

**NEARLY BLOWN AWAY: HOW POLICYHOLDERS AFFECTED BY HURRICANE
KATRINA MAY RECOVER UNDER THEIR HOMEOWNER'S INSURANCE POLICIES IN
THE FACE OF ANTI-CONCURRENT CAUSATION LANGUAGE**

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Introduction

We live in a world fraught with danger. For that reason, we purchase insurance policies for our cars, our homes, our health, and our very lives, as a financial safeguard against future tragedies. We do not, however, always take the time to read and fully understand the fine print. When an individual purchases an “all-risk” homeowner’s insurance policy that contains certain enumerated exclusions, she might safely assume that her claim will be denied if she is unlucky enough to lose her house to an excluded peril; but she will likely assume that her loss will be covered if a non-excluded risk damages the home. This train of thought sounds logical, but is it entirely correct?

Not necessarily. The question becomes far more complicated when insured risks and excluded perils act together to cause property damage. For example, assume that Harry Homeowner lives in a suburb of Metropolis, U.S.A. Harry purchased an all-risk homeowner’s insurance policy that covers fire damage, but contains an exclusion for losses caused by earthquakes. One fateful day, a powerful earthquake rocked Metropolis, pulverizing buildings, bridges, and pavement. The violent shockwaves caused a gas main to rupture and explode. Before long, a massive fire spread rapidly and raged through the forests near Harry’s backyard. Harry’s home, which had begun to shake violently in the quake, ended up burning to the ground within minutes after the earthquake began. Will Harry’s insurance company cover the loss?

The answer to this question varies from state to state. In some jurisdictions, courts will ascertain which of the several causes was most responsible for the loss and determine whether the insurance policy covers that risk. This approach, known as the efficient proximate cause

doctrine, is followed in most jurisdictions,¹ but different states apply different variations of the rule.² Thus, Harry would prevail in some states but would be denied coverage in others. In addition, if Harry’s policy contains an anti-concurrent causation clause (“ACC clause”)—clever language devised by insurance companies to circumvent the application of the efficient proximate cause doctrine in a policyholder’s favor³—coverage may be denied even if the covered risk (*i.e.*, the fire) is primarily to blame for the loss. Some states have upheld ACC clauses, whereas others have invalidated them.⁴ Against this complex web of divergent legal rules and doctrinal subtleties, public adjusters must determine whether their clients are entitled to recover under their policies—an increasingly difficult task since the advent of the ACC clause.⁵

This Essay traces the history and application of ACC clauses in property insurance contracts, and seeks to address how, in spite of these clauses, public adjusters can effectively advocate for policyholders whose homes were destroyed by Hurricane Katrina. Part I of this Essay discusses the efficient proximate cause doctrine and explains how different jurisdictions have defined the term “efficient proximate cause.”⁶ Part II of this Essay discusses the origin of the ACC clause⁷ and the potential impact that these clauses have on a homeowner’s ability to

¹ 4 DAVID L. LEITNER, REAGAN W. SIMPSON & JOHN M. BJORKMAN, LAW AND PRAC. OF INS. COVERAGE LITIG. § 52:33 (2007).

² See *infra* notes 14-18 and accompanying text.

³ See *infra* notes 23-27 and accompanying text.

⁴ See *infra* Part II.b.

⁵ Cf. RAWLE O. KING, POST-KATRINA INSURANCE ISSUES SURROUNDING WATER DAMAGE EXCLUSIONS IN HOMEOWNERS’ INSURANCE POLICIES, CRS REPORT FOR CONGRESS, at 19 (March 22, 2007) (noting that “claims adjustment becomes more challenging” when multiple factors—some insured and others not—combine to cause a loss).

⁶ See *infra* Part I.

