

Hurricanes Katrina and Rita:

Anti-Concurrent Causation Clauses
Enforcement and Implications

by Kimberly Myers

The hurricane season of 2005 brought two major storms to the gulf coast¹ and brought many poor and underinsured communities in Louisiana and Mississippi to their knees.² In the wake of the storms, communities, homeowners, insurers, along with state and federal governments have begun to address the insurance dilemma presented by the catastrophes. This paper addresses the evolution, current use and enforcement of anti-concurrent causation (ACC) clauses in first-party property insurance and the implications for homeowners and public adjusters. In doing so, this paper reviews the evolution of today's homeowner's policies including the flood exclusion and the anti-concurrent causation clause.³ The paper then examines the default doctrine of efficient proximate cause (EPC) and how courts have applied ACC clauses where common law indicates that the state follows the efficient proximate cause doctrine.⁴ Next, the paper examines the implications for policy holders and public adjusters,⁵ finally the paper looks at the reforms of NFIP proposed by congress and suggests that public adjusters should support a reform that would combine windstorm and flood insurance in one policy.⁶

¹ Hurricane Katrina made landfall on the gulf coast August 29, 2005. See RICHARD D. KNABB ET AL., NATIONAL HURRICANE CENTER, TROPICAL CYCLONE REPORT HURRICANE KATRINA 3 (2005), available at http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf. Hurricane Rita hit the some of the same areas September 24, 2005. See RICHARD D. KNABB ET AL., NATIONAL HURRICANE CENTER, TROPICAL CYCLONE REPORT HURRICANE RITA 2 (2006), available at http://www.nhc.noaa.gov/pdf/TCR-AL182005_Rita.pdf.

² See *Insurance Claims Payment Process in the Gulf Coast after the 2005 Hurricanes Before the U.S. H. Financial Serv. Comm. Subcomm. on Oversight and Investigations*, 110th Cong. 5 (2007), (written Testimony of Robert P. Hartwig, President & Chief Economist, Insurance Information Institute), available at http://server.iii.org/yy_obj_data/binary/768660_1_0/Hartwig%20Hurricane%20Oversight%20Testimony.pdf "In parts of coastal Mississippi, for example, fewer than 20 percent of dwellings were insured against flood. By contrast, upwards of 60 to 80 percent of homes in some Louisiana parishes had flood coverage." *Id.*

³ See *infra* Part I.

⁴ See *infra* Part II.

⁵ See *infra* Part III.

⁶ See *infra* Part IV.

I. EVOLUTION OF TODAY'S ALL-RISK POLICIES IN FIRST-PARTY PROPERTY INSURANCE

There are two main types of property insurance, “all-risk” or “open-peril” policies, and “named-peril” policies. Initially first-party property insurance consisted of named-peril policies, usually fire policies.⁷ Named-peril policies were policies written for certain perils, and covered only those perils specifically included by the policy.⁸ Homeowners would buy several policies in order to obtain the coverage that they required.⁹ This would usually include a fire policy, a vandalism policy, a theft policy, etc.¹⁰ All-risk policies on the other hand, emerged from marine insurance and insured “all risks” that may be encountered at sea.¹¹ The insurance industry realized the advantages to such comprehensive coverage and began to issue all-risk policies in homeowner’s insurance.¹² Insurers sought to cover the same risks that were covered in the separate named-peril policies in one-policy. In order to minimize exposure to additional risks, the all-risk policies included a list of exclusions. Now, most first-party or homeowner’s policies are all-risk policies.¹³

⁷ Mitchell F. Crusto, *The Katrina Fund: Repairing Breaches in Gulf Coast Insurance Levees*, 43 HARV. J. ON LEGIS. 329, 334 (2006).

⁸ See Brian Lake, *The Empire Strikes Back: The Insurance Industry Battles Toxic Mold*, 33 WM. MITCHELL L. REV. 1527, 1538 (2007). “On the other hand, with “named perils” policies, one must focus on those perils covered in the policy, and the coverage analysis centers around whether any of those covered perils caused the damage.” *Id.*

⁹ See Crusto, *supra* note 7.

¹⁰ *Id.*

¹¹ See Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance* 36 TORT & INS. L.J. 777, 782–83 (2001).

¹² *Id.*

¹³ See Pamela A. Okano, *What do we cover, Read the policy!*, 36 WTR BRIEF 12, 13 (2007) (“Today, the basic first-party property coverage for dwellings offered by many homeowners policies is an “all risks,” “all perils,” or “open perils” coverage”).

The general rule under an all-risk policy is a presumption of coverage.¹⁴ In order to get the benefit of the presumption the insured must show only (1) that the policy was in effect at the time of the loss, (2) that insured interest sustained the loss, and (3) that the loss was fortuitous.¹⁵ A property owner showing these three elements generally is entitled to the presumption of coverage, and the insurance company must show that the loss was due to an excluded cause. Conversely in a named-peril policy, it is the policyholder's burden to prove that the damage was caused by one of the named perils.¹⁶ As discussed at greater length *infra*, these causation issues create opportunities for public adjusters to work with homeowners and experts to write a claim that delineates between damage caused by the covered peril and damage caused by the excluded peril.¹⁷ While the final decision as to causation is a question of fact left for a judge or jury to determine (a public adjuster cannot determine causation)¹⁸ a well-written claim with expert opinions and or testimony available will likely result in greater and more expeditious recovery for the homeowner.

