 2.

[143] *See, e.g.*, Sabella v. Wisler, 377 P.2d 889, 895 (Cal. 1963).

[144] *See, e.g.*, Shinrone, Inc. v. Ins. Co. of N. Am., 570 F.2d 715, 718-19 (8th Cir. 1978).

[145] Perhaps the word need not be dropped permanently, but certainly a long hiatus would be beneficial to avoid the current conflation of terms currently applied to "concurrent."

[146] *See* sources cited *supra* note 3.

[147] *See supra* note 122 and accompanying text.

they are unable to appropriately define concurrent while maintaining some semblance of the term as defined by dictionaries or as originally intended by courts and insurers.

For that reason, courts and commentators should avoid using the term "concurrent" to refer to a loss caused by more than one cause. Instead, courts and commentators should use "multi-cause" in its place. Either a loss is caused by one cause, or the loss is caused by multi-causes. If the loss is caused by one cause, the analysis is simple and the court determines whether that loss is covered. If, however, the loss is caused by multi-causes, then courts should engage a new approach to the multi-cause loss analysis.

This presents a simple remedy to an unnecessarily complicated problem. There is no reason that multi-cause losses should be referred to as concurrent, but that is what has been done for years. If there were some reason to use the term concurrent, I would refrain from suggesting a replacement. However, there is absolutely no reason whatsoever to refer to a loss caused by multiple causes as a "concurrent" loss.

Second, the term efficient proximate cause has been used in so many different ways that there is confusion about its definition as well. As originally envisioned, efficient proximate cause related to chain-of-event questions.[148] Originally, courts would attempt to determine the efficient proximate cause to decide which event set the other events in motion.[149] Thus, the precise definition for efficient proximate cause is the cause that sets the others in motion and relates expressly to chain-of-event losses. This is the only place where the term efficient proximate cause should be used.

Over time, courts and commentators began to use efficient proximate cause more loosely and applied the term to non-chain-of-event multi-cause losses. Efficient proximate started being defined as the "predominant factor" in a loss and has been used to refer to the dominant-cause approach.[150] This has generated confusion because courts now attempt to look for the "moving" cause of loss even when there is not a chain-of-events preceding the loss. For non-chain-of-event losses, however, there is no "moving" cause of loss and courts must look to the predominant or substantial cause of the loss.

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[148] Lavitt, *supra* note 47.

[149] Vintila v. Drassen, 52 S.W.3d 28, 41-42 (Mo. Ct. App. 2001).

[150] Elizabeth L. Perry, *Why Fear the Fungus? Why Toxic Mold is and is not the Next Big Toxic Tort*, BUFF. L. REV. 257, 280 (2004).

B. NEW ANALYSIS FOR MULTI-CAUSE LOSSES

Rather than having courts attempt to analyze insurance policies in a vacuum, I would propose that courts and commentators address concurrent causation issues using a more methodical, categorical approach.

In insurance coverage, categorization is often essential to understanding the issues. Indeed, the proliferation of confusion concerning multi-cause losses can be traced to deficiencies in categorization. For instance, the post-*Partridge* proliferation largely occurred because courts failed to appropriately categorize the losses. Different concerns arise in property and liability disputes and courts should treat the disputes differently.[151] In the post-*Partridge* era, courts failed to properly distinguish property from liability cases and inappropriately applied liability standards to property cases.

To avoid these types of categorical problems, this article advocates a more methodical approach and recommends that courts engage in an analysis using a number of discreet, step-by-step questions. The discreet questions would encourage courts to appropriately categorize the loss and subsequently apply the proper means of analysis to that particular category of loss. This approach would more uniformly address multi-cause losses and would lead to improved consistency and efficiency throughout jurisdictions, would avoid inequitable results, and would lead to greater contract certainty.[152]

When addressing insurance coverage questions, the key concern is causation and whether the peril causing the loss is covered or excluded. The approach advocated in this article presents a more direct-line, causal, approach to causation questions than the piecemeal approach currently employed by the courts.

Obviously the threshold question in a coverage dispute concerns the determination of what specific peril or perils contributed to the loss. When losses only involve one peril, the analysis is straightforward: was the peril covered or excluded? Conversely, when losses involve multiple

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[151] Garvey v. State Farm Fire and Cas. Co., 770 P.2d 704, 710 (Cal. 1989) ("Liability and corresponding coverage under a third-party insurance policy must be carefully distinguished from the coverage analysis applied in a first-party property contract. Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability.") (citing Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385, 386 (1985)).

