"Why Won't My Homeowners Insurance Cover My Loss?": Reassessing Property Insurance Concurrent Causation Coverage Disputes

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"Why Won’t My Homeowners Insurance Cover My Loss?": Reassessing Property Insurance Concurrent Causation Coverage Disputes

Peter Nash Swisher*

Property insurance coverage disputes can be extremely complex cases when there are multiple concurrent causes in a causal chain of events and when some of these concurrent causes are covered under the policy language but other concurrent causes are excluded from coverage. To complicate matters enormously, there are no fewer than three different judicial approaches attempting to resolve this concurrent causation interpretive conundrum. Over the past two decades, a number of property insurance companies have attempted to address this interpretive problem contractually by inserting so-called anti-concurrent causation clauses into their property insurance policy language. But these anti-concurrent causation clauses have engendered unintended and unexpected interpretive consequences of their own that have not been adequately explored by the courts or commentators. The purpose of this Article is to analyze the strengths and weaknesses of the various interpretive approaches in resolving property insurance concurrent causation coverage disputes and to suggest six policyholder defenses to combat the often unchallenged judicial acceptance of such anti-concurrent causation clauses in property insurance policies.

Language of causation [in insurance policies] is simple, but it disguises extremely complex and difficult legal questions. This difficulty has led to a profusion of inconsistent cases on remarkably similar facts.1

Concurrent causation cases are the most costly, inefficient, tortured and unpredictable of insurance cases. . . . It is difficult for insurers and insureds alike to arrange their insurance and indeed, their very conduct, around shifting standards for resolving these disputes.2

The danger with the anticoncurrent causation clause is that it could in theory tempt an insurer to take it to an unreasonable extreme, which in turn could cause a court to overreact and construe the clause too narrowly, creating an undesirable precedent.3

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I. INTRODUCTION

Homeowners insurance and other property insurance coverage disputes can be extremely complex when there are multiple concurrent causation issues in a causal chain of events that result in a loss and when some of those concurrent causes are covered under the policy language but other concurrent causes are excluded from coverage.4 To complicate this interpretive conundrum further, there are no fewer than three different judicial approaches to resolving property insurance coverage disputes involving issues of concurrent causation.5 Consequently, over the past two decades, a number of property insurance companies, in order to limit these concurrent coverage disputes, have unilaterally inserted so-called anti-concurrent causation clauses into their policies that effectively limit a policyholder’s right to recover on insured losses for a number of explicitly excluded direct or indirect concurrent causes.6 However, these clauses have engendered a number of their own unexpected consequences and created their own interpretive coverage uncertainties, as illustrated in a number of Hurricane Katrina (and more recently, Hurricane Sandy) concurrent


6. See, e.g., INS. SERVS. OFFICE, HO 00 02 05 01, HOMEOWNERS 2—BROAD FORM (2008) [hereinafter BROAD FORM] (“We do not insure for loss caused directly or indirectly by any of the following . . . ’’). The Homeowners 3—Special Form [HO 00 03 04 91] states, “We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.” INS. SERVS. OFFICE, HO 03 05 01, HOMEOWNERS 3—SPECIAL FORM (2008) [hereinafter SPECIAL FORM].
causation coverage disputes that a number of courts and academic commentators have failed to address adequately.

The purpose of this Article is to analyze the strengths and weaknesses of these different interpretive approaches for resolving property insurance concurrent causation coverage disputes and to suggest a realistic judicial approach for interpreting anti-concurrent causation clauses in property insurance policies, including six proposed policyholder defenses to the enforcement of these onerous clauses. Part II of this Article presents an overview of causation requirements in insurance coverage disputes, including a comparison of tort and insurance law causation requirements, the evolution of the doctrine of reasonable expectations in property insurance law, and the interpretive clash of legal formalist courts versus legal functionalist courts in interpreting and applying this doctrine of reasonable expectations. Part III of this Article discusses the three concurrent causation interpretive rules that various courts currently employ, absent an anti-concurrent causation clause found in the property insurance policy itself. Part IV of this Article demonstrates the inconsistent application of anti-concurrent causation clauses, with illustrations from various Hurricane Katrina wind-versus-water decisions in Mississippi and Louisiana federal district courts that were subsequently questioned or reversed by the United States Court of Appeals for the Fifth Circuit. And Part V of this Article proposes six policyholder defenses to the anti-concurrent causation clauses that are found in many property insurance policies today.

II. CAUSATION REQUIREMENTS IN INSURANCE COVERAGE DISPUTES: A BRIEF OVERVIEW

A. A Comparison of Tort and Insurance Law Causation Requirements

For the past four centuries, since Lord Chancellor Francis Bacon's First Maxim of Law, "In jure non remota causa, sed proxima spectator," legal causation requirements have remained a crucial, though often misunderstood, element of Anglo-American law.

For example, the prima facie elements of negligence in a tort law action include the requirements that (1) the defendant owed the plaintiff a duty of due care; (2) the defendant breached this duty of due

7. "In law not the remote cause, but the proximate, is looked to." Lord Chancellor Bacon, The Maxims of Law (1630), reprinted in 7 THE WORKS OF FRANCIS BACON 327 (James Spedding et al. eds., 1870).
care; (3) the defendant's acts were the cause in fact and the proximate cause of the plaintiff's loss, constituting a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage to the plaintiff as a result of the defendant's actions.\(^8\)

In contrast, the required elements for an insurance law cause of action include (1) the coverage provisions of an insurance policy (or, more generally, the promise of the contract), (2) the occurrence of the event (or, more generally, the breach), (3) the loss or damage, and (4) the causal "connector" between the event and the loss.\(^9\) So in both tort law and insurance law there must be a necessary causal connection between the occurrence and the loss.

Because most litigation, research, and analysis involving legal causation has largely occurred in the context of tort law,\(^10\) many courts have applied these classic tort cause-in-fact and proximate cause principles\(^11\) to insurance contract disputes as well.\(^12\)

Thus, as one commentator has noted:

> Among the decided cases, it is generally taken to be beyond dispute that proximate cause is proximate cause, whenever it may be found, and the court is content with a brief definition in the traditional [tort] manner. The rule in insurance cases appears to be that the definition of proximate cause which should be applied is the same or substantially the same as in negligence cases . . . .\(^13\)

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11. Causation in fact, or "but for" causation, generally involves a direct (as opposed to an indirect or a remote) causal chain of events, without any intervening, superseding causes. See Keeton et al., supra note 8, at 272-73; see also Restatement (Second) of Torts § 435 (1965) (concluding an actor should be held liable if his action was a substantial factor in causing harm, regardless of foreseeability). See generally Richard W. Wright, Causation in Tort Law, 73 Calif. L. Rev. 1735 (1985) (discussing causation in tort law). Proximate or legal causation is a limitation of liability based on public policy grounds, involving concepts of foreseeable harm. Id. at 1737.
In a tort law context, a substantial factor rule involving multiple concurrent causation can be summarized as follows: if two or more causes concur to bring about an event and either one of them, operating alone, would have been sufficient to cause an identical result, then each cause in fact has played so important a part in producing the result that legal responsibility should be imposed upon it as a substantial factor of the ultimate result, and there may be more than one substantial factor in a causal chain of events.\(^\text{14}\)

Likewise, in an insurance law context, a number of courts have applied this classic tort causal chain of events approach to insurance coverage disputes, holding that "[w]here a peril specifically insured against sets other causes in motion which, in an unbroken sequence [of events] between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the 'proximate cause' of the entire loss," and it is therefore "the efficient or predominant cause which sets into motion the chain of events producing the loss which is regarded as the proximate cause, [and] not necessarily the last act in a chain of events."\(^\text{15}\)

However, there is also a substantial body of case law and legal commentary demonstrating that there are important differences, as well as similarities, between legal causation requirements in tort law and insurance law, and that general rules of causation often are applied in a different—and a more literal—manner in an insurance law context than in a traditional tort action, especially involving property insurance coverage disputes, as illustrated below.\(^\text{16}\)

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\(^{14}\)Restatement (Second) of Torts section 431 states that an actor's negligent conduct is a legal cause of harm to another if his or her conduct is a substantial factor in bringing about the harm. See, e.g., Sharp v. Fairbanks N. Star Borough, 569 P.2d 178 (Alaska 1977); Bockrath v. Aldrich Chem. Co., 980 P.2d 398, 403 (Cal. 1999) ("[T]he substantial factor [test for proving causation] is a relatively broad one, requiring only that the contribution of [individual causes] be more than negligible or theoretical."); see also infra text accompanying notes 47-49 (comparing the immediate cause rule to the dominant cause rule).


\(^{16}\)See, e.g., Sidney I. Simon, Proximate Cause in Insurance, 10 AM. BUS. L.J. 33 (1972); Hareckham, supra note 4; Phillips & Coplen, supra note 4; Swisher, Causation Issues, supra note 5.

One crucial distinction between tort and property insurance causation principles is the reasonable expectation of the parties doctrine as an important interpretive factor in insurance causation disputes, which was first enunciated in then-Judge Benjamin Cardozo’s seminal opinion in the property insurance causation case of Bird v. Saint Paul Fire & Marine Insurance Co.¹⁷

The Bird case involved a damaged maritime vessel, which was insured under a fire and marine insurance policy by the St. Paul Insurance Company. On the night of July 30, 1916, a fire of unknown origin broke out beneath some railroad freight cars in New York Harbor.¹⁸ The railroad cars were loaded with explosives, and after the fire had burned for approximately thirty minutes, the contents of the cars exploded. This explosion caused an additional fire, which in turn caused a much greater explosion of a large quantity of dynamite and other explosives stored in the freight yard. This last explosion caused a concussion of air, which damaged the plaintiff’s vessel lying about 1000 feet distant in the harbor. No fire reached the vessel.

The question for Judge Cardozo in this particular case was whether the damage to the vessel was covered under the St. Paul’s property insurance policy provision that provided coverage for a direct loss caused by fire.¹⁹ Judge Cardozo conceded that “[t]here is no doubt that when fire spreads to an insured building and there causes an explosion, the insurer is liable for all the damage,”²⁰ and the trial court had found for the plaintiff policyholder under a similar rationale.²¹ Nevertheless, Judge Cardozo reversed and remanded judgment for the defendant insurer in this particular case, largely based upon insurance causation principles.

First, Judge Cardozo opined that the damage to the vessel constituted “damage by concussion; and concussion is not fire nor the immediate consequence of fire.”²² Then Judge Cardozo discussed the important insurance law proximate cause issues involved in this case:

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17. 120 N.E. 86 (N.Y. 1918).
18. Id. at 86.
19. Id.
20. Id.
21. Id. at 87.
22. Id.
We must put ourselves in the place of the average owner whose boat or building is damaged by the concussion of a distant explosion, let us say a mile away. Some glassware in his pantry is thrown down and broken. It would probably never occur to him that, within the meaning of his policy of insurance, he had suffered loss by fire. A philosopher or a lawyer might persuade him that he had, but he would not believe it until they told him. He would expect indemnity, of course, if fire reached the thing insured. He would expect indemnity, very likely, if the fire was near at hand, if his boat or his building was within the danger zone of ordinary experience, if damage of some sort, whether from ignition or from the indirect consequences of fire might fairly be said to be within the range of normal apprehension. But a different case presents itself when the fire is at all times so remote that there is never exposure to its direct perils, and that exposure to its indirect perils comes only through the presence of extraordinary conditions.