¹⁴ See e.g., *In Re Katrina Canal Breaches Litigation*, 495 F.3d. 191, 208 (2007), *cert denied*, 128 S. Ct. 1230 (2008), *cert. denied* 128 S.Ct. 1231 (2008).

¹⁵ *Id.* A loss is generally considered fortuitous if it is a loss beyond the control of either party. *U. S. Industries, Inc. v. Aetna Cas. & Sur. Co.*, 690 F.2d 459, 461 (5th Cir. 1982).

¹⁶ Interestingly in Mississippi, homeowners purchase separate windstorm insurance for their personal property. That insurance is named-peril insurance, and thus the insured is burdened with showing that the damage is caused by windstorm. See *Brian Lake supra* note 8 at 1538. However, dwelling insurance in Mississippi remains an all-risk or "open peril" policy under which there is a presumption of coverage. *Id.* Insurers have argued that though the presumption of coverage exists in the open-peril policy, once the insurance companies advances some evidence its exclusion defense the burden shifts back to the homeowners to prove there is an exception to the exclusion. See *Broussard v. State Farm Fire and Cas. Co.*, No. 07-60443, 2008 WL 921699, *4 (5th Cir. April 7, 2008). Placing the burden on homeowners to demonstrate that the damage was cause by windstorm and not excluded water damage creates problems for homeowners who cannot readily delineate between damage caused by the covered peril and that caused by the excluded peril. The Fifth Circuit, however, decided that the "shifting-back" regime proposed by the insurance company was not the law in Mississippi. *Id.* at *5.

¹⁷ See *infra* Part III.B.

¹⁸ See Peter Nash Swisher, *Insurance Causation Issues: The Legacy of Bird v. St. Paul Fire & Marine Ins. Co.*, 2 NEV. L.J. 351, 385 (2002) (noting that causation is "determined by a court or a trier of fact").

A. The Flood Exclusion and the National Flood Insurance Program

Flood insurance is not considered to be a commercially viable form of insurance.¹⁹

Generally, insurance companies only offer coverage when risks can be calculated and spread over a large population.²⁰ Flood insurance differs from other types of insurance because flood risks tend to be centralized around coastal regions and bodies of water that may overflow. With such a centralized risk, the problem of adverse selection arises.²¹ That is, only high risk people are likely to purchase flood insurance; and those who do purchase are likely to make frequent claims.²² Because of this dynamic, insurance companies have found flood insurance to be cost-prohibitive and have not consistently offered private flood insurance,²³ and as all-risk policies emerged they did so with flood exclusions.

Though a sound business reason exists for insurance companies to exclude flood and water damage, that exclusion creates a problem for owners of property located in flood prone areas. Responding to this gap in coverage, in 1968 the federal government established the National Flood Insurance Program (NFIP).²⁴ Through this program homeowners in flood prone areas can obtain flood insurance through NFIP itself or private companies (through Write-Your-

¹⁹ See Crusto, *supra* note 7, at 335. Flood insurance was, however, available commercially as an additional peril added to a fire policy until about 1930. After the dramatic flooding of the Mississippi river in 1927 commercial interest in flood insurance quickly faded. See Adam F. Scales, *A Nation of Policyholders: Governmental and Market Failure in Flood Insurance*, 26 MISS. C. L. REV. 3, 7 (2007).

²⁰ See Crusto, *supra* note 7, at 335.

²¹ See Scales, *supra* note 19. “Adverse selection occurs when insureds know more about their risk profiles than their insurers.” *Id.*

²² See Crusto, *supra* note 7, at 335.

²³ *Id.*

²⁴ See generally FED. EMERGENCY MGMT. AGENCY FED. INS. & MITIGATION ADMIN., NATIONAL FLOOD INSURANCE PROGRAM, PROGRAM DESCRIPTION (2002), available at <http://www.fema.gov/library/viewRecord.do?id=1480> (click on view/download/print).

Own (WYO) carriers) that are subsidized and guaranteed by the federal government.²⁵ Coverage under the NFIP goes up to \$250,000 for property and an additional \$100,000 for contents.²⁶ Additionally some private insurance carriers offer coverage in excess of those limits.²⁷ The premiums charged for the flood insurance under NFIP are set by the federal government and based on the level of risk and type of property to be insured.²⁸ The NFIP however offered only limited help to the victims of Katrina, because very few of those affected had flood insurance.²⁹

B. The Anti-Concurrent Causation Clause

A typical anti-concurrent causation clause may read, “[w]e will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.”³⁰ Following the lead in language quoted above, would be a list of exclusions, typically including an exclusion for loss from flooding.³¹ The ACC clause was designed to limit the insurer’s liability when an otherwise covered risk combines with an excluded peril. Where ACC

²⁵ See *id.* at 26; see also R. Jason Richards, *The National Flood Insurance Program: A “Flood” of Controversy*, 82 FLA. B.J. 9 (April 2008). “Flood insurance policies can be issued by FEMA directly or by private insurers called write your own (WYO) companies, who issue flood policies in their own names, collect premiums under segregated accounts, and pay claims. In the event there are insufficient funds in the segregated accounts to pay potential outstanding claims, WYO companies must cease writing flood insurance altogether.” *Id.* at 10.