[152] As with most insurance questions, these issues are often best addressed by a flowchart and I have attached the flowchart to the appendix for review.

causes, the analysis becomes far more complicated. Accordingly, once the stakeholders recognize that the loss involves multiple causes, it would behoove the courts to address a series of questions before opining on the resulting coverage question: (1) did the causes operate in an unbroken chain of events or did the causes operate independently?; (2) if the losses operated independently, did they act simultaneously or sequentially?; (2a) if the losses were simultaneous, were the various causes independently sufficient or independently insufficient to cause the loss?; (2b) if the losses were sequential, what cause and resultant loss came first and did the second cause exacerbate the preceding loss?[153]

1. Did the Causes Operate in an Unbroken Chain or did the Causes Operate Independently?

Different analyses are required when dealing with losses caused by an unbroken chain-of-events and losses caused by independent perils. For unbroken chains-of-events, courts typically try to determine what was the "moving" cause of the loss, or stated in other terms, "if the immediate cause of the loss was dependent on other forces or events, then the trier of fact [is] required to engage in a process of selection to determine the 'efficient' cause of the loss."[154]

If there is a chain-of-events, the court should look to the "efficient proximate cause of the loss." In typical chain-of-event scenarios, the event that sets the others in motion is well established and easily ascertainable. For instance, in a relatively recent Ninth Circuit Court of Appeals case, the parties unequivocally agreed on the efficient proximate cause of the loss stemming from an unbroken chain of events.[155] In *Terminal Freezers*, the policyholder had built a commercial freezer facility.[156] Eventually, the policyholder discovered that ice was accumulating in the ceilings and walls.[157] The parties unanimously agreed that the ice was caused due to an unbroken chain-of-events.[158] During construction, the contractor had

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[153] See flowchart attached to appendix for clarity on the steps.

[154] Lavitt, *supra* note 47, at 9 (citing Gen. Mut. Ins. Co. v. Sherwood, 55 U.S. 351, 366-67 (1852)). California has certainly tried—and justifiably so—to distance itself as the genesis of concurrent causation. *Id*. at 7.

[155] *See* Terminal Freezers Inc. v. U.S. Fire Ins., No. 08-35623**,** No. 08-35656, 2009 U.S. App. LEXIS 20321 (9th Cir. Sept. 3, 2009).

[156] Terminal Freezers Inc. v. U.S. Fire Ins., No. C07-0090BHS, 2008 U.S. Dist. LEXIS 48280, at *3 (W.D. Wash. June 23, 2008).

[157] *Id.* at *20.

[158] *Id.* at *20-21.

defectively installed a vapor barrier, the defective vapor barrier allowed water vapor to enter the facility, the water vapor infiltrated ceiling tiles and insulation, and the water vapor then froze in the ceiling tiles and insulation; thereby destroying the interior of the facility and causing significant damage.[159] In *Terminal Freezers*, the immediate cause of the loss was water vapor freezing; however, there was no doubt between the parties that the real "cause", or the "efficient" cause of the loss, was the defectively installed vapor barrier: but-for the defectively installed vapor barrier, the ice would not have accumulated in the building.[160] Like *Terminal Freezers*, most chain-of-event cases provide a relatively straightforward question that is often capable of agreement between the parties.

Accordingly, for chain-of-event cases, the court should continue to seek to determine the efficient proximate cause of the loss and determine whether the efficient proximate cause is covered or excluded. If the cause is covered, the entire loss should be covered; conversely if the efficient proximate cause is excluded, then the entire loss should be excluded.

In non-chain-of-event cases, however, there is no "efficient proximate cause" setting in motion an unbroken chain of events. Accordingly, the efficient proximate cause analysis is inappropriate for independent cause cases, which helps to explain why courts have had such difficulty attempting to fit the efficient proximate cause framework into independent causation analyses. Thus, courts should employ an entirely different analysis when evaluating these types of losses. In these cases, courts should determine whether the causes operated simultaneously or sequentially.

2. Did the Causes in the Multi-Cause Loss operate Simultaneously or Sequentially

Simultaneity is important in the insurance context. Modern "concurrent causation"—multi-cause—jurisprudence arose when California addressed a loss where simultaneous causes operated to create the loss.[161]

In this author's view, perils operating simultaneously should be

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[159] *Id.* at *4.