The case comes, therefore, to this: Fire must reach the thing insured, or come within such proximity to it that damage, direct or indirect, is within the compass of reasonable probability. Then only is it the proximate cause, because then only may we suppose that it was within the contemplation of the [contracting parties] and not merely in the physical bond of union between events, which solves, at least for the jurist, this problem of causation.

Here, then, was the underlying rationale—and the genius—of Judge Cardozo's proximate cause analysis involving this property insurance coverage dispute. Proximate cause in an insurance law context should not always be determined solely through an objective "classic tort" test of foreseeable harm. Rather, proximate cause in insurance coverage disputes must also be determined according to the reasonable expectations of the contracting parties: "General definitions of a proximate cause give little aid [in an insurance law context]. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts."

This evolutionary—some would say revolutionary—definition of the proximate cause reasonable expectations doctrine in an insurance law context, applicable to both the insured and the insurer alike,

23. Id. at 87-88.
24. Id. (emphasis added); see also Swisher, Causation Issues, supra note 5, at 363-66 (discussing the rationale of the Biro case).
arguably was an important precursor to Professor Arthur Corbin’s famous first axiom of contract law: “The Main Purpose of Contract Law is the Realization of Reasonable Expectations Induced by Promises.”

This contractually based insurance law doctrine of reasonable expectations has been developed and adopted successfully by the vast majority of American courts over the past eighty years; and in order to recognize the reasonable expectations of the parties to coverage within this overarching contractual context, various rules of insurance contract interpretation were formulated, recognized, and incorporated into the case law of most American jurisdictions, including (1) the contra proferentem doctrine of ambiguities; (2) contract unconscionability and public policy defenses; (3) the application of certain equitable remedies such as waiver, equitable estoppel, promissory estoppel, election, and contract reformation; and (4) additional interpretive rules applicable to standardized insurance contracts of adhesion.

Indeed, this contractually based reasonable expectations doctrine was firmly established by the time Professor (and later Judge) Robert Keeton propounded his groundbreaking 1970 “rights at variance with the policy language” reasonable expectations doctrine. As proposed by Professor Keeton, this functional (as opposed to contractual) reasonable expectations doctrine is based upon a two-prong rationale: (1) that an insurer should be denied any unconscionable advantage in an insurance contract and (2) that the reasonable expectations of insurance applicants and intended beneficiaries regarding the terms of insurance coverage should be honored, even though a painstaking study of the policy provisions contractually would have negated those expectations. Professor Keeton’s reasonable expectations doctrine, at variance with the insurance policy language, “suggests that an insured

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26. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS 1 (1952); GORDON D. SCHARBER & CLAUDE D. ROHWER, CONTRACTS IN A NUTSHELL 147 (3d ed. 1990) (“One purpose of contract law is to protect the reasonable expectations of persons who have become parties to a bargain.”). See generally Jerry, supra note 25, at 42-50 (discussing the evolution of this reasonable expectations doctrine).


28. See id.

can have reasonable expectations of coverage that arise from some source other than the policy language itself, and that such an extrinsic expectation can be powerful enough to override any policy provisions no matter how clear.\textsuperscript{30} A minority of courts have adopted Professor Keeton's controversial reasonable expectations doctrine at variance with the clear and unambiguous insurance policy language.\textsuperscript{31}

The first prong of Professor Keeton's reasonable expectations doctrine, that an insurer should be denied any unconscionable advantage in an insurance contract, can be justified in large part through the depth and breadth of a more traditional, contractually based reasonable expectations doctrine involving elements of contract ambiguity, unconscionability, and waiver and estoppel principles,\textsuperscript{32} and Professor Keeton himself wrote that this unconscionability principle "explains much that is called waiver or estoppel in insurance law, in circumstances involving neither voluntary relinquishment nor detrimental reliance—the essence of waiver and estoppel respectively. It also accounts for most of the distinctive controls over defenses based on warranty, representation or concealment [and] the doctrine of election."\textsuperscript{33} A majority of contemporary American courts and commentators, therefore, generally recognize and apply this unconscionability variant of Professor Keeton's reasonable expectations doctrine in resolving insurance coverage disputes.\textsuperscript{34}

The second prong of Keeton's doctrine of reasonable expectations, however, has been much more controversial—that the reasonable expectations of the insured should be honored, even though

\begin{itemize}
  \item \textsuperscript{30} Mark C. Rahdert, \textit{Reasonable Expectations Reconsidered}, 18 \textit{CONN. L. REV.} 323, 335 (1986).
  \item \textsuperscript{32} See \textit{JERRY & RICHMOND}, \textit{supra} note 1, at 148 ("[T]he doctrine's contours are found precisely where Professor Keeton 'discovered' the doctrine—in the more traditional [contractual] doctrines with which lawyers and judges are more familiar and comfortable."); Kenneth S. Abraham, \textit{Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured}, 67 \textit{VA. L. REV.} 1151, 1175-77 (1981) (discussing various equitable remedies); see also Rahdert, \textit{supra} note 30, at 325-44 (discussing Professor Keeton's reasonable expectations doctrine).
  \item \textsuperscript{33} Keeton, \textit{supra} note 29, at 963-64.
  \item \textsuperscript{34} See Swisher, \textit{supra} note 27, at 764-65.
\end{itemize}
a "painstaking study" of the policy provisions "would have negated those expectations."  

Criticism of this Keeton reasonable expectation rights at variance with the insurance policy language doctrine has been threefold. First, under this controversial rights at variance with the insurance policy language doctrine, the insurance policy need not be interpreted according to its clear contractual language—which is anathema to a traditional formalistic theory of insurance contract interpretation. Second, those courts that purportedly do apply this rights at variance reasonable expectations approach have been unable to agree on what specific factors actually constitute the insured's reasonable expectation to coverage and what factors do not. Third, a growing number of commentators and courts have questioned the underlying doctrinal justification purportedly supporting this rights at variance with the policy language interpretive approach to insurance coverage disputes.
Accordingly, a growing number of courts have severely restricted—or expressly rejected—the Keeton rights at variance with the insurance policy language doctrine of reasonable expectations, while still recognizing a contractually based doctrine of reasonable expectations, including the doctrine of ambiguities.\textsuperscript{39} But how will the reasonable expectations of the parties be interpreted by the courts in an insurance coverage dispute? This depends largely on whether the judge is a legal formalist or a legal functionalist as discussed in more detail below.

\textbf{C. Judicial Interpretations of Insurance Coverage Disputes: Legal Formalism Versus Legal Functionalism—And a Consensus “Middle Ground” Interpretive Approach}

It is generally acknowledged that the interpretation of insurance contract disputes is a function of the judge, as a matter of law, rather than a function of the jury.\textsuperscript{40} But what interpretive principles should a judge apply in order to resolve insurance coverage disputes?

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\textsuperscript{39} See Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1140 (Fla. 1998) ("We decline to adopt the [Keeton] doctrine of reasonable expectations. There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged." (footnote omitted)); see also Luechtefeld v. Allstate Ins. Co., 656 N.E.2d 1058, 1064 (Ill. 1995) ("[P]ublic policy does not require invalidation of clearly written provisions simply to avoid disappointment to the insured." (quoting Menke v. Country Mut. Ins. Co., 401 N.E.2d 539, 542 (Ill. 1980))); Liggett v. Emp'rs Mut. Cas. Co., 46 P.3d 1120, 1128 (Kan. 2002) ("[A]mbiguity is a condition precedent to the application of the reasonable expectations doctrine."); Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776, 787 (Mich. 2003) ("[T]he rule of reasonable expectations clearly has no application when interpreting an unambiguous contract because a policyholder cannot be said to have reasonably expected something different from the clear language of the contract."); Jostens, Inc. v. Northfield Ins. Co., 527 N.W.2d 116, 118 (Minn. Ct. App. 1995) (holding that the insured's reasonable expectation to coverage must be "derived from the policy language, not its own original expectations as it went into the insurance marketplace above"); Banfield v. Allstate Ins. Co., 880 A.2d 373, 377 (N.H. 2005) ("We need not examine the parties' reasonable expectations of coverage when a policy is clear and unambiguous."); Martin v. Farmers Ins. Exch., 894 P.2d 618, 622 (Wyo. 1995) ("[C]onsumer expectations can hardly be reasonable, by definition, if they are cultivated in contravention of clear and unambiguous language contained within the contract of insurance."). See generally Swisher, supra note 27, at 735-47 (discussing courts' varying applications of the doctrine of ambiguities).

\textsuperscript{40} See Parsons v. Bristol Dev. Co., 402 P.2d 839, 842 (Cal. 1965) (holding that insurance contract interpretation is "solely a judicial function ... unless the interpretation turns on the credibility of extrinsic evidence"); see also I STEVEN PLITT ET AL., COUCH ON INSURANCE § 21:3 (3d ed. 2013) ("[T]he construction and effect of a written contract of
Over the past eight decades, formalist and functionalist judges have battled over what Professor Robert Jerry calls "the heart and soul" of insurance contract law:

On one side are the formalists or classicists, whose champions are Professor Williston and the first *Restatement of Contracts*. The formalists care mightily about texts and the four corners of documents. They believe that words often have a plain meaning that exists independently of any sense in which the speaker or writer may intend the words. They insist that a court or a party can discern the meaning of contractual language without asking about the intentions or [reasonable] expectations of the parties. They contend that interpretation is appropriate only if an ambiguity appears on the face of the document... In the world of the formalists, an insurer that drafts a clear form should be entitled to rely on that form in setting rates without worrying that a court will disregard the finely turned, clear language....