²⁶ See *id.* at 25.

²⁷ Rachel Emma Silverman, *Flood Coverage For Costly Homes*, The Wall Street Journal Online, September 2, 2005, <http://www.realestatejournal.com/buysell/taxesandinsurance/20050902-silverman.html> (noting that among others American International Group Inc., Chubb Corp. and Lloyd's provide excess flood insurance).

²⁸ See Richards, *supra* note 25, at 26–27.

²⁹ See Scales, *supra* note 19, at 15 (noting “fewer than one-in-ten residents along the Gulf Coast of Mississippi are believed to have held flood insurance prior to Katrina”).

³⁰ See Randy J. Maniloff, *Unraveling Insurance Coverage for Hurricane Katrina: No Big Easy Task*, THE NATIONAL UNDERWRITER, 2 (Sept. 2005) (citing Insurance Services Office’s (ISO) current Causes of Loss – Special Form (CP 10 30 04 02), accompanying ISO’s Building and Personal Property Coverage Form (CP 00 10 04 02)), available at http://www.policyholdersofamerica.org/pdf_public/insurance_coverage_for_katrina.pdf.

³¹ *Id.*

clauses are enforced the insurer may be able to avoid liability for both the covered and the excluded peril depending on how a court interprets the exclusionary language. Recently courts have been asked to determine whether the insurance companies' language supersedes the common law doctrine of efficient proximate cause. The majority response has been that insurance companies can use ACC clauses to contract around the common law rule of efficient proximate cause.

Prior to the emergence of anti-concurrent causation regime, most jurisdictions operated under a "concurrent causation," or efficient primary efficient cause (EPC) doctrine. Under these doctrines, a homeowner was more likely to recover. These doctrines left plenty of room for judicial activism. Judges were known to find coverage where the policy (and perhaps even the policy holder) clearly intended there to be none.³² This effectively required insurance companies to pay for a risk that was not contemplated when determining the premium for the property insurance.³³ As a reaction, insurance companies began including anti-concurrent causation clauses in their policies which explicitly excluded coverage from a non-covered peril even if it occurred at the same time or in conjunction with the covered peril.³⁴ In the aftermath of Hurricane Katrina and Rita these anti-concurrent causation clauses have been widely attacked by homeowners as ambiguous and alleged to be unenforceable.³⁵ Despite early success and pro-consumer rulings, recent decisions from the Fifth Circuit Court of Appeals have found such

³² See Scales, *supra* note 19, at 29–30.

³³ *Id.* (noting that "[c]ourts detect what may or may not be a genuine ambiguity and resolve it in favor of coverage).

³⁴ *Id.* (noting that as a reaction to judicial opinions indicating that exclusionary language must not be ambiguous, insurance companies continued to draft language to more clearly exclude coverage, culminating in the anti-concurrent causation clauses now widely included in homeowner's insurance policies).

³⁵ See Rhonda D. Orin, *First-Party Coverage for Catastrophic Risks: Part I – Personal Lines*, in PRACTISING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 89, 95–96 (Practising Law Institute 2007).

clauses to be unambiguous and enforceable.³⁶ Continuing application of the anti-concurrent causation clause in this manner creates the inverse of the problem that such clauses sought to avoid. Now, rather than the insured gaining a benefit that they didn't pay for, the insurer may be able to avoid liability for a risk that the insured paid to be protected against.

II. THE DOCTRINE OF EFFICIENT PROXIMATE CAUSE (EPC)

Under the EPC doctrine a loss caused by two or more causes was not excluded if the covered cause was the dominant, primary, or efficient cause of the loss.³⁷ That is, if wind (a covered peril) and water (an excluded peril) combined to create a loss, and if a court found that the wind was the dominant, primary, or efficient cause of the loss, there would be coverage under the insurance policy. On the other hand, if the court found that the covered peril was not the dominant, efficient, or primary cause of the loss there would be no coverage, or in some instances reduced coverage. The EPC doctrine had been applied in Louisiana and Mississippi Courts prior to Hurricane Katrina.³⁸

A. Out of Jurisdiction Jurisprudence

The majority of jurisdictions that have addressed the validity and enforceability of anti-concurrent causation clauses have found that ACC language can override the common law doctrine of efficient proximate cause.³⁹ Of the states that have addressed the question, only West

³⁶ Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 430 (5th Cir. 2007), *cert. denied*, No. 07-880, 2008 WL 77718 (April 13, 2008).

³⁷ See Orin, *supra* note 35, at 99.

³⁸ *Id.* (citing Roach-Strayhan-Holland Post No. 20 Am. Legion Club, Inc. v. Cont'l Inc. Co. of N.Y., 112 So. 2d 680 (La. 1959), and Lorio v. Aetna Ins. Co., 232 So. 2d 490 (La. 1970) each discussing the dominant cause of the event).