[160] *Terminal Freezers*, 2008 U.S. Dist. LEXIS 48280 (the parties did dispute, however, whether the resultant ice formations should be covered or excluded, but the case is illustrative of how courts employ the chain-of-events analysis works).

[161] State Farm Mut. Auto. Ins. Co. v. Partridge, 514 P.2d 123 (Cal. 1973).

analyzed separately from independent perils operating sequentially.[162] The temporal differences raise independent questions. Just as in the case of conflating chain-of-event and independent losses, when courts and commentators begin classifying simultaneous and sequential losses together, confusion results because the concerns and the issues in both cases are separate and distinct.

a. Simultaneous Losses

For perils operating simultaneously, courts should first determine whether the various perils were independently sufficient or independently insufficient to cause the loss. By way of analogy, the quintessential independent-simultaneous-multi-cause loss would present itself if an earthquake (excluded peril) occurred at the *exact* same time as a fire (covered peril). For this analogy, the two events are entirely unrelated, and the property was completely destroyed as a result of the loss.

In this analogy, the court would determine whether a covered peril was independently sufficient to cause the entire loss. If a covered peril is sufficient to cause the entire loss, then the entire loss should be covered. For example, in this analogy, if the fire could have caused the entire loss, then the loss should be covered, even if the earthquake could also have caused the entire loss.

If the covered peril was not sufficient to cause the entire loss, and the excluded peril could have independently caused the loss, then the entire loss should be excluded. Continuing the analogy, if the fire could not have caused the entire loss, but the earthquake could have caused the entire loss, then the entire loss should be excluded.

If, however, neither the fire nor the earthquake could have independently caused the loss, then the court should determine which of the two perils was the "predominant" cause of loss.[163] If the court determines that the fire is the predominant cause of loss, then the entire loss should be

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[162] It is important to note that once we are in step 2, sequential losses do not refer to sequential unbroken chain-of-events. Rather, sequential refers solely to independent perils occurring sequentially. For chain-of-event losses, courts should continue applying the efficient proximate cause analysis as discussed *supra* Part V.B.1.

[163] It is important to note the definitional consistency that needs to be employed in this category. This analysis should be referred to as seeking the "predominant" cause of the loss. This should not be referred to as the "efficient proximate cause" of the loss because that term is limited to chain-of-event situations, which are not present in this example.

covered. If however, the court determines that the earthquake is the predominant cause of the loss, then the entire loss should be excluded.

The rationales for this approach relate to reasonableness and notions of fairness. If one covered cause of loss was sufficient to cause the entire loss, then the insurer should not benefit from the fortuitous circumstance that an excluded loss operated at the same time. The insurer underwrites the policy and intends to provide insurance for certain events. Once that event is triggered, the insurer should not be able to benefit because an additional cause occurred at the same time. The policyholder pays a premium for particular coverages, and once those coverages are triggered, the insurer is obligated to pay. Conversely, if an excluded peril could have caused the entire loss, then the policyholder should not be able to benefit when the property would have been completely destroyed and the damages caused by the covered perils were less than the damages caused by the excluded perils. Similarly, if neither peril could have independently caused the loss, fairness dictates that the court should attempt to determine which cause was the predominant cause of the loss. If the predominant factor in the loss was excluded, the policyholder should not be able to receive coverage when the bulk of the damage is caused by excluded causes. By that same token, the insurer should not be able to avoid coverage when covered losses predominate.

b. Sequential Losses

For *independent* causes occurring in sequence, the threshold question should attempt to determine which cause and resultant loss came first. The second question would ask whether the subsequent loss exacerbated the damage or created new damage.

While some courts have ignored the sequence of losses, fundamental notions of insurance dictate that the sequence is essential to determine whether there should be coverage. As prudently stated by the Mississippi Supreme Court:

> No reasonable person can seriously dispute that if a loss occurs, caused by either a covered peril (wind) or an excluded peril (water), that particular loss is not changed by any subsequent cause or event. Nor can the loss be excluded after it has been suffered, as the right to be indemnified for a loss caused by a covered peril attaches at that point in time when the insured suffers deprivation of, physical damage to, or destruction of the property insured.