The other contestants in the battle for the soul of contract law are the functionalists, who are sometimes also labeled as the progressives, the realists, or the post-classicists. The champions of this side are Professor Corbin and the *Restatement (Second) of Contracts*. The functionalists care less about the text of [insurance] contracts, believing it to be most useful as an articulation of the objective manifestations of the contracting parties and as a means to understanding their intentions and [reasonable] expectations.... Text does not have inherent meaning, but text means what the drafter or speaker knows or should know the other side will understand those words to mean in context.... Where a form is standardized, the functionalists substitute objectively reasonable expectations for whatever the particular recipient of the form understood, given that the recipient has less reason to know what the drafter means, while the drafter has insights into what the ordinary, reasonable recipient of the form is likely to understand.41

Does this mean that an irreconcilable difference exists, and must continue to exist, between formalist and functionalist courts in the interpretation of insurance contract disputes? Not necessarily. As I argued in a previous article:

Professor Corbin—like Professor Williston—was not willing to reject a number of well-established rules of [insurance] contract interpretation in pursuit of his more functional and contextual approach to contract

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law, and Professor Corbin—like Professor Williston—therefore continued to recognize a large number of traditional interpretive rules of contract interpretation to help ascertain the parties' reasonable expectation to coverage, including: contract ambiguity and the doctrine of contra proferentem, contract unconscionability and public policy issues, and equitable remedies such as waiver, equitable estoppel, promissory estoppel, election, and reformation of contract. A fair reading of both Williston on Contracts and Corbin on Contracts therefore suggests that there are far more similarities than differences in their respective approaches to contract law in general, and insurance coverage disputes in particular.42

A majority of American courts have not explicitly adopted, nor explicitly rejected, a legal formalist or a legal functionalist jurisprudential posture, although a number of courts have recently criticized Professor Keeton's rights at variance with the policy language or "strong" reasonable expectations approach to insurance coverage disputes.43

Instead, most American courts have arguably adopted a "middle ground" or "consensus" interpretive approach to insurance coverage disputes and remain unwilling or unable to reject these contractually based interpretative rules and remedies in order to ascertain the reasonable expectations of the parties in insurance contract disputes.44

A realistic consensus approach to the insurance law doctrine of reasonable expectations therefore recognizes a number of well-established contractual parameters for allowing judicial discretion, when justice and equity requires it, to recognize and honor the reasonable expectations of the parties to coverage in insurance contract disputes that are supplemental to—rather than at variance with—the terms of the parties' insurance contract.45

How this "middle ground" or "consensus" interpretive approach to insurance contract disputes affects property insurance concurrent causation issues will be discussed more fully below.46

42. Swisher, supra note 27, at 755 (footnotes omitted).
43. See supra text accompanying notes 35-39.
44. These contractually based interpretive rules, once again, would include (1) the doctrine of ambiguities; (2) contract unconscionability and public policy issues; (3) equitable remedies such as waiver, equitable estoppel, promissory estoppel, election, and contract reformation; and (4) a number of additional interpretive rules applied to standardized insurance contracts as contracts of adhesion. See Swisher, supra note 27, at 778.
45. Id.
46. See discussion infra Parts III-V.
D. **Multiple Concurrent Causation: Immediate Cause Versus Efficient or Dominant Proximate Cause**

A final issue with concurrent causation in a causal chain of events is determining which concurrent cause (or causes) is the primary or dominant cause resulting in an insurable loss.

American courts have not been uniform in analyzing the primary or dominant concurrent causes in a causal chain of events, and most courts have applied one of two competing interpretive models for multiple concurrent causation: (1) the immediate cause rule, involving the cause nearest to the loss, and (2) the efficient or dominant cause rule, similar to the classic tort substantial factor rule for multiple concurrent causation.47

The traditional immediate cause rule is that the cause of loss in an insurance law context must be the *immediate cause* of the injury or loss, rather than a "dominant" proximate concurrent cause in a causal chain of events.48 For example, in the case of *Queen Insurance Co. of America v. Globe & Rutgers Fire Insurance Co.*, Justice Holmes wrote:

> [T]he common understanding is that in construing these [insurance] policies we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss. This is a settled rule of construction, and, if it is understood, does not deserve much criticism, since theoretically at least the parties can shape their [insurance] contract as they like.49

A growing number of American courts, however, have rejected this immediate cause rule in favor of an efficient or dominant proximate cause rule.50 Under this classic tort efficient or dominant multiple concurrent causation rule, there will be coverage if a risk of loss that is specifically insured against in the policy sets in motion, in

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47. *See* STEMPEL, *supra* note 13, § 7.02.
49. 263 U.S. 487, 492 (1924); *see also* Bruener v. Twin City Fire Ins. Co., 222 P.2d 833, 834-35 (Wash. 1950) ("In the rare instances where proximate cause has any bearing in [insurance] contract cases, it has a different meaning than when used in tort. . . . In tort cases, the rules of proximate cause are applied for the single purpose of fixing culpability, with which insurance cases are not concerned. . . . Insurance cases are not concerned with why the injury occurred or the question of culpability, but only with the nature of the injury and how it happened."). However, this case subsequently was overruled by *Graham v. Public Employees Mutual Insurance Co.*, which adopted the efficient or dominant multiple concurrent causation rule. 656 P.2d 1077 (Wash. 1983).
an unbroken causal sequence, the events that cause the ultimate loss, even though the last immediate cause in the causal chain of events may have been an excluded cause.\textsuperscript{51}

For example, in the case of \textit{Shirone, Inc. v. Insurance Co. of North America}, the insured's cattle died during a violent storm that produced high winds, damp snow, and muddy field conditions. The insurance policy insured livestock against death by windstorm but did not provide coverage for any loss caused by "dampness of atmosphere or extremes of temperature."\textsuperscript{52} Expert witnesses testified that the cattle died due to a combination of substantial concurrent causes—wind, cold temperature, snow, muddy conditions, the lack of adequate wind protection, and the size and age of the cattle. The jury found that the windstorm was the dominant or efficient proximate cause of the loss, notwithstanding the contribution of other excluded factors to the loss, and this jury verdict in favor of coverage for the policyholder was affirmed on appeal.\textsuperscript{53}

Commercial property insurance policies often employ this concurrent causation principle in this manner:

\begin{quote}
We will not pay for loss or damage caused by or resulting from any of the following [excluded causes]. But if an excluded cause of loss listed [below] results in a Covered Cause of Loss, we will pay for the loss or damage caused by the Covered Cause of Loss.\textsuperscript{54}
\end{quote}

Which is the better-reasoned rule? The immediate cause rule? Or the dominant or efficient proximate cause rule? As I concluded in an earlier article:

Clearly, the "immediate cause" rule cannot be applied in all circumstances, especially when it is unfair and contrary to the intent of


\textsuperscript{52} \textit{Shirone, Inc. v. Ins. Co. of N. Am.}, 570 F.2d 715, 716 (8th Cir. 1978) (applying Iowa law).

\textsuperscript{53} \textit{Id} at 718-19.

\textsuperscript{54} INS. SERVS. OFFICE, BP 00 02 01 96, BUSINESS OWNERS SPECIAL PROPERTY COVERAGE FORM (2008).
the contracting parties. On the other hand, the "efficient" or "dominant" proximate cause rule should not be applied to insurance coverage disputes when the initial cause in the causal chain of events is too remote. The better reasoned view, therefore, in order to validate the reasonable expectations of the contracting parties would be to permit a court to apply either the "immediate cause" rule or the "efficient" or "dominant" proximate cause rule according to which rule would provide coverage in a particular insurance contract dispute, especially if there was policy language that was arguably ambiguous.55

III. THREE MULTIPLE CONCURRENT CAUSATION RULES IN PROPERTY INSURANCE COVERAGE DISPUTES

American courts have employed no fewer than three different interpretive rules addressing property insurance coverage disputes involving multiple concurrent causation: (1) a traditional "conservative rule," (2) a "liberal rule," and (3) a majority efficient or dominant proximate cause rule.

A. The Traditional "Conservative Rule" Applied to Property Insurance Concurrent Causation Coverage Disputes

Under the traditional "conservative rule" applied to property insurance concurrent causation coverage disputes, if a covered loss combines with an excluded loss to produce a loss, then the insured cannot recover under his or her property insurance policy based upon an underlying public policy rationale that an insurer should not be held responsible for any loss caused by an excluded peril as a concurrent cause of the insured's loss.56

55. Swisher, Causation Issues, supra note 5, at 368 (footnote omitted), cited with approval in Stempel, supra note 13, at 7-14; see also Key Tronic Corp. v. Aetna (Cigna) Fire Underwriters Ins. Co., 881 P.2d 201, 206 (Wash. 1994) (reasoning that the efficient proximate cause rule favors coverage); Windt, supra note 36, at 623 ([W]hether a court applied the immediate cause rule [or the "efficient" or "dominant" proximate cause rule] might depend upon whether one is considering a 'cause' that would exclude coverage or one that would create coverage. If the policy language is ambiguous, a court should adopt the immediate cause rule when the rule would serve to render an exclusion inapplicable, even though the court would apply [the "efficient" or "dominant" proximate cause rule] when applying a policy provision extending coverage.

56. See Lydick v. Ins. Co. of N. Am., 187 N.W.2d 602, 605 (Neb. 1971) (holding that under this traditional "conservative rule," if a covered hazard expressly excluded from the policy to produce a loss, then the insured cannot recover); Jerry & Richmond, supra note 1, at 541-44 (discussing the conservative view of insurance causation); Swisher, Causation Issues, supra note 5, at 369 (discussing three approaches to multiple causation disputes). For illustration of these principles, refer to the following cases: Abady v. Hanover Fire Insurance Co., 266 F.2d 362 (4th Cir. 1959) (applying Virginia law); Niagara Fire Insurance Co. v.
Thus, under this traditional “conservative rule”:

[I]f a [covered] windstorm combines with a hazard expressly excluded from the policy coverage [such as high water, flooding, or other water damage] to produce the loss [then] the insured may not recover. This [traditional “conservative”] rule appears to be bottomed on the reasoning that the insurer cannot be held liable for any part of the damage caused by the excluded hazard, [and] the total loss resulting from the combined action of the two [covered and excluded perils] falls outside the policy coverage. ¹⁵

The weakness of this traditional “conservative rule,” however, is that the reasonable expectations of the insured to coverage are easily frustrated and abrogated. ¹⁶

During the past two decades, many insurers have revised their standardized property insurance policy forms in an attempt to make this traditional “conservative rule” the controlling interpretative concurrent causation doctrine through various anti-concurrent causation provisions. ¹⁷

B. The “Liberal Rule” Applied to Property Insurance Concurrent Causation Coverage Disputes

Other courts have adopted a more “liberal” rule, holding that when loss occurs through the concurrence of covered and excluded risks in a property insurance context, the insurer is liable for the entire loss, as long as at least one of the covered risks was a proximate cause of the loss. ¹⁸

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¹⁵.J.C. Vance, Annotation, Causes of Loss Under Windstorm Insurance Coverage, 93 A.L.R.2d 145, 161-62 (1964); see also Niagara Fire Ins. Co., 208 F.2d 191 (applying Missouri law and holding that the plaintiff could not recover under a similar concurrent causation issue); Wood v. Mich. Millers Mut. Fire Ins. Co., 96 S.E.2d 28, 30 (N.C. 1957) (“[I]f the cause insured against (windstorm) and an excluded cause (high water) combined to create the damage, plaintiff could not recover.”); Hardware Dealers Mut. Ins. Co. v. Berglund, 393 S.W.2d 309 (Tex. 1965) (holding that the plaintiff could not recover for damage resulting from wind and tidal wave); Franklin Fire Ins. Co. v. Smith, 103 S.W.2d 470 (Tex. Ct. Civ. App. 1937) (holding that the plaintiff could not recover under a wind and high water concurrent causation issue).