³⁹ James A. Knox Jr., *Causation, The Flood Exclusion, and Katrina*, 41 TORT TRIAL & INS. PRAC. L.J. 901, 925 & n.173 (2006). "The majority of courts nationally have enforced anticoncurrent causation clauses, understanding their intent of overcoming the efficient proximate cause rule and excluding coverage when the loss is caused by a combination of covered and excluded perils." *Id.*

Virginia, Washington, and California⁴⁰ have determined that an anti-concurrent causation clause does not trump the common law doctrine of efficient proximate cause. The West Virginia Supreme Court described the “efficient proximate cause” doctrine holding that,

when examining whether coverage exists for a loss under a first-party insurance policy when the loss is caused by a combination of covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss. . . . The efficient proximate cause is the risk that sets others in motion. It is not necessarily the last act in a chain of events, nor is it the triggering cause.⁴¹

The EPC doctrine has been used often in the context of mold cases. In mold cases, courts have applied the EPC doctrine when a burst pipe or some other covered peril (i.e. vandalism) causes mold (an excluded peril) to develop. In some such cases, the courts have found that the covered peril was the EPC of the loss, and allowed recovery even in the presence of a mold exclusion.⁴²

B. Mississippi Caselaw Related to Efficient Proximate Cause

Mississippi courts have often addressed the doctrine of efficient proximate cause as related to windstorm policies and hurricanes. As early as 1952 the Supreme Court of Mississippi held that if the dominant and efficient cause of the loss is the covered peril the insured can recover.⁴³ Specifically many cases from the aftermath of Hurricane Camille addressed very similar questions (e.g. whether windstorm policies would cover a loss when the damage was

⁴⁰ California has adopted the “efficient proximate cause” doctrine by statute. See Jay M. Levin, *Recent Developments in Property Insurance Law*, 41 TORT TRIAL & INS. PRAC. L.J. 685, 692 (2006).

⁴¹ *Murray v. State Farm Fire and Cas. Co.*, 509 S.E.2d 1, 12 (W.Va. 1998).

⁴² Courts have allowed coverage in these cases because they find that the efficient cause of the mold is the covered peril. For instance in a Washington case residential tenants caused mold growth through vandalism. *Bowers v. Farmers Ins. Exchange*, 991 P.2d 734 (Wash. App. 2000). There the court found that because vandalism was a covered peril, and because the covered peril was the efficient cause of the mold, that there was coverage under the policy despite an exclusion for mold. *See id.* The court reasoned that if the insured peril is the proximate cause of the loss, there is coverage “even if subsequent events in the causal chain are specifically excluded from coverage.” *See id.* at 737.

⁴³ *See Evana Plantation v. Yorkshire Ins. Co.*, 58 So.2d 797, 798 (Miss.1952). “The general rule is that, if the cause designated in the policy is the dominant and efficient cause of the loss the right of the insurer to recover will not be defeated by the fact that there were contributing causes.” *Id.*

caused by wind and water) to those posed by Hurricanes Katrina and Rita.⁴⁴ In *Grace v. Lititz Mutual Insurance Company*, the court extensively reviewed the facts and testimony presented at trial and finally held that, [i]t is sufficient to show that wind was the proximate or efficient cause of the loss or damage notwithstanding other factors contributed to the loss.”⁴⁵

A notable difference between the insurance contracts interpreted following Hurricane Camille and those interpreted following Hurricanes Katrina and Rita was that the insurance contracts of the 1960s and 1970s did not include the ACC clauses.⁴⁶ After Hurricanes Katrina and Rita, homeowners in Mississippi sought to apply the EPC doctrine to find coverage for losses incurred where damage was caused by both wind and water.⁴⁷ However, homeowners now faced the heightened challenge of showing not only that the wind was the efficient proximate cause of the loss, but also that the ACC clause did not prohibit or lessen recovery.

In *Leonard v. Nationwide Mutual Insurance Co.*, the Fifth Circuit interpreted the ACC clause to prohibit recovery when a covered and excluded peril occurred concurrently and each contributed to the loss.⁴⁸ The ACC clause in question read,

“[w]e 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 the loss. ... Water or damage caused by water-

⁴⁴ Hurricane Camille made landfall on August 17, 1969. See Hurricane Camille August 16-21, 1969, <http://www.hpc.ncep.noaa.gov/tropical/rain/camille1969.html> (last visited April 27, 2008).

⁴⁵ See *Grace v. Lititz Mutual Insurance Company*, 257 So.2d 217 (1972). See also *Lititz Mut. Ins. Co. v. Boatner*, 254 So.2d 765 (1971) (employing a similar analysis and reaching a similar outcome applying the efficient proximate cause standard).

⁴⁶ See Lolita Buckner Inniss, *A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina*, 27 B.C. THIRD WORLD L.J. 325, 341–42 (2007) (nothing that “[b]ecause of the doctrine’s success, many insurers had inserted anti-concurrent causation clauses in their policies, chiefly in response to paying large numbers of claims from the devastation of Hurricane Camille in 1969”) (internal quotations omitted).