> An insurer cannot avoid its obligation to indemnify the insured based upon an event which occurs subsequent to the covered loss.[164]

In *Corban*, the court addressed immutable principles of insurance coverage. Covered losses do not become excluded merely because a subsequent cause operates on the loss.[165] Similarly, excluded losses do not become covered merely because subsequent covered perils happen to impact the loss. Thus, the key question should center on which peril came first and whether that peril is covered or excluded: If the peril is covered, the loss should be covered, and the reverse holds true as well.

After determining which loss came first, the court should determine whether the subsequent peril exacerbated the loss or created new damage. If the subsequent cause exacerbated the loss, then the exacerbated damages should be categorized according to the prior loss. If, however, the subsequent cause creates new damage, then the court should re-analyze whether that cause is covered or excluded and provide coverage for the new loss accordingly.

For example, if an earthquake (excluded) damaged a property and two hours later a fire (covered) came and merely exacerbated the earthquake damage, the entire loss would be excluded. If, however, the earthquake damaged the foundation of the property causing distinct damages, and the fire later damaged the roof and framing, then the fire damage should not be excluded merely because an earthquake caused some damage to the property.

The rationale for this approach relates to reasonableness and doctrines of fairness. It should be an immutable doctrine of insurance coverage that covered losses do not become uncovered merely because the insurer has not had yet paid the claim.

By way of analogy, suppose a policyholder suffered a loss on the 1st of the month, and the insurer acknowledged the loss was covered and payment should be made on the policy. No reasonable insurer would argue that the covered loss on the 1st of the month becomes excluded simply because the policyholder suffers a subsequent loss caused by an excluded peril on the 31st of that month. Although that analogy seems absurd, that is essentially the argument that insurers make during sequential multi-cause

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[164] Corban v. United Servs. Auto. Ass'n, 20 So. 3d 601, 613 (Miss. 2009) (footnotes omitted).

[165] *Id.*

losses.[166] These arguments should be rejected when an excluded peril merely subsequently impacts the property and causes the same damage or merely exacerbates the previous loss. Just as the argument is rejected for losses occurring 30 days later, so too should they be rejected when occurring 30 minutes later.

Similarly, the policyholder should not be able to receive an undue benefit. By analogy, if an automobile is in an accident and the hood is mangled and unfit for daily use, no reasonable policyholder would argue that the policyholder should be able to recover for an unrelated key-scratch on the same hood. The same analogy applies. The fact that a covered event occurs after an excluded event should not morph the excluded loss into a covered one.

The area for potential pushback in this approach concerns the exacerbation/new loss distinction. If the subsequent loss significantly exacerbates the loss, the stakeholders may have a claim that there should be some offset. However, experience indicates that bifurcating losses is extremely difficult, and apportionment is inexact and difficult to prove. The problem only becomes more complicated in cases of total losses. Thus, for clarity and policy consistency, a subsequent exacerbation of a previous loss should not affect the prior loss determination.

In cases where the losses and subsequent causes can be clearly bifurcated, the subsequent loss should be analyzed under general principles of insurance interpretation.

Revisiting the earthquake-fire analogy, if an earthquake were to damage the foundation and then an unrelated fire were to strike the property, the damage from the earthquake would clearly be excluded since it occurred first. If the earthquake caused the total loss of the property, then the loss would be excluded, even if a subsequent unrelated fire struck the location and would have assuredly burned the building to the ground. If the earthquake did not cause a total loss of the property, and an unrelated fire later struck the same property, then the court would look to the impact on the property and the nature of the fire damage. If the fire damage exacerbated structural problems caused by the earthquake, then the resultant fire-structural damage would be excluded. Conversely, if the fire damaged property was undamaged by the earthquake, then the policy would cover the resultant unrelated fire damage.

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[166] The ISO policy exclusions exclude losses caused "in any sequence" by excluded perils. Tim Ryles, *Rethinking Concurrent Causation and the Flood Exclusion: Further Comments on Katrina-Related Coverage Disputes*, IRMI.COM, Sept. 2007, http://www.irmi.com/exp ert/articles/2007/ryles09.aspx.

C. ARGUMENTS AGAINST THE REVISED APPROACH

As for my proposal calling for definitional clarity, most courts and commentators would probably agree that the current definitional landmine is unworkable and that it is time to revisit the terms relating to these issues. While some may disagree with the terms used in this article, most commentators will probably agree that the current lexicon is unworkable.

As for the approach this article takes with respect to jurisprudential analysis, there are probably two main areas for attack: (1) the article essentially adopts the dominant cause approach in most circumstances and would result in a pro-policyholder jurisprudential shift and (2) the revised approach could create additional confusion.