¹⁶. See supra text accompanying notes 17-39.

¹⁷. See supra text accompanying note 6; discussion infra Part IV.

The advantage of this liberal view of causation, at least for the insured policyholder, is that when various causes combine to produce an insured loss, a dominant or predominant efficient cause need not be shown—only a minimally sufficient proximate cause.\(^{61}\) For example, in the case of *Benke v. Mukwonago-Vernon Mutual Insurance Co.*, when snow on a roof (an excluded peril) combined with wind (a covered peril) to blow down a stable, the court held that coverage existed, without discussing which cause was dominant.\(^{62}\)

The major disadvantage of this "liberal rule" however, is that insurers probably never intended to provide such broad coverage under their property insurance policies, and not surprisingly, various commentators in a number of insurance-defense-oriented journals have strongly attacked this liberal rule.\(^{63}\)

C. The Majority Efficient or Dominant Proximate Cause Rule Applied to Property Insurance Concurrent Causation Coverage Disputes

The majority approach to concurrent causation issues in property insurance coverage disputes, in order to validate the insurer’s contractual rights and obligations, as well as validate the insured’s reasonable expectation to coverage,\(^{64}\) is to require the finding of a


This "liberal rule" used to be called the "California rule." Subsequently, however, the California Supreme Court repudiated its "liberal" concurrent causation rule, and California currently recognizes a dominant or efficient causal nexus rule in property insurance concurrent causation coverage disputes. See *State Farm Fire & Cas. Co. v. Von Der Lieth*, 820 P.2d 285 (Cal. 1991); *Benavides v. State Farm Gen. Ins. Co.*, 39 Cal. Rptr. 3d 650 (Cl. App. 2006). California has codified its insurance proximate causation doctrine in CAL. INS. CODE §§ 530, 532 (2013).

61. See, e.g., JERRY & RICHMOND, supra note 1, at 539-41.
62. 329 N.W.2d 243 (Wis. Ct. App. 1982); see also Mattis v. State Farm Fire & Cas. Co., 454 N.E.2d 1156 (Ill. App. Ct. 1983) (holding that when the improper design and construction of a building (a covered peril) combines with the settling of soil (an excluded peril) to produce loss, coverage exists regardless of which cause was dominant).
63. See Houser, supra note 4; Houser & Kent, supra note 4; Litsey, supra note 4; Wueful & Koop, supra note 4. These commentators generally make a distinction between first-party property insurance concurrent causation disputes (e.g., *Sabella v. Wiser*), which arguably should require a dominant or efficient concurrent causal nexus, and third-party liability insurance concurrent causation disputes (e.g., *State Farm Mutual Automobile Insurance Co. v. Partridge*), which arguably may only require a minimal or sufficient causal nexus to compensate the third-party claimant for his or her injuries. See, e.g., Houser & Kent, supra note 4, at 578-83.
64. See supra text accompanying notes 17-39.
covered dominant or efficient proximate cause in any property insurance concurrent causation coverage dispute.65

Under this realistic “middle ground” property insurance concurrent causation approach, if multiple concurrent causes exist, and if the dominant or efficient cause of loss is a covered peril, then coverage would exist for the entire loss, even though other concurrent causes were not covered under the policy.66 As explained in the case of Duensing v. State Farm Fire & Casualty Co.:

The efficient proximate cause doctrine ... applies “in determining the cause of a loss for the purpose of fixing insurance liability when concurring causes of the damage appear, the proximate cause is the dominant or efficient one that sets the other causes in operation; incidental causes are not proximate though they may be nearer in time and place to the loss.” ... If the insured successfully demonstrates that the proximate cause of the loss is covered under the policy, the entire loss is covered notwithstanding the fact that an event in the chain of causation was specifically excluded from coverage.67

If neither cause is dominant, then loss probably would be attributed to the cause that would result in coverage.68

The dominant or efficient concurrent causation approach is justified, not only because it honors the reasonable expectation of the policyholder to coverage and disallows the insurer an unconscionable advantage, but also because of the well-established insurance law rationale of liberally resolving any ambiguities in insurance coverage disputes in favor of the insured (the nondrafting party), and strictly construing such ambiguities against the insurer (the drafting party).69

This dominant or efficient concurrent causation approach has not been without its critics. Richard Fierce, for example, advocates that any concurrent causation approach, even the “conservative” approach,

65. See supra text accompanying notes 55-59; see also JERRY & RICHMOND, supra note 1, at 534-39 (discussing dominant or efficient proximate cause approach to insurance causation coverage disputes).


is better than the "unpredictable hocus-pocus" of the dominant or efficient concurrent causation rule. And Erik Knutsen argues:

"Dominance" is often in the eye of the beholder. There is little consistency among jurisdictions and even among the same courts with similar fact patterns in cases over time. This has created a tortured pattern of litigation because litigants cannot reliably predict coverage in concurrent causation cases where the dominant cause approach will be applied.

However, other commentators argue for retaining this dominant or efficient causation rule, as recognized in a majority of courts today. Admittedly, the dominant or efficient concurrent causation approach is not a bright-line rule, and may require judicial interpretation based on the facts of a particular case. But it still provides a realistic "middle ground" compromise to the proinsurer "conservative" rule and the proinsured "liberal" rule.

IV. ANTI-CONCURRENT CAUSATION CLAUSES IN PROPERTY INSURANCE POLICIES: INCONSISTENT APPLICATIONS

Over the past two decades, a number of property insurance companies have unilaterally revised their standardized homeowners insurance policies and other property insurance policies in an apparent effort to make the traditional "conservative" approach to concurrent causation, rather than the "liberal" approach or the efficient or dominant proximate cause rule, binding upon the parties through express contractual language appearing within the insurance policy itself.

For example, a recommended provision related to homeowners property insurance, drafted by the Insurance Services Office (ISO), states in relevant part: "We do not insure for loss caused directly or indirectly by any of the following. . . . Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." And in 2006, the ISO included new language
introducing homeowners insurance policy exclusions that states, "We do not insure for loss caused directly or indirectly by any of the following . . . ." These homeowners policy provisions are variously known as "lead-in clauses" or "anti-concurrent causation clauses."

The average homeowner, of course, probably would not be aware of this anti-concurrent causation change in his or her homeowners insurance policy, although it is generally held to be the duty of an insured to read and understand one's own insurance policy.79

In forming a contract, an insured relies not upon the text of the policies but on the general descriptions of the coverage provided by the insurer and its agents during the time the insured was considering whether to submit an application. Absent a special request, an insured will not see the text of the policy until after the application has been submitted and the first premium paid. Under these circumstances, it is not surprising that the so-called "duty to read" has less significance in [some] modern cases.80

A. Judicial Recognition of Anti-Concurrent Causation Clauses: An Interpretive Conundrum and Possible Solutions

Since the recent introduction of such "lead-in" or anti-concurrent causation clauses within the express policy language of many property insurance policies, approximately twenty American courts81 have recognized the validity of these anti-concurrent causation clauses, where the parties are allowed to contract around, or contract out of, any default dominant or efficient concurrent causation approach (or a default "liberal" causation approach), in various contemporary property insurance policies.82

78. BROAD FORM, supra note 6.
80. JERRY & RICHMOND, supra note 1, at 192 ("Yet the doctrine can still have force, and it must not be overlooked in contemporary litigation." (citing Dahlke v. John F. Zimmer Ins. Agency, Inc., 515 N.W.2d 767 (Neb. 1994))). The authors conclude, "To summarize, jurisdictions are [currently] divided on whether the insured has a duty to read the policy, and this disagreement has enormous implications for how particular cases are decided." Id. at 193.
81. See Phillips & Coplen, supra note 4, at 35-39 (diagramming key cases from each state allowing anti-concurrent causation clauses).
For example, in the case of *State Farm Fire & Casualty Co. v. Bongen*, the Alaska Supreme Court recognized State Farm's anti-concurrent lead-in clause relating to an earth movement exclusionary clause in its property insurance policy and held for the insurer. But in the subsequent case of *West v. Umialik Insurance Co.*, the same Supreme Court reversed the lower court's summary judgment in favor of the insurer and held that summary judgment should be entered in favor of the insured. The court rejected the insurer's argument that its previous *Bongen* case was established precedent because the property insurance policy in *Bongen* had an anti-concurrent causation lead-in clause, where the policy in *West* had no such clause, so the court would apply the efficient or dominant concurrent causation interpretive approach.

Likewise, in the case of *Powell v. Liberty Mutual Fire Insurance Co.*, the Nevada Supreme Court held that a property insurance policy at issue in the earlier case of *Schroeder v. State Farm Fire & Casualty Co.* was distinguishable from, and inapplicable to, the policy at issue in the *Powell* case because Schroeder's policy had an anti-concurrent causation provision, which excluded earth movement combined with water, whereas Powell's policy did not have an all-inclusive anti-concurrent causation provision. Thus, the court held that the trial court erred in its reliance on *Schroeder*.

Not all courts have wholeheartedly embraced anti-concurrent causation lead-in clauses in property insurance policies. For example, the Supreme Court of Appeals of West Virginia in the case of *Murray v. State Farm Fire & Casualty Co.* questioned other jurisdictions' findings that State Farm's anti-concurrent causation lead-in clause involving earth movement was valid and unambiguous. Anti-concurrent causation clauses, according to the West Virginia court, are contrary to the reasonable expectations of the parties and void against public policy because insurance contracts are contracts of adhesion.

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83. 925 P.2d 1042 (Alaska 1996).
84. 8 P.3d 1135 (Alaska 2000).
85. Id. at 1141.
86. 770 F. Supp. at 561.
88. See supra text accompanying notes 17-39 for a discussion of reasonable expectations.
and the parties did not freely contract "to exclude the efficient proximate cause doctrine." 89

Two states have adopted an efficient or dominant concurrent proximate cause doctrine by state statutory enactment, which would arguably supersede any anti-concurrent causation provisions found within the policy language itself. 90 For example, the California Insurance Code provides in relevant part:

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. 91

Likewise, a North Dakota statute states:

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. 92

Thus, in the case of Western National Mutual Insurance Co. v. University of North Dakota, the North Dakota Supreme Court held that because the efficient or dominant concurrent causation doctrine was codified in state law, the insurer could not contract around it with an anti-concurrent causation provision in its policy. 93

This efficient proximate cause doctrine comporting with state public policy is not limited only to statutory law. In the case of Safeco Insurance Co. of America v. Hirschmann, for example, the Washington Supreme Court held that the efficient proximate cause doctrine in Washington would trump any property insurance anti-concurrent causation policy provisions to the contrary. 94

What is especially troubling, however, is the burden of proof that insurers must meet in validating their anti-concurrent causation clauses

90. See, e.g., CAL. INS. CODE§ 530 (2013).
91. Id; see also Julian v. Hartford Underwriters Ins. Co., 110 P.3d 903, 904 (Cal. 2005) ("We have construed [California Insurance Code] section 530 as incorporating into California law the efficient proximate cause doctrine, an interpretive rule for first party insurance.").
93. 643 N.W.2d 4, 13 (N.D. 2002).
94. 773 P.2d 413, 416-17 (Wash. 1989) ("When an insured risk sets into operation a chain of causation in which the last step may be an excluded risk, the exclusion will not defeat recovery.").
in property insurance policies. An insured, for example, generally must prove that a "direct physical loss to property" occurred. But the 2006 ISO language for anti-concurrent causation lead-in clauses states, "We do not insure for loss caused directly or indirectly by any of the following . . ." Granted, many property insurance policies provide all-risk coverage, except for enumerated exclusions, and the burden of persuasion is thus on the insurer to prove such exclusions.