⁴⁷ See *id.*

⁴⁸ *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 430 (5th Cir. 2007), *cert. denied*, No. 07-880, 2008 WL 77718 (April 13, 2008).

borne material ... flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind.”⁴⁹

In *Leonard*, the homeowner suffered losses from both wind and water. The trial court found that the ACC clause was ambiguous, and interpreted it to exclude coverage for the excluded peril but to allow for recovery for damage caused by the covered peril.⁵⁰ Thus the court awarded a small sum for the wind damage to the property while excluding coverage for the water damage.⁵¹

On appeal, the Fifth Circuit criticized the trial court and held that the ACC clause was not ambiguous and that a straightforward reading of the text of the clause led only to the conclusion that the ACC clause eliminated coverage for both covered and excluded perils if the perils occurred concurrently.⁵² The court distinguished among three types of damages, those caused exclusively by wind, those caused exclusively by water, and those caused concurrently by both.⁵³ The Court reasoned that in the presence of the ACC clause, only damage caused exclusively by wind would be covered.⁵⁴ Because the trial court only allowed recovery for damaged caused exclusively by wind, the judgment was affirmed, but the reasoning was highly criticized.⁵⁵ The Fifth Circuit noted that if the insurer had proven that the wind damage “was caused by the concurrent or sequential action of water” that the ACC clause would prohibit recovery under the policy.⁵⁶

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *Id.* at 430–31.

⁵⁵ *See id.*

⁵⁶ *See id.* at 430.

The Court considered Mississippi’s jurisprudence which had held that there was coverage under a policy if the covered peril was the efficient proximate cause of the loss. The court noted the default rule is the EPC doctrine, and under that rule “it is sufficient to show that wind [i.e. the covered peril] was the proximate or efficient cause of the loss . . . notwithstanding other factors [i.e. excluded perils like water] contributed”⁵⁷ Though the court acknowledged the application of this doctrine in the aftermath of Hurricane Camille, it went on to note that in those cases, there was no ACC clause to challenge the doctrine.⁵⁸ Ultimately, the Court found that the ACC clause was an effective way of contracting around the EPC doctrine.

C. Louisiana Caselaw Related to Efficient Proximate Cause

At least two Louisiana cases prior to litigation arising from the hurricanes of 2005, have applied the efficient proximate cause doctrine. In *Roach-Strayhan-Hollan Post No. 20. Am. Legion Club, Inc. v. Cont’l Ins. Co. of N.Y.*, the Louisiana Supreme Court applied the doctrine. In the case, an American Legion Hall’s roof caved in.⁵⁹ The court found that though the roof was not adequately constructed, the high winds the night the roof collapsed were the dominant cause of the loss.⁶⁰ Thus the court allowed the property owner to recover for the loss.⁶¹

The Louisiana State Supreme Court again addressed the efficient or dominant cause of a loss in *Lorio v. Aetna Ins. Co.*⁶² In *Lorio*, a race horse was stabled in a damaged shed after the

⁵⁷ *Id.* at 432 (citing *Lititz Mut. Ins. v. Boatner*, 254 So.2d 765, 767, omissions and alterations in original).

⁵⁸ *Id.* at 433 (citing to earth movement cases in Mississippi the Fifth Circuit noted that ACCs “that abrogated the default efficient proximate causation rule and excluded damage occasioned by the synergistic action of a covered and an excluded peril” had been upheld).

⁵⁹ *See Roach-Strayhan-Holland Post No. 20 Am. Legion Club, Inc. v. Cont’l Inc. Co. of N.Y.*, 112 So. 2d 680 (La. 1959).

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *Lorio v. Aetna Ins. Co.*, 232 So. 2d 490 (La. 1970).

hurricane.⁶³ The horse was able to knock through a wall separating the horse from the feed; once it did so it ate the feed until it foundered and died.⁶⁴ There, the Court discussed causation and found that the Hurricane was not the EPC of the horse's death and did not allow recovery.⁶⁵

The Fifth Circuit addressed the application of the EPC rule in Louisiana claims in *In Re Katrina Canal Breaches Litigation*.⁶⁶ Of specific interest in that case is the claim brought by the *Chehardy* plaintiffs. Those plaintiffs sought a “declaratory judgment that the efficient proximate causes of their damage were windstorm, acts of negligence, and storm surge, all of which were covered perils.”⁶⁷ In the *Chehardy* claim, several insurance policies included ACC clauses.⁶⁸ The Fifth Circuit carefully examined the language of the exclusions to determine whether the plaintiffs in the action could apply the EPC doctrine to find recovery.⁶⁹ The court, however, found that there was no reason to apply the anti-concurrent causation language to determine whether the loss was covered.⁷⁰ Rather here, the court reasoned, that the homeowners were not

⁶³ *See id.* at 491–92.

⁶⁴ *See id.*

⁶⁵ *See id.* at 493.

⁶⁶ *In Re Katrina Canal Breaches Litigation*, 495 F.3d. 191 (2007), *cert denied*, 128 S. Ct. 1230 (2008), *cert. denied* 128 S.Ct. 1231 (2008).

⁶⁷ *Id.* at 201.

⁶⁸ For example several policies read, “[w]e 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 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 202.

⁶⁹ The Fifth Circuit, while acknowledging that Louisiana state courts had applied the doctrine, “express[ed] no opinion on the extent to which Louisiana follows the efficient-proximate-cause rule in the context of all-risk policies because we conclude that the rule is inapplicable to this case.” *Id.* at 222, n. 28. Rather, the Court found that the language used by the insurance companies in their exclusionary clauses amounted to anti-concurrent causation clauses, and cited to an Eighth Circuit Court of Appeal decision noting that ACC language “has been recognized as demonstrating an insurer’s intent to contract around . . . the efficient-proximate-cause rule.” *Id.* at 222 (citing *TNT Speed & Sport Ctr., Inc. v. Am. States. Ins. Co.*, 114 F.3d 731, 732–33 (8th Cir. 1997)).