1. The Dominant-Cause or Efficient Proximate Cause Critique

In many ways, the approach advocated for in this article does adopt some iterations of the dominant-cause approach. However, this incorporation is intentional: (1) when insurers began inserting anti-concurrent causation clauses into insurance policies, the insurers were trying to combat post-*Partridge* analyses to multi-cause losses; and (2) policyholders do not possess the same negotiating leverage or coordination of effort to institute the reasonable changes proffered in this article.

First, insurers sought to avoid situations where a minor covered cause in a chain-of-events operated to cover the entire loss.[167] By applying the approach advocated in this article, the insurer is back in the pre-*Partridge* analysis of multi-cause losses. In the perfect world, there would be much greater uniformity across jurisdictions, which would allow insurers to be able to maintain some sense of contractual certainty. Insurers would know ex ante how courts would address multi-cause losses, and insurers and policyholders alike would have a better understanding of the scope of insurance policies. In a recent conversation with one of the nation's premier property insurance coverage experts, James Costner indicated that it is virtually impossible to maintain contract certainty in the current state of multi-cause loss jurisprudence.[168] Adopting the approach advocated in this article would undoubtedly improve contract certainty.

Second, most policyholders—personal lines and small commercial accounts—do not possess the power or capacity to unilaterally alter

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[167] Bragg, *supra* note 120.

[168] Interview with James Costner, Former Senior Vice President, Property Practice, Willis North America (Feb. 9, 2011).

Insurance Services Office policies.[169] While courts often discuss the freedom to contract and reason that policyholders could have bargained to avoid the "anti-concurrent exclusions," these courts fail to acknowledge that insurance contracts are pure contracts of adhesion, meaning that the contracts are presented on a take-it-or leave it basis. Additionally, the policyholder generally has no idea that anti-concurrent exclusions exist, much less any clue as to how the policies will be interpreted. Accordingly, the approach advocated in this article attempts to align doctrines of reasonableness with policyholder expectations. It should be unconscionable for a loss that is 99% covered to be excluded merely because 1% of the loss was excluded.

The unconscionability extends even further when the potential for a 99%-covered loss is excluded under an "**all risk**" policy. Policyholders understandably overestimate what is included in an "all risk" policy, but no reasonable policyholder would expect the disproportionate forfeiture that would result when a 99%-covered loss is excluded simply because a crafty adjuster is able to find some small amount of the loss that is excluded.[170] Also, if these types of exclusions are included, they should come with a disclaimer specifically alerting the policyholder of the nature of the potential exclusion.

Thus, while the approach advocated in this article does follow some elements of the dominant-cause approach, it is a deliberate choice, which more accurately reflects what should be the default position between insurer and policyholder.

This approach also limits the dominant-cause approach analysis to chain-of-event losses, and parts ways with the dominant-cause approach for independently caused losses. As advocated in this article, independent losses should be analyzed separately and distinctly from chain-of-event losses.[171] Accordingly, the approach advocated in this article, attempts to provide a new method of analysis for independent losses.

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[169] To be sure, large commercial entities can dictate terms of insurance and can negotiate, draft, and use manuscript policies.

[170] The policies themselves can also be drafted to ensure that some portion of the loss will be excluded. *See, e.g.,* Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd., No. CIV.A. 399CV1623D, 2002 WL 356756, at *4 (N.D. Tex. Mar. 5, 2002) (denying coverage for improper "property maintenance" as a concurrent cause).

[171] This idea is not novel and was discussed by the California Supreme Court in *Garvey*.

2. Confusion About How to Approach the Analysis

Because this approach recommends a series of questions relating to categorization, some may argue that the categorization itself could prove more problematic than the original problem. For instance, questions may arise as to how a court should determine whether causes harmonized to create a clear chain-of-events or whether the causes operated independently.

There certainly exists an element of discretion in this approach. There will invariably be close cases in determining whether a loss was caused by a chain-of-events or independent causes. Similarly, it may not always be easy to determine whether causes operated simultaneously or sequentially.

This approach addresses those concerns by making those close calls fact issues. The fact-finder will determine whether the causes operated sequentially or simultaneously. The approach is not designed to remove fact finding from the calculus. Rather, the approach attempts to clearly delineate fact questions from legal questions. Once the fact-finder determines the relevant facts, the law is more easily applied.