But can an insurer also argue an indirect causal nexus to prove its exclusions—even assuming that such exclusions to coverage may not have been efficient or dominant causal factors in the concurrent causal chain of events? Assume, for example, that combined water damage and earth movement are excluded under an insurer's anti-concurrent causation lead-in clause, but such earth movement, in fact, was indirect and insignificant (and maybe the water damage was indirect and insignificant as well). Can the insurer still deny coverage? Common sense (not to mention law, equity, and the reasonable expectations of the parties) would suggest the answer should be "No." But few, if any, anti-concurrent causation clauses expressly require that a dominant or efficient exclusionary cause must be proved by the insurer, as it must normally be proved by the insured for coverage to apply. And here, as Douglas Widin suggests, "The danger with the anticoncurrent causation clause is that it could in theory tempt an insurer to take it to an unreasonable extreme, which in turn could cause a court to overreact and construe the clause too narrowly, creating an undesirable precedent."

To avoid this possible interpretive conundrum, I would recommend a "what's good for the goose is good for the gander" rule: That is, in any property insurance coverage dispute involving anti-concurrent causation lead-in clauses, in order to deny coverage effectively, the insurer must also demonstrate that its excluded cause or causes that were clearly enumerated in its property insurance policy must also have been dominant or efficient concurrent causes in the

95. See, e.g., Ins. Servs. Office, Inc., Homeowner's 3—Special Form HO 00 03 10 00, MIAMI UNIV. (1999), http://www.sba.muohio.edu/adelmasw/classes/Policies/01-08%20HO3_sample.pdf (emphasis added).

96. BROAD FORM, supra note 6.

97. Such exclusions may include earth movement, water damage, neglect, war, nuclear hazard, and intentional loss. Ins. Servs. Office Inc., supra note 95, at 11-12.


100. See supra text accompanying notes 17-39.

101. See Knox, supra note 3.
causal chain of events—similar to the insured’s burden of proof in property insurance coverage disputes involving multiple concurrent causation. Moreover, if some courts have been impliedly utilizing this informal “goose/gander” interpretive rule, they should now expressly adopt it as a reasonable “middle ground” judicial precedent.

B. Applying Anti-Concurrent Causation Clauses to Hurricane Katrina Property Insurance Coverage Disputes: Some Illustrative Cases as a Template for Hurricane Sandy Coverage Disputes

The following wind-versus-water concurrent causation opinions illustrate troubling and inconsistent judicial interpretations of anti-concurrent causation clauses in Hurricane Katrina-related litigation. In the majority of these cases, federal district court judges in Mississippi and Louisiana interpreted anti-concurrent causation clauses in various property insurance policies to provide coverage to the policyholders. But the Fifth Circuit, applying a more formalistic plain meaning textual approach to anti-concurrent causation clauses, subsequently held that there was no coverage provided to the policyholders under these clauses.

On August 29, 2005, Hurricane Katrina hit New Orleans and the Gulf Coast. On Sunday, August 28, New Orleans Mayor Ray Nagin ordered a mandatory evacuation of the city, but when Katrina made landfall in Louisiana, an estimated 100,000 people were still in New Orleans. At the time, Katrina was the strongest hurricane ever recorded in the Gulf of Mexico, leaving 1800 people dead in its wake, and in terms of property damage in Louisiana, Mississippi, and Alabama, it still ranks as the costliest storm in the history of the United States.

102. See supra text accompanying notes 47-55.
103. See infra text accompanying notes 199-203.
107. Id.
108. See id. Hurricane Sandy, which ravaged the East Coast of the United States during the last week of October 2012, was responsible for damages estimated to be in the range of $50 to $60 billion. Hurricane Katrina’s damages, by comparison, amounted to approximately 157 billion dollars. NBC Nightly News (NBC television broadcast Nov. 27, 2012), available at https://archive.org/details/KNTV_20121128_013000_NBC_Nightly_News.
In the aftermath of Hurricane Katrina, many Gulf Coast residents whose homes were damaged or destroyed turned to their property insurance companies to provide compensation for their losses, only to find that their homeowners’ policy explicitly excluded losses due to flooding.109 Such policies would often cover damages caused by wind or rain, but excluded damages caused from water. For many homes affected by Hurricane Katrina, the damage was caused by a concurrent combination of wind and water, where one dominant factor in the causal chain of events was covered, but the other causal factor was excluded from coverage.110 And often, with this wind-versus-water debate, numerous homeowners policies also contained anti-concurrent causation lead-in clauses.111 The following cases illustrate this wind-versus-water interpretive conundrum affecting Hurricane Katrina property insurance coverage disputes with anti-concurrent lead-in clauses:

1. **Buente v. Allstate Insurance Co.**

In **Buente v. Allstate Insurance Co.**, the plaintiff insureds brought an action against the Allstate Insurance Company and its agents as a result of a denial of coverage for hurricane damages resulting from Hurricane Katrina under the insureds’ homeowners policy.112 The insurers filed a motion for judgment on the pleadings, arguing that the insureds did not have a cause of action, especially under Allstate’s anti-concurrent lead-in clause incorporated into the homeowners policy. The major dispute in this case was whether the Buentes’ losses

109. Many Mississippi homeowners, for example, did not purchase flood insurance, either because their mortgage companies did not require it or because their properties were not in a designated flood plain. Additional flood insurance may be purchased through the federal government under the National Flood Insurance Act, 42 U.S.C. § 4001 (2006). See STEMPPEL, SWISHER & KNUTSEN, supra note 98, § 3.03(B)(3).


111. See, e.g., Douglas R. Richmond, Insurance and Catastrophe in the Case of Katrina and Beyond, 26 Miss. C. L. Rev. 49, 73 (2006) (defending the insurers’ “combined causes” exclusions due to the potential “to seriously impair insurance markets in affected states”); Brendan R. Vaughan, Note, Watered Down: Are Insurance Companies Getting Hosed in the Wind vs. Water Controversy?, 2008 U. ILL. L. REV. 777, 777 (2008) (arguing for a “conservative approach” to these wind versus water concurrent causation disputes; otherwise, the “insurance companies will be forced to either raise premiums or to discontinue offering insurance in the Gulf Coast region”). But see Amber L. Altemose, Comment, The Anti-Concurrent Clause and Its Impact on Texas Residents After Hurricane Ike, 16 TEX. WESLEYAN L. REV. 201, 223 (2010) (“By invalidating the anti-concurrent clause and requiring insurance companies to pay for damages that are covered under the insurance policy, Texas will send a message to insurance companies to fix the broken system.”).

112. 422 F. Supp. 2d 690.
attributable to this storm surge were covered losses because they were wind-driven; or whether these losses were excluded from coverage because they were caused by water or flood.

The Allstate homeowners policy provided in relevant part with regard to the insured dwelling (section I, coverage A) and other structures (section I, coverage B):

Losses We Cover ... We will cover sudden and accidental direct physical loss to [the insured property] ... except as limited or excluded in this policy. ... Losses We Do Not Cover ... We do not cover loss to the [insured] property consisting of or caused by: 1. Flood, including, but not limited to surface water, waves, tidal water, or overflow of any body of water, or spray from any of these, whether or not driven by wind.\textsuperscript{113}

Windstorm losses, however, were covered under the policy.\textsuperscript{114} The policy also contained anti-concurrent lead-in clauses for both real property and personal property that stated in relevant part, “We do not cover loss to covered property ... when: a) there are two or more causes of loss to the covered property; and b) the predominant cause(s) of loss is (are) excluded under [l]osses.”\textsuperscript{115}

The major dispute in this case, according to Judge Senter of the United States District Court for the Southern District of Mississippi, was

whether losses attributable to “storm surge” are ... wind driven or whether losses attributable to “storm surge” are excluded from coverage because such damages are caused by “water” (Exclusion 4) or by “flood, including but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these whether or not driven by wind” (Exclusion 1).\textsuperscript{116}

Judge Senter emphasized that the exclusions found in the policy for water damage and damages attributable to flooding “are valid and enforceable policy provisions.”\textsuperscript{117} But he also stressed that because this

\begin{enumerate}
  \item Id. at 693.
  \item Id. at 694.
  \item Id.
  \item Id. at 696.
  \item Id. Id. Indeed, in the subsequent case of Buente v. Allstate Property & Casualty Insurance Co., No. 1:05CV712 LTS JMR, 2006 WL 980784 (S.D. Miss. Apr. 12, 2006), Judge Senter reiterated that the “flood exclusions” in the policy were not ambiguous.