⁷⁰ *Id.* at 223.

arguing that two causes combined but instead that one covered peril caused the damage.⁷¹ Under such a circumstance, neither the EPC rule, nor the ACC language has any applicability.⁷² Thus, because the court reasoned that there was only one excluded peril that caused the damage, there could be no recovery for the homeowners under their policies.⁷³ While the holding was not favorable to the litigants, it did leave room for Louisiana to announce that it abides by the EPC rule, and/or that the EPC rule trumps ACC language included in policies.

Since the hurricanes of 2005, state and federal courts have also addressed the EPC rule in the context of Louisiana's Valued Policy Law (VPL). In *Chauvin v. State Farm*, the Fifth Circuit determined that the VPL was intended to stop insurance companies from paying less for a total loss that occurred as a result of a covered peril, not to extend coverage to the policy limits in the event that an excluded peril combined with a covered peril to result in a total loss. State Courts, however, have come to a different conclusion. In *Landry v. Louisiana Citizens Property Insurance Co.*⁷⁴ the trial and intermediate appellate held that if the covered peril was the EPC of a total loss then Louisiana's Valued Policy Law applied.⁷⁵ The result was that the insureds could recover the full value of their policy and the insurance company could not offset payments because excluded perils contributed to the loss. *Landry* is currently on appeal to the Louisiana

⁷¹ *Id.*

⁷² Homeowners in this litigation argued that it was the negligent design/construction of the levy that caused the loss. *Id.* The court however, reasoned that the cause of the loss in this circumstance was flooding, a peril specifically excluded under the homeowners' policies. *Id.*

⁷³ *Id.*

⁷⁴ *Landry v. Louisiana Citizens Property Insurance Company*, 964 So.2d 463 (La. App. 2007), *cert. granted*, 969 So.2d 615 (La. 2007).

⁷⁵ Valued Policy Laws (VPLs) provide (generally) that if a homeowner suffers a total loss the insurance company is obligated to pay the full value of the policy. Valued Policy Laws were enacted in many states in the late 1800s and early 1900s for two general reasons to discourage insurance companies from selling overvalued policies, and to disallow insurers from claiming depreciation in the case of a total loss. *See id.* at 474 (citing *Atlas Lubricant Corp. v. Fed. Ins. Co. of New Jersey*, 293 So.2d 550, 556 (La. App. 1974)).

Supreme Court. Therefore it is still an open question whether the EPC will be applied to circumvent ACC language in cases of a total loss governed by Louisiana's VPL.

III. IMPLICATIONS FOR POLICY HOLDERS AND PUBLIC ADJUSTERS

All of this information leaves many unanswered questions for the concerned parties. The following section addresses some implications for policy holders and public adjusters in the context of recent decisions regarding the applicability of ACC clauses.

A. Policy Holders

The first step property owners should take is to review their insurance polic(ies), and determine what coverage they have. Homeowners should take note of anti-concurrent causation language, because it is unlikely that they will be able to recover under their homeowner's policy in the event a covered and an excluded peril combine to cause the loss. Further, homeowners living in areas that may be affected by floods from Hurricanes, breached levees, or other threats, should maintain flood insurance through NFIP or a Write Your Own (WYO) carrier.⁷⁶ Homeowners in such areas should seek complimentary insurance policies that will cover them in the event of wind, water, or concurrent wind and water damage. Owners of high value property or possessions should seek excess flood coverage from a private insurer.⁷⁷

If a homeowner is faced with a loss caused by wind and water, determining the sequence of events and the cause of specific damage will be very important. Based on recent decisions interpreting Mississippi law, a homeowner in that state must show that at least some damage was caused exclusively by a covered peril, and that the damage was not caused at the same time or in sequence with damage caused by an excluded peril.⁷⁸ Even with that showing

⁷⁶ See Richards, *supra* note 25.

⁷⁷ See Silverman, *supra* note 27.

the homeowner will only be able to recover for the covered loss. Louisiana citizens face a more uncertain landscape in concurrent causation scenarios. In the presence of a total loss *Landry* suggests that a homeowner may be able to recover the full value of the policy if the covered peril contributed to the loss.⁷⁹ However, *Landry* is currently on appeal to the State Supreme Court where the decision could be overturned.⁸⁰ Where the loss is not total, the Fifth Circuit has held that the insured may recover for damage caused by the covered peril, but has upheld the validity of the ACC clause. The Court indicated that it will be the insured's burden to prove, (though not to a monetary certainty) what damage was caused *exclusively* by the covered peril.⁸¹ In the event that a homeowner suffers a loss from wind and water where losses must be attributed to either each peril, homeowners should seek assistance in writing their claim, and should attempt to delineate damage that arose from wind at the outset. While causation remains a question for the factfinder, clear delineation and expert opinions or testimony should increase recovery.