Certainly, there will be results where parties disagree with courts' conclusions respecting whether the losses were harmonious or independent. However, the facts will be uniformly applied and will generate some consistency in the muddled "concurrent causation" web. Further, the approach will allow courts to look to other jurisdictions and clearly understand how a court ruled and why the court ruled as it did.

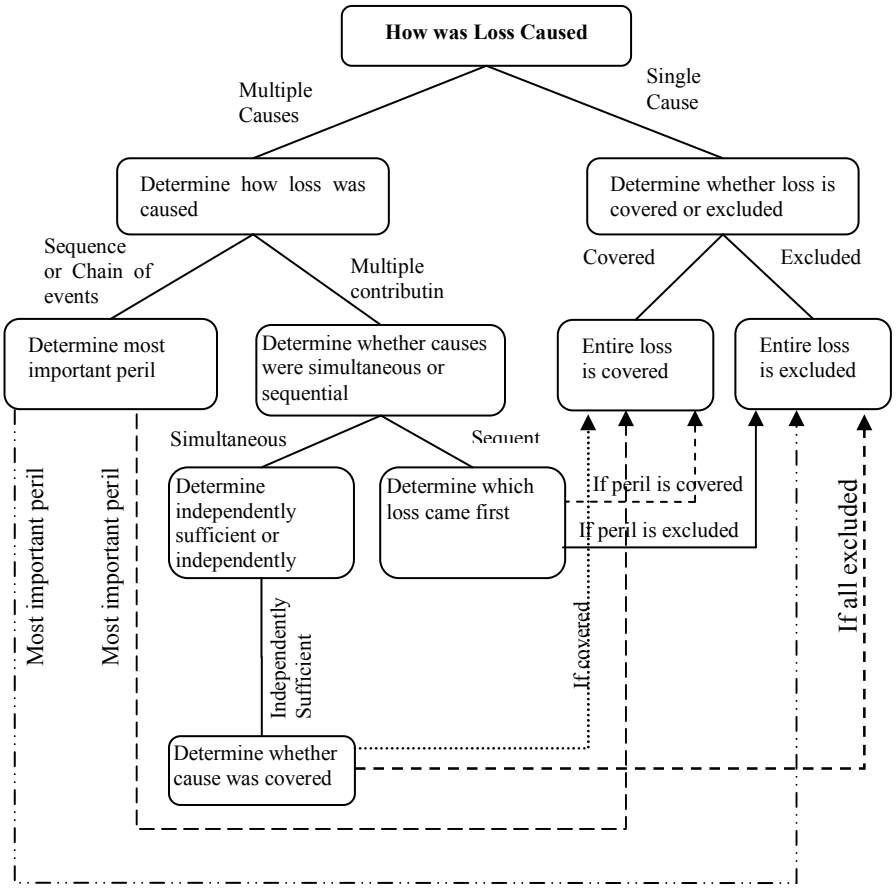
Creating clear legal guidelines will allow parties to understand *ex ante* the types of issues that will be addressed. Policyholders will have a clearer understanding of perils that are covered and excluded and will not have to play the concurrent-causation-roulette currently employed across jurisdictions. Similarly, insurers will understand how courts interpret their policies, which will create greater contract certainty and more accurate underwriting determinations.

VI. CONCLUSION

"Current causation" has evolved into an unworkable mess. The concurrent causation lexicon has become so muddled and amalgamated that it is impossible to forecast how a court, insurer, or policyholder will interpret "concurrent causation" questions. For these reasons, this article concludes that the "concurrent causation" lexicon should be revised and recommends that courts analyze multi-cause losses according to a

formulaic, categorical approach. By applying more precise and accurate language to multi-cause losses, courts and commentators will avoid unnecessary confusion and potential conflation of terms; thereby assuring contract certainty and ensuring that reasonable expectations are maintained.

APPENDIX


How was Loss Caused
Multiple Causes
Single Cause
Determine how loss was caused
Determine whether loss is covered or excluded
Sequence or Chain of events
Multiple contributin
Covered
Excluded
Determine most important peril
Determine whether causes were simultaneous or sequential
Entire loss is covered
Entire loss is excluded
Simultaneous
Sequent
Determine independently sufficient or independently
Determine which loss came first
If peril is covered
If peril is excluded
Most important peril
Most important peril
Independently Sufficient
If covered
If all excluded
Determine whether cause was covered