Hurricane Katrina moved tidal waters from the Mississippi Sound on shore and inundated thousands of homes, some within and some beyond the ordinary flood [plain] established by responsible agencies of the United States government. Since the water that entered and damaged the plaintiffs’ home was tidal water, I find that
was "an exclusion from coverage in a comprehensive homeowners insurance policy, and because the exclusion constitutes an affirmative defense, Allstate would bear the burden of proving that the exclusion applies to the plaintiffs’ claims."\textsuperscript{118} Moreover, because the policy carried a specific "Hurricane Deductible Endorsement," "it [was] apparent to [him] that it was intended to cover damages sustained in a hurricane because of the effects of rain, hurricane winds, and objects that might be carried by those winds, whether or not there was also damage caused by high water."\textsuperscript{119}

Judge Senter therefore held that the Allstate homeowners policy was ambiguous, including Allstate’s anti-concurrent causation lead-in clauses that "are ambiguous in light of the other policy provisions granting coverage for wind and rain damage and in light of the inclusion of a ‘hurricane deductible’ as part of the policy."\textsuperscript{120}

To the extent that plaintiffs can prove their allegations that the hurricane winds (or objects driven by those winds) and rains entering the insured premises through openings caused by the hurricane winds proximately caused damages to the insured property, those losses will be covered under the policy, and this will be the case even if flood damage, which is not covered, subsequently occurred.\textsuperscript{121}

2. \textit{Broussard v. State Farm Fire & Casualty Co.}

In \textit{Broussard v. State Farm Fire & Casualty Co.}, the insureds’ Biloxi, Mississippi, home was completely destroyed by Hurricane Katrina, leaving only the foundation concrete slab.\textsuperscript{122} The Broussards, who did not have flood insurance, brought a claim under their State Farm homeowners policy, arguing that their home was destroyed by "tornadic" winds before the Hurricane Katrina storm surge arrived and that they were therefore entitled to recover under their homeowners policy for any losses that State Farm could not show were caused by water. The State Farm claims adjuster who inspected the site, however,

\begin{itemize}
\item the damage caused by this inundation is excluded from coverage under the Allstate policy. Id. at *1.
\item \textsuperscript{118} Buente, 422 F. Supp. 2d at 696.
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id. at 697.
\item \textsuperscript{121} Id. Judge Senter also held that alleged representations made by Allstate’s agent that the insureds did not need flood insurance because their property was situated outside the flood plain was a question of fact to be determined in a subsequent trial. Id. at 697-98.
\end{itemize}
concluded that the evidence suggested that the home was more damaged by the flood than by the wind, and State Farm denied the Broussards' claim in its entirety, applying the State Farm policy's anti-concurrent causation provisions.\footnote{123. \textit{Broussard}, 523 F.3d at 622-23.}

Judge Senter, once again the federal district court judge in the \textit{Broussard} case, noted that because this case dealt with a total loss of the property—down to the foundation slab—under these circumstances, the allocation of proof was critical, because "one party or the other must bear this total loss in the absence of evidence by which the two types of losses [wind versus water] may be reasonably identified and separated."\footnote{124. \textit{Broussard}, 2007 WL 113942, at *2.} The key issue, therefore, would be how much damage had occurred as a result of the wind \textit{before} the storm surge arrived, because the preceding wind damage would be covered, but any additional damage caused by the arrival of the flood would be excluded.\footnote{125. \textit{Id.} (emphasis added).} Once the plaintiffs established their prima facie case for coverage, based on the stipulated pretrial order, then the burden of proof shifted to State Farm to prove the merits of its affirmative defense based upon the water damage exclusion in the policy.\footnote{126. \textit{Id.} at *3 (citing Lunday v. Lititz Mut. Ins. Co., 276 So. 2d 696 (Miss. 1973)).}

And here, Judge Senter found as a matter of law that State Farm had not met its burden of proof as to the segregation of the total loss into wind damage, which was covered, and water damage, which was excluded from coverage. Also, State Farm failed to establish or offer evidence that would support a finding that the insured property sustained no wind damage.\footnote{127. \textit{Id.}} Thus Judge Senter found that State Farm was liable to the plaintiffs for the full limits of coverage under the policy and also awarded punitive damages.\footnote{128. \textit{Id.}}

On appeal, the Fifth Circuit reversed Judge Senter's trial court decision in \textit{Broussard}.\footnote{129. \textit{Broussard} v. State Farm Fire & Casualty Co., 523 F.3d 618 (5th Cir. 2008) (applying Mississippi law).} First, the Fifth Circuit distinguished \textit{Broussard} from an earlier case of \textit{Tuepker} v. State Farm Fire & Casualty Co.\footnote{130. 507 F.3d 346 (5th Cir. 2007) (interpreting a State Farm homeowners insurance policy with provisions identical to the Broussards' policy in all significant respects).}

The claims in \textit{Broussard} are different from the claims in \textit{Tuepker}. The \textit{Tuepker} plaintiffs [unsuccessfully] challenged the enforceability of
the [anti-concurrent causation] clause and the applicability of the water damage exclusion to a hurricane-created storm surge. The main thrust of the Broussards’ claim is that their home was destroyed by tornadic winds prior to the arrival of the storm surge.\textsuperscript{131}

Next, the Fifth Circuit held that the Broussards had named-peril coverage for their personal property, and open-peril coverage for their dwelling, meaning that the parties would bear different burdens of proof under their personal property and dwelling coverage:

For [personal property] “named peril” coverage . . . the plaintiff has the burden of proving that any losses were caused by a peril covered by the policy. Under [dwelling] “open peril” coverage . . . the plaintiff still has the basic burden of proving his right to recover. However, under “open peril” coverage the insurer bears the burden of proving that a particular peril falls within a policy exclusion, and must plead and prove the applicability of an exclusion as an affirmative defense.\textsuperscript{132}

The Broussards’ policy also contained an anti-concurrent causation clause that applied to both the personal property and the dwelling coverage in the State Farm policy. “The ACC clause, like the water damage exclusion, is an affirmative defense, and State Farm bears the burden of pleading and proving that the ACC clause applies.”\textsuperscript{133} But State Farm’s position on appeal was that it did not rely on the anti-concurrent causation clause in denying the Broussards’ claim, and that the claim was denied because “absent physical evidence of wind damage there was no way to pay the claim other than to speculate.”\textsuperscript{134} Thus, State Farm had waived any defense based on the anti-concurrent causation clause.\textsuperscript{135}

Ultimately, the Fifth Circuit held that State Farm had an arguable basis for denying the Broussards’ claim because the State Farm claims adjuster and other State Farm expert witnesses testified that the Broussards’ damages came from the storm surge rather than from the wind, and this testimony was “more than sufficient” to withstand a motion for judgment as a matter of law from the trial court judge.\textsuperscript{136} So although State Farm might be liable for the loss of some roof shingles

\footnotesize{\textsuperscript{131} Broussard, 523 F.3d at 623 n.1 (citations omitted).}\textsuperscript{132} Id. at 625-26 (citing Tuepker, 507 F.3d at 356-57).\textsuperscript{133} Id. at 626 n.2 (citing Tuepker, 507 F.3d at 365-67).\textsuperscript{134} Id.\textsuperscript{135} Id.\textsuperscript{136} Id. at 625. State Farm’s expert witnesses testified that although the wind may have caused a relatively small amount of damage to the Broussards’ roof, Hurricane Katrina’s winds were not strong enough to cause structural damage to the home, which was caused by the storm surge. Id.
that were damaged by the wind prior to the arrival of the storm surge, there was no malice or gross negligence on the part of State Farm to merit any punitive damages in this particular case.\textsuperscript{137}

3. \textit{In re Katrina Canal Breaches Consolidated Litigation}

\textit{In re Katrina Canal Breaches Consolidated Litigation} involved a group of consolidated cases in New Orleans, Louisiana, where the plaintiff insureds sought coverage under the defendant insurers’ property insurance policies for damages caused by flooding due to a number of levee breaches following Hurricane Katrina.\textsuperscript{138} The insurers argued that the massive water damages from the levee breaches during Hurricane Katrina were excluded from coverage under their policies’ flood exclusions.\textsuperscript{139}

Defendants contended that all water damage caused by the canal and levee breaches was excluded from coverage because these policies excluded coverage for water damage resulting from a “flood” and that the definition of “flood” was not limited to natural events.\textsuperscript{140} Plaintiffs, however, maintained that the “efficient moving cause” of their loss was a covered risk, based on third party negligence, leading to the failure of the levees.\textsuperscript{141} Thus, the salient question for district court Judge Duval [was] whether, in the context of an all-risk policy where coverage is provided for direct loss to property, these insurance provisions which exclude coverage for water damage caused by “flood” clearly and unambiguously exclude from coverage damages caused by . . . alleged third party negligence . . . which plaintiffs contend caused a section of the floodwall . . . to break causing water to enter the streets of the City of New Orleans and homes of the plaintiffs in this suit.\textsuperscript{142}

\begin{flushleft}
\textsuperscript{137} Id. at 627-29.
\textsuperscript{138} 466 F. Supp. 2d 729 (E.D. La. 2006), vacated, In re Katrina Breaches Litig., 495 F.3d 191 (5th Cir. 2007) (applying Louisiana law).

\textsuperscript{139} Policies issued by defendants Standard Fire, Hartford, Hanover, and Unitrin insurance companies stated in relevant part: “We do not insure for loss caused directly or indirectly by any of the following: . . . (c) Water Damage, meaning: Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind . . . .” Id. at 740-41 (emphasis omitted). Other defendant insurers had similar flood exclusions in their property insurance policies. Id. at 741-43.

\textsuperscript{140} Id. at 743. The defendants relied on the case of \textit{Kane v. Royal Insurance Co. of America}, 768 P.2d 678, 681 (Colo. 1989), where the plaintiffs’ property had been damaged by a flood caused by a dam failure, as authority for this proposition. In re Katrina Breaches Consol. Litig., 466 F. Supp. 2d at 744.


\textsuperscript{142} 466 F. Supp. 2d at 746.
\end{flushleft}
Judge Duval ultimately adopted the position that the term "flood" is limited only to naturally occurring events, citing to a number of cases in other jurisdictions as authority, and he then went on to distinguish cases where "flood" included water damage caused by negligent or intentional acts from the present case. Judge Duval concluded that the word "flood" has various meanings, and therefore under Louisiana law "the Court is constrained to find the language ambiguous" and "[i]f there is any doubt or ambiguity as to the meaning of a provision in an insurance policy, it must be construed in favor of the insured and against the insurer." Judge Duval also stressed that under Louisiana law, the insurance policy should be construed "to fulfill the reasonable expectations of the parties in the light of the customs and usages of the industry... In insurance parlance, this is labeled the reasonable expectations doctrine."

However, a year later, the Fifth Circuit vacated and remanded Judge Duval's opinion in In re Katrina Canal Breaches Litigation. Judge King, writing for the court, concluded that even if the plaintiffs could prove that the levees were negligently designed, constructed, or maintained, and that the breaches were due to this negligence, the flood exclusions in the plaintiffs' [property insurance] policies unambiguously preclude their recovery. Regardless of what caused the failure of the flood-control structures that were put in place to prevent such a catastrophe, their failure resulted in a widespread flood that damaged the plaintiffs' property. This event was excluded from coverage under the plaintiffs' insurance policies, and under Louisiana law, we are bound to enforce the unambiguous terms of their insurance contracts as written. Accordingly, we conclude that the plaintiffs are not entitled to recover under their policies.