B. Public Adjusters

Public adjusters are licensed professionals who work directly for the insured to write first party claims.⁸² In this capacity, public adjusters are able to offer a valuable service to homeowners faced with causation issues. While noting that causation cannot be determined by the public adjuster,⁸³ s/he may be able to offer a valuable coordination of services to the homeowner that will maximize the property owner's recovery. Public adjusters are likely to be

⁷⁸ *Id.*

⁷⁹ *See supra* Part II.C.

⁸⁰ *Landry v. Louisiana Citizens Property Insurance Company*, 964 So.2d 463 (La. App. 3 Cir. 2007), *cert. granted*, 969 So.2d 615 (La. 2007).

⁸¹ *Id.*

⁸² *See* National Association of Professional Insurance Adjusters – NAPIA, <http://www.napia.com> (last visited April 27, 2008) (defining public adjusters).

⁸³ *See Swisher, supra* note 18 (noting that causation is “determined by a court or a trier of fact”).

familiar with state insurance law, will understand policy language⁸⁴ and will be able to coordinate resources and personnel to write a claim that addresses concerns the insurance company and/or a court will raise in evaluating what losses are covered by the policy. The coordination of services and specificity with which a public adjuster could write a claim would be valuable to a homeowner who is unfamiliar with the state insurance law, the language of the policy, and whose claim is likely to be undervalued or denied by the insurance company.

(1) Adjusting claims where there is no flood coverage

The work involved in adjusting claims where excluded and covered perils combine to create a loss will be significantly more intensive and costly than in a situation where a homeowner has suffered a loss only from a covered peril. To effectively write a claim the public adjuster needs to coordinate and work with experts, the cost that public adjusters would incur in doing so would be passed on to the homeowners, and in some cases the extra expense may make using a public adjuster prohibitive. Most Katrina victim's had far less damage from wind than from water.⁸⁵ Thus, even in a situation where the homeowner is likely to recover for the damage caused by wind, that amount may be so small that working with a public adjuster and delineating between the concurrent causes of damage may not be fiscally responsible. Thus public adjusters should refrain from assisting homeowners in writing claims, where it is likely recovery under the homeowner's policy will be dramatically limited by ACC language.

(2) Adjusting claims where there is comprehensive coverage

Public adjusters should limit their involvement to cases in which homeowners have both a homeowners policy and a flood insurance policy. In these situations, public adjusters would be

⁸⁴ See National Association of Professional Insurance Adjusters – NAPIA, *supra* note 81.

⁸⁵ See *e.g.* Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 430 (5th Cir. 2007), *cert. denied*, No. 07-880, 2008 WL 77718 (April 13, 2008).

helpful to homeowners. Public adjusters coordinating with experts could parse out damage caused under each policy and submit claims that maximizes the homeowner's recovery. Given the more comprehensive coverage of a homeowner in this situation, the additional costs incurred by the public adjuster may be worthwhile because the claims written will be more comprehensive and will increase recovery.

(3) Adjusting claims in the presence of Valued Policy Laws

Some additional concerns may arise for public adjusters where there is a Valued Policy Law (VPL) and a total loss. In such instances public adjusters who attempt to work with homeowners whose insurance companies do not contest that the home is a total loss may be viewed as taking advantage of the homeowner. Because under VPLs, insurance companies cannot dispute the valuation, public adjusters may not be able to increase a homeowner's recovery. Therefore, public adjusters should be aware that in situations involving VPLs, and an admitted total loss, it may be unethical to work with homeowners where the maximum recovery is guaranteed under the VPL and the adjuster's services will not increase the recovery.⁸⁶

On the other hand, in the presence of a VPL where the insurance company is disputing the fact that there is a total loss, public adjusters may have an important role in helping homeowners demonstrate that they have suffered a total loss. This role of the public adjuster does however, implicate some concerns related to moral hazard and claims inflation. Public

⁸⁶ Florida has passed emergency rules in response to weather related disasters prohibiting public adjusters from adjusting claims where the insurance company conceded there was a total loss. *See e.g.* Rule 69BER07-02 - Requirements Relating to Public Adjusting (February 6, 2007), available at http://www.myfloridacfo.com/Agents/Emer-Rules/Emerg_Rule_Torn-Pub-Adj_02_07.pdf. Public adjusters have argued in response that they are still able to offer homeowners a valuable service, helping them to recover expenses above and beyond the policy value. *See* Consumer E-views, CFO Sink Restricts Public Adjusters from Collecting Fees on Residential Property Declared A Total Loss (February 16, 2007) (noting that "[w]hen a property is decreed a total loss by the insurance company, that does not mean that is all [the insured is] entitled to . . . there are extensions of coverage such as personal property, debris removal and code upgrades" that may be available in addition to the written limit of coverage), available at http://www.fldfs.com/PressOffice/Newsletter/2007/021607/February_1607ALT2.htm.

adjusters must adhere to ethical standards and carefully write claims that reflect the true damage and loss suffered by the homeowner. Because public adjuster's actions and representations can be attributed to the homeowner,⁸⁷ it is doubly important to ensure that the claim accurately reflects the loss. The licensing requirement of most states, and organizations like the National Association of Public Insurance Adjusters (NAPIA) that promulgate ethical standards and codes of conduct for public adjusters are helpful in maintaining the credibility of the profession, and reassuring homeowners that the service provided is done so in an ethical, efficient, and fair way.