143. Id. at 748-50 (citing Ebbing v. State Farm Fire & Cas. Co., 1 S.W.3d 459 (Ark. Ct. App. 1999) (burst water pipe)); see Mellon v. Hingham Mut. Fire Ins. Co., 472 N.E.2d 674 (Mass. App. Ct. 1984) (broken drainage pipe in basement); Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1, 9 n.5 (W. Va. 1998) ("A provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. This rule is based on the understanding that 'one cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance.'").
144. In re Katrina Breaches Consol. Litig., 446 F. Supp. 2d at 750.
145. Id. at 756.
147. 495 F.3d 191 (5th Cir. 2007) (applying Louisiana law).
148. Id. at 196.
Specifically, Judge King cited numerous sources to demonstrate that the term “flood” was not ambiguous, including various dictionary and encyclopedia definitions of the term “flood”\(^{149}\) and Appleman on Insurance Law.\(^{150}\) A second insurance law treatise, Couch on Insurance, also concurred that the term “flood” is generally unambiguous, and not limited only to natural causes.\(^{151}\) Judge King wrote:

In sum, we conclude that the flood exclusions in the plaintiffs’ policies are unambiguous in the context of the facts of this case. . . . This event was a “flood” within that term’s generally prevailing meaning as used in common parlance, and our interpretation of the exclusions ends there. The flood is unambiguously excluded from coverage under the plaintiffs’ all-risk policies, and the district court’s conclusion to the contrary was erroneous.\(^{152}\)

Accordingly,

we need not address the applicability of anti-concurrent-causation clauses or the efficient-proximate-cause rule because, as pleaded, there was not more than one separate cause of the plaintiffs’ losses. As the district court recognized, there are other cases arising in the context of Hurricane Katrina where these issues may come into play, but this is not the case for their resolution.\(^{153}\)


A fourth significant Hurricane Katrina property insurance dispute was that of *Leonard v. Nationwide Mutual Insurance Co.*\(^{154}\)

Plaintiffs Paul and Julie Leonard owned a home in Pascagoula, Mississippi, that was insured under a Nationwide Insurance Company homeowners policy. The Leonards’ residence was not covered by any separate policy of flood insurance when it was extensively damaged by Hurricane Katrina on August 29, 2005. The Leonards’ Nationwide

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149. *Id.* at 209-14.
151. PLITT ET AL., supra note 40, § 153:49.
152. *In re Katrina Breaches Litig.*, 495 F.3d at 221. This Fifth Circuit opinion arguably presents more of a formalist than a functionalist conclusion. See *supra* text accompanying notes 40-45.
153. *In re Katrina Breaches*, 495 F.3d at 223.
154. 438 F. Supp. 2d 684 (S.D. Miss. 2006), *aff’d*, 499 F.3d 419 (5th Cir. 2007).
insurance policy contained the following anti-concurrent causation language:

We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss. . . . (b) Water or damage caused by water-borne material. . . . Water and water-borne material damage means: (1) flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind. 155

The policy, however, did cover wind damage. 156 The primary disputes in this particular case were the cause of the damage, the extent of damage, and the question of whether Nationwide was legally obligated to reimburse the Leonards for any or all of this damage. 157 Judge Senter held:

Under applicable Mississippi law, in a situation such as this, where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss) the insured may recover that portion of the loss which he can prove to have been caused by wind. . . . Nationwide is not responsible for that portion of the damage it can prove was caused by water. To the extent property is damaged by wind, and is thereafter also damaged by water, the insured can recover that portion of the loss which he can prove to have been caused by wind, but the insurer is not responsible for any additional loss it can prove to have been later caused by water. 158

Then Judge Senter summarily invalidated Nationwide’s anti-concurrent causation clause, stating, “The provisions of the Nationwide policy that purport to exclude coverage entirely for damages caused by a combination of the effects of water (an excluded loss) and damage caused by the effects of wind (a covered loss) are ambiguous.” 159

Accordingly, Judge Senter found that “[a]lmost all of the damage to the Leonard residence is attributable to the incursion of water” and

155. Id. at 695.
156. Id. at 693 (“[T]his damage does not exclude coverage for different damage, the damage caused by wind, a covered peril, even if the wind damage occurred concurrently or in sequence with the excluded water damage. The wind damage is covered. The water damage is not.”).
157. Id. at 687.
158. Id. at 695 (citing Lititz Mut. Ins. Co. v. Boatner, 254 So. 2d 765 (Miss. 1971)) (citation omitted).
159. Id. at 693.
awarded damages to the Leonards of $1,661.17 although their total damages from Hurricane Katrina exceeded $130,000.\footnote{160} The Leonards also sued their local Nationwide agent, Jay Fletcher, whom Paul Leonard had previously asked whether he should purchase a separate flood insurance policy, and who had ventured his opinion that the purchase of such a policy was not necessary.\footnote{161} But Judge Senter held that Fletcher did not materially misrepresent the terms of the Nationwide homeowners policy to the Leonards, nor did he make any statements that could be reasonably understood to alter the terms of the Nationwide policy.\footnote{162}

The Fifth Circuit, in an opinion written by then-Chief Judge Jones, subsequently affirmed Judge Senter's lower court judgment. However, the Fifth Circuit also held that Nationwide's anti-concurrent causation clause was \textit{not} ambiguous, contrary to what Judge Senter had previously decided.\footnote{163}

The first hurdle that attorneys for Nationwide had to overcome was whether Nationwide had any standing to appeal, based upon the anti-concurrent causation clause ambiguity issue because "[o]rdinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom."\footnote{164} The Fifth Circuit held, however, that "a party may be aggrieved by a district court decision that adversely affects its legal rights or position vis-à-vis other parties in the case or other potential litigants."\footnote{165} And, in this particular case,

\[\text{[t]he ACC clause and negligent misrepresentation issues are currently being litigated by Nationwide in hundreds of cases in the trial courts, causing Nationwide to incur considerable litigation expense and potential enormous liability to other policyholders. The threat of additional claims for bad-faith denial of coverage based on the court's rulings in this case also looms large for Nationwide. In sum, the district}\]

\footnote{160. \textit{Id.} at 695.} \footnote{161. \textit{Id.} at 690 ("Fletcher did not carry flood insurance on his own property, and his office assistant, Cindy Byrd Collins, did not carry flood insurance on her property.")).} \footnote{162. \textit{Id.} at 692 ("The statement embodied Fletcher's opinion, but it did not contain a reason for that opinion. In my view, Fletcher's statement was not a representation of existing fact, and it was not, in these particular circumstances, a misrepresentation of fact.... [Leonard] did not ask Fletcher to clarify or otherwise explain the effect of the water damage exclusion in the Nationwide policy.").} \footnote{163. Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419 (5th Cir. 2007) (applying Mississippi law).} \footnote{164. \textit{Id.} at 427 (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980) (internal quotation marks omitted)).} \footnote{165. \textit{Id.} at 428 (quoting Custer v. Sweeney, 89 F.3d 1156, 1164 (4th Cir. 1996) (internal quotation marks omitted)).}
court's resolution of both the ACC clause and negligent misrepresentation issues renders Nationwide sufficiently aggrieved by the judgment below that it retains a stake in appealing the district court's damages methodology, as well as the collateral issue of the validity of Nationwide's homeowner's policy in the presence of allegedly contradictory oral representations by its agents.\textsuperscript{166}

Next, the Fifth Circuit disagreed with Judge Senter and held that the anti-concurrent causation clause in the Nationwide policy was not ambiguous. The Court held that Nationwide's anti-concurrent causation clause

unambiguously excludes coverage for water damage "even if another peril"—e.g., wind—"contributed concurrently or in any sequence to cause the loss." The plain language of the policy leaves the district court no interpretive leeway to conclude that recovery can be obtained for wind damage that "occurred concurrently or in sequence with the excluded water damage."\ldots Nationwide's assertion that the district court "simply read the clause out of the contract," is not all that wide of the mark. The clause is not ambiguous.\textsuperscript{167}

Thus concluded Judge Jones,

[b]ecause [Nationwide's] ACC clause is unambiguous, the Leonards can prevail only if they can demonstrate that [Nationwide's ACC] clause is prohibited by Mississippi caselaw, statutory law, or public policy. None of these sources of state law restricts Nationwide's use of the ACC clause to preclude recovery for concurrently caused hurricane losses.\textsuperscript{168}

The Fifth Circuit, in other words, held that parties to a property insurance contract may validly contract out of, or contract around, a default efficient or dominant proximate cause rule\textsuperscript{169} in concurrent causation coverage disputes, even though the average homeowner would not be aware of, nor fully understand, the legal effect of such an anti-concurrent causation clause.\textsuperscript{170}

The Fifth Circuit applied a more textual and formalistic plain meaning interpretive approach to anti-concurrent causation clauses in property insurance policies in these cases, often overruling Mississippi and Louisiana federal district court opinions that arguably had applied a more contextual and functionalistic reasonable expectations

\textsuperscript{166} Id. (citations omitted).
\textsuperscript{167} Id. at 430.
\textsuperscript{168} Id. at 431.
\textsuperscript{169} See supra text accompanying notes 81-87.
\textsuperscript{170} See supra text accompanying notes 81-87.
interpretive approach to anti-concurrent causation clauses in property insurance policies.\textsuperscript{171}

It is not clear at this writing whether the United States Courts of Appeals for the First and Second Circuits, applying New York and New Jersey insurance law concepts to a large number of probable property insurance coverage disputes in the wake of Hurricane Sandy's devastation of the East Coast in late October of 2012, will likewise apply a more textual and formalistic plain meaning interpretive approach to anti-concurrent causation clauses as the Fifth Circuit did, or whether the Second Circuit will apply a more functionalistic reasonable expectations interpretive approach to these anti-concurrent causation clauses in property insurance policies. Arguably, the First Circuit could recognize a more functionalistic reasonable expectations interpretive approach, at least applying New Jersey insurance law.\textsuperscript{172}

V. SIX POLICYHOLDER DEFENSES TO ANTI-CONCURRENT CAUSATION CLAUSES IN PROPERTY INSURANCE POLICIES

As the Fifth Circuit noted in the case of \textit{Leonard}, of those states that have considered the matter of concurrent causation, approximately twenty states\textsuperscript{173} have enforced the plain meaning of anti-concurrent causation exclusionary clauses in property insurance policies, which allows the parties to contract out of, or contract around, the efficient or dominant proximate cause rule in concurrent causation property insurance coverage disputes.\textsuperscript{174}

These state court decisions upholding exclusionary anti-concurrent causation clause language in property insurance policies therefore apply a more formalistic plain meaning textual approach to insurance contracts generally rather than applying a more functionalistic reasonable expectations of the parties contextual approach.\textsuperscript{175} But it is also important to note that appellate courts in approximately thirty other states have not yet dealt with this troubling

\begin{itemize}
  \item \textsuperscript{171} \textit{See Leonard}, 499 F.3d at 431.
  \item \textsuperscript{173} \textit{See supra} text accompanying notes 81-82.
  \item \textsuperscript{174} \textit{Leonard}, 499 F.3d at 433-34.
  \item \textsuperscript{175} \textit{See supra} notes 41-46 and accompanying text.
\end{itemize}
unilateral and exclusionary anti-concurrent causation clause interpretive conundrum on an appellate court level.

So what should a policyholder do when confronted with exclusionary anti-concurrent causation language in his or her homeowners’ policy? There are six possible defenses that a policyholder may raise—and should raise—to counteract the exclusionary language of an ACC clause in a property insurance policy.

(1) Unambiguous anti-concurrent causation language must appear within the insurance policy itself. Otherwise, a default efficient or dominant proximate cause interpretive rule should be applied.

In order to contract out of, or contract around, a default efficient or dominant proximate cause concurrent causation interpretive approach, express and unambiguous anti-concurrent causation language must appear within the insurance policy itself. Otherwise, a default efficient or dominant proximate cause interpretive rule should prevail. For example, in Bongen, the Alaska Supreme Court recognized State Farm’s anti-concurrent causation clause relating to an earth movement exclusion in its property insurance policy. But in the subsequent case of West, the same court applied the efficient or dominant proximate cause rule for concurrent causation, because that property insurance policy did not have any anti-concurrent causation language appearing within the policy itself. Moreover, if a court finds that the anti-concurrent causation clause language is ambiguous, then it is to be interpreted liberally in favor of the nondrafting party (the policyholder) and interpreted strictly against the drafting party (the insurance company).

(2) Even if the anti-concurrent causation language is clear and unambiguous, the insurer may be held to have waived it, or be estopped to deny it.

“Waiver” in insurance law is the express or implied voluntary relinquishment of a known right, which may result from either the affirmative acts of the insurer or its authorized agent or from the

176. See supra notes 81-87 and accompanying text.
179. See, e.g., Buente v. Allstate Ins. Co., 422 F. Supp. 2d 690, 696 (S.D. Miss. 2006); see also supra notes 117-121 and accompanying text (analyzing the Buente opinion).
insurer’s nonaction, with knowledge of the applicable facts. ¹⁸⁰ For example, in Broussard, State Farm’s position on appeal was that it did not rely on its anti-concurrent causation clause in denying the plaintiffs’ claim; so State Farm therefore waived any defense it had based on its anti-concurrent causation clause. ¹⁸¹

“Estoppel,” on the other hand, does not require any actual surrender of a known right. Rather, it implies some misleading act, conduct, or inaction on the part of the insurer or its agent upon which the insured detrimentally relies. ¹⁸² For example, in Leonard, the plaintiffs sued their local Nationwide agent, Jay Fletcher, who had ventured his opinion that the Leonards did not need to buy a separate flood insurance policy, and the Leonards argued that they had relied on Fletcher’s statement to their detriment. ¹⁸³ But the trial court judge ruled on the facts of this particular case that Fletcher did not materially misrepresent the terms of the Nationwide policy, nor did he make any statements which could be reasonably understood to alter the terms of the Nationwide policy. ¹⁸⁴ On appeal, the Fifth Circuit likewise held that Fletcher’s statements did not bind Nationwide:

General agency law controls the relationship between insurance companies and their agents. Under Mississippi law, an agent’s representations that purport to modify the insurance contract can bind an [insurance company] only if the statements were made pursuant to actual or apparent authority. . . . Nationwide does not authorize its [general] agents to orally modify contracts . . . [; therefore,] the Leonard’s reliance on Fletcher’s statements was objectively unreasonable in light of the policy language clearly excluding water damage, including damage caused by a flood. ¹⁸⁵

However, in those cases where a general agent’s powers are not so limited by the insurer, a waiver or estoppel argument based upon the actual or apparent authority of the agent may be actionable. ¹⁸⁶

¹⁸⁰. Plitt et al., supra note 40; Jeffrey W. Stempel, Law of Insurance Contract Disputes § 5.01-.05 (3d rev. ed. 2010); Stempel, Swisher & Knutsen, supra note 98.
¹⁸³. Leonard v. Nationwide Mut. Ins. Co., 438 F. Supp. 2d 684 (S.D. Miss. 2006), aff’d, 499 F.3d 419 (5th Cir. 2007) (reasoning that an actor must have falsely represented or concealed a material fact for estoppel to apply).
¹⁸⁴. Id. at 692.
¹⁸⁵. Leonard, 499 F.3d at 439-40 (citation omitted).
¹⁸⁶. See Jerry & Richmond, supra note 1, at 212-50.
(3) Some courts, applying a functionalistic reasonable expectations interpretive approach, rather than a formalistic plain meaning contractual approach, may declare that anti-concurrent causation clauses found in property insurance policies are invalid and unconscionable based on public policy grounds.

The West Virginia Supreme Court in Murray rejected the reasoning that parties to a property insurance contract can contract out of or contract around an efficient or dominant proximate cause doctrine. Anti-concurrent causation clauses, according to the West Virginia Supreme Court, are contrary to the reasonable expectations of the parties and void as against public policy because insurance contracts normally are contracts of adhesion, and the parties did not freely contract "to exclude the efficient proximate cause doctrine." Although this West Virginia reasonable expectations approach to the interpretation of anti-concurrent causation clauses in property insurance policies is not currently a majority approach today, it may be persuasive to other functionalist American courts that have not yet had an opportunity to interpret anti-concurrent causation clauses in their own particular jurisdictions.

(4) If a state has enacted a statute recognizing that the efficient or dominant proximate cause doctrine is applicable to insurance concurrent causation issues, the statute will prevail over any anti-concurrent causation clause language appearing in the policy.

California and North Dakota each require efficient proximate causation by state statute, and such statutory language would prevail over any anti-concurrent causation clause language in the property insurance policy itself.

(5) Even in the absence of a state statute mandating an efficient or dominant proximate cause approach to concurrent causation disputes, a state court could still apply an efficient proximate cause doctrine if the anti-concurrent clause language excluded

188. See supra notes 17-39 and accompanying text.
190. See CAL. INS. CODE § 530 (2013).
certain perils, no matter how insignificant those perils may have been to the loss.

Persuasive arguments supporting the efficient proximate cause doctrine over anti-concurrent causation clause policy language in property insurance coverage disputes are not limited only to statutory law. For example, in *Hirschmann*, the Washington Supreme Court held that the efficient proximate cause doctrine in Washington would prevail over anti-concurrent causation language in the policy, unless the excluded peril was the "efficient proximate cause" of the loss. In this case, and in a similar case, the Washington Supreme Court held that an insurer could not circumvent its "efficient proximate cause" rule through the use of anti-concurrent causation clause language purporting to exclude any perils no matter how insignificant those perils might have been to the loss. In dissent, Chief Justice Callow stated, "Contrary to settled law, the majority invalidates unambiguous language in an insurance contract without stating how it is inconsistent with this state's public policy." What would happen to a formalist plain meaning interpretive approach in assessing property insurance coverage disputes if more courts adopted this Washington State approach? And should such a distinction be made between efficient or dominant causes, and insignificant causes, in anti-concurrent causation clause exclusionary language?

(6) **The burden of proof on an insurer to uphold any exclusion under its anti-concurrent causation clause language in a property insurance policy should at least be as rigorous as the burden of proof on a policyholder to prove coverage under the policy.**

An insured, in order to prove coverage under his or her property insurance policy, generally must prove that a direct physical loss to the property occurred. However, many anti-concurrent causation clauses

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193. Safeco Ins. Co. of Am. v. Hirschmann, 773 P.2d 413, 416-17 (Wash. 1989); see supra notes 92-95 and accompanying text.
195. *Hirschmann*, 773 P.2d at 415 (emphasis added) (citing Safeco Ins. Co. of Am. v. Hirschmann, 760 P.2d 969 (Wash. Ct. App. 1988)). In footnote 1 of this case, the court referred to a deposition of Safeco's "vice president of personal lines-underwriting": "Q. Doesn't [the language of your lead-in exclusionary clause] attempt to exclude a cause no matter how slight that cause may contribute to the loss? A. Yes, that's the intent." Id. at 415 n.1.
196. Id. at 420.
197. *See supra* notes 40-42 and accompanying text.
198. This author would argue in the affirmative. See *infra* text accompanying note 201 for my discussion on policyholder defense item (6).
state, “We do not insure for loss caused directly or indirectly by any of the following.” Thus few anti-concurrent causation clauses expressly require that a direct dominant or efficient exclusionary clause must be proven by the insurer, because it must normally be proven by the insured for coverage to exist.\(^{199}\)

To avoid such contractual unfairness, courts should adopt a “what’s good for the goose is good for the gander” interpretive approach to anti-concurrent causation clauses: That is to say, in any property insurance contractual dispute involving anti-concurrent causation clauses, in order to deny coverage effectively, the insurer also must demonstrate that the excluded clause or clauses were dominant or efficient direct concurrent causes, rather than indirect and insignificant causes, similar to the insured’s burden of proof for coverage involving multiple concurrent causation.\(^{200}\)

For example, in Buente, the plaintiffs’ homeowners policy included the following language: “We do not cover loss to covered property . . . when: (a) there are two or more causes of loss to the covered property; and (b) the predominant cause(s) of loss is (are) excluded under [l]osses . . . .”\(^{201}\) In the absence of such express language in the property insurance policy, however, courts should impliedly adopt this “goose/gander” rule based on public policy grounds.\(^{202}\) Otherwise, to allow an insurer to exclude coverage based upon indirect and insignificant causes in its anti-concurrent causation clause language “could in theory tempt an insurer to take it to an unreasonable extreme, which in turn could cause a court to overreact and construe the clause too narrow, creating an undesirable precedent.”\(^{203}\)

Thus, if an unwary property owner is unaware of anti-concurrent causation clause language in his or her homeowners policy, there are at least six possible defenses that a policyholder may still raise to counteract the exclusionary anti-concurrent causation clause language in a property insurance policy.

\(^{199}\) See supra notes 95-103 and accompanying text.

\(^{200}\) See, e.g., Hirschmann, 773 P.2d 413.


\(^{202}\) See, e.g., Hirschmann, 773 P.2d at 414-17.

\(^{203}\) Knox, supra note 3, at 925-26.
VI. CONCLUSION

Property insurance coverage disputes can be extremely complex cases when there are multiple concurrent causes in a causal chain of events that result in a loss and when some of these concurrent causes are covered under the insurance policy language but other concurrent causes are excluded from coverage. To complicate matters more, there are no fewer than three different judicial interpretive approaches attempting to resolve this concurrent causation interpretive conundrum.

A number of property insurance companies over the past two decades have unilaterally addressed these insurance coverage disputes involving concurrent causation by inserting anti-concurrent causation clauses or similar lead-in clauses in their property insurance policy language, in effect denying coverage to many unwary policyholders for various losses that have multiple concurrent causes.

Some courts apply a strict textual and formalistic plain meaning contractual interpretation to anti-concurrent causation clauses in property insurance policies, which allows the parties to contract out of or contract around a default dominant proximate cause approach in concurrent causation disputes. Other courts have applied a more contextual and functionalistic interpretive approach to anti-concurrent causation clauses, taking into account the reasonable expectations of the parties and state public policy, as well as the contractual language found in the insurance policy. I argue that a contractually based reasonable expectations doctrine is a realistic and viable "middle ground" interpretive approach to the strict proinsurer formalist textual interpretation on one hand and the contextual propolicyholder functionalistic interpretation on the other hand.

Accordingly, this Article concludes with six proposed defenses that a policyholder may argue to counteract the onerous exclusionary language of anti-concurrent causation clauses found in many homeowners and other property insurance policies today. These six policyholder defenses can be—and should be—raised in subsequent wind-versus-water coverage disputes, including the devastating property damage caused by Hurricane Sandy in late October 2012.