IV. PROPOSED REFORMS TO THE NATIONAL FLOOD INSURANCE PROGRAM

Most professionals agree that the current insurance situation and the strength of the NFIP is not adequate to address disasters like Hurricane Katrina. The NFIP, as organized, is not actuarially sound.⁸⁸ Until 2005 the program had operated by taking in roughly the same amount it paid out in claims.⁸⁹ However, as a result of the hurricanes of 2005, the NFIP paid out more in claims in that year than it had in its entire existence up until then, and had to borrow over \$17 billion from the U.S. Treasury to pay related claims and expenses.⁹⁰ In addition to not being actuarially sound, the current NFIP has several other shortcomings. The available coverage falls

⁸⁷ See David L. Nersessian, *Penalty by Proxy: Holding the Innocent Policyholder Liable for Fraud by Coinsureds, Claims Professionals, and Other Agents*, 38 TORT TRIAL & INS. PRAC. L.J. 907, 922 (2003) "As a general rule, if the misrepresentation would bar recovery if made by the insured and the misrepresentation by the public adjuster fell within the scope of his or her authority on the claim, most jurisdictions impute the adjuster's misrepresentation to the innocent insured and bar recovery." *Id.*

⁸⁸ See FED. EMERGENCY MGMT. AGENCY FED. INS. & MITIGATION ADMIN., *supra* note 24 at 28 (noting that the long-term goal is for NFIP to be actuarially sound, but that in the short-term "the NFIP overall is intended to generate premium at least sufficient to cover expenses and losses relative to what is called the 'historical average loss year'" which is less than the true long term average).

⁸⁹ *Id.*

⁹⁰ See RAWLE O. KING, CRS REPORT FOR CONGRESS, SIDE-BY-SIDE COMPARISON OF FLOOD INSURANCE REFORM LEGISLATION IN THE 100TH CONGRESS (2008), available at http://assets.opencrs.com/rpts/RL34367_20080212.pdf.

short of what some homeowners need with limits of \$250,000 for the home and \$100,000 for the contents. Further, many people who should have flood insurance do not.

Bills in congress are working towards reforming the NFIP program, and the House and Senate have each passed reform bills, however differences persist between the House and Senate version.⁹¹ Many provisions are agreed upon (though not to the letter) between the houses. Both bills propose to reform the NFIP to “bring more consumers into the system and gradually phase out premium subsidies currently available for structures built prior to the mapping and implementation of NFIP floodplain management requirements.”⁹² The house version of the bill strikingly includes a provision that would make windstorm insurance available through the NFIP.⁹³ There is no such provision in the Senate version of the bill.⁹⁴ While other provisions of the bills also differ this provision could have large implications for public adjusters.

First, the combination of wind and flood damage into one policy would eliminate the causations problems posed by the anti-concurrent causation clauses discussed above. If windstorm and flood insurance were offered together, only one claim would need to be written and all damage (assuming that the hurricane related damage was limited to wind and water) would be covered by one policy. This would reduce the complexity of writing claims and would allow public adjusters to work more efficiently with homeowners. If the NFIP continues to subsidize the rates under the reformed program it’s more likely that homeowners will avail themselves of the coverage. Not only will more people be insured with the appropriate (or at least far greater) coverage, but public adjuster will be writing more valuable claims for those

⁹¹ *See id.*

⁹² *See id.* at 2.

⁹³ *See id.*

⁹⁴ *Id.*

homeowners. From the homeowner's and public adjuster's point of view this type of combined coverage would greatly simplify the claims process in the aftermath of hurricanes.

V. CONCLUSION

Anti-concurrent causations clauses have and will continue to change the way that claims are evaluated and valued. Currently the majority rule is that insurers may use ACC clauses to contract around the doctrine of EPC.⁹⁵ The ACC clauses clearly exclude coverage in the event covered and excluded perils combine and where policy language is not ambiguous or against public policy it should be enforced as written. However, the result is inefficient for homeowners and claims adjusters. Realizing the shortcomings of the current state of flood insurance and problems related to combined causation, congress is attempting to reform the NFIP.⁹⁶ The House of Representatives has approved a bill that allows windstorm and flood insurance to be issued in the same policy.⁹⁷ This approach, though not without other concerns, would make comprehensive coverage easily accessible for more homeowners and could simplify the claims adjusting process. Because this would likely result in more homeowners being comprehensively insured, public adjusters should advocate for this type of reform of the NFIP. However, under the current causation regime, homeowners should seek out and obtain comprehensive coverage, and public adjusters should only adjust claims where homeowners are comprehensively insured.

⁹⁵ *See supra* Part II.

⁹⁶ *See supra* Part IV.

⁹⁷ *Id.* Unfortunately, the President has promised to veto an NFIP reform that includes both windstorm and flood coverage through the NFIP. *See* EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 3121 – FLOOD INSURANCE REFORM AND MODERNIZATION ACT OF 2007 (2007) available at, <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr3121sap-r.pdf>. However, because it's likely that this debate will continue beyond this administration, and reform of the NFIP will continue to be a hot topic, public adjusters should support measures that would provide more comprehensive coverage for more homeowners.