⁷ See *infra* Part II.a.

recover under his policy.⁸ In addition, Part II surveys the divergent judicial responses to the ACC clause.⁹ Part III examines the impact of ACC clauses on Hurricane Katrina victims who lost their homes in the storm.¹⁰ Finally, Part IV explores how public adjusters may handle their Katrina-afflicted clients' claims despite the ACC language that lurks in their insurance policies.¹¹

I. The Efficient Proximate Cause Doctrine

The determination of whether an insured is covered for a particular loss under her property insurance policy is not always cut and dried. When a single identifiable event causes damage to property, the issue may be resolved rather quickly. Sometimes, however, two or more events combine forces to damage a single piece of property. Disputes between an insured and her insurance company are likely to arise when insured and non-insured risks act together to cause property damage. In such situations, an insured may still recover despite the fact that an excluded risk is partly responsible for her loss. Under the efficient proximate cause doctrine, an insured is entitled to recover under her property insurance policy when a covered event and an excluded risk concurrently cause damage to her property where the *covered* event is the *efficient proximate cause* of the loss.¹² The doctrine applies only to situations where multiple events in a causal chain are each independently capable of causing the loss.¹³ Any homeowner embattled

⁸ *Id.*

⁹ *See infra* Part II.b.

¹⁰ *See infra* Part III.

¹¹ *See infra* Part IV.

¹² *See Garvey v. State Farm Fire and Cas. Co.*, 770 P.2d 704, 708 (Cal. 1989).

¹³ *See Pieper v. Commercial Underwriters Ins. Co.*, 59 Cal. App. 4th 1008, 1020 (Cal. Dist. Ct. App. 1997) (“For the efficient proximate cause theory to apply, . . . there must be two separate or distinct perils which could each, under some circumstances, have occurred independently of the other and caused the damage”) (internal quotation marks omitted).

with her insurer would be wise to employ a public adjuster to establish whether the covered peril that contributed to the loss constituted the efficient proximate cause of the loss.

Most jurisdictions have adopted some form of the efficient proximate cause rule.¹⁴ Some jurisdictions define the “efficient proximate cause” as the first event in the causal chain that sets the other causes in motion—*i.e.*, the *moving cause* or *initiating cause*.¹⁵ Under this approach, an insured’s claim is covered if an insured risk is the “risk [that] set[s] the other causes in motion which, in an unbroken sequence, produced the result for which recovery is sought.”¹⁶ Other states hold that the efficient proximate cause is the *predominant* or *most important* cause in the chain of events resulting in the property damage.¹⁷ The insured is entitled to recovery under this approach only if she can prove that an insured risk was the predominant, or most important cause of her loss.¹⁸

A handful of jurisdictions have instead adopted the concurrent causation doctrine,¹⁹ which allows recovery when multiple causes contribute to a loss so long as at least one cause is a covered risk.²⁰ Under this approach, the insured need not show that the covered peril was first in

¹⁴ 4 LEITNER, SIMPSON & BJORKMAN, *supra* note 1, at § 52.33.

¹⁵ *See, e.g.*, Murray v. United of Omaha Life Ins. Co., 145 F.3d 143, 156 (3d Cir. 1998); Burgess v. Allstate Ins. Co., 334 F. Supp. 2d 1351, 1361 (N.D. Ga. 2003); Burgess Farms v. New Hampshire Ins. Group, 702 P.2d 869, 873 (Idaho Ct. App. 1985).

¹⁶ 7 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 101:57 (3d ed. 1997).

¹⁷ *See, e.g.*, Garvey, 770 P.2d at 708.

¹⁸ *Id.*

¹⁹ Florida, Minnesota, New Mexico, North Carolina, and Arizona are the only “true concurrent causation” states. *See* 4 LEITNER, SIMPSON & BJORKMAN, *supra* note 1, at §52.33.

²⁰ Michael C. Phillips & Lisa L. Coplen, *Concurrent Causation versus Efficient Proximate Cause in First-Party Property Insurance Coverage Analysis*, 36 THE BRIEF 32, 33 (Winter 2007).

the causal chain or that it predominates over the excluded causes.²¹ Rather, coverage exists as long as a covered peril meaningfully contributed to the loss.²²

Harry Homeowner's misfortune is illustrative of the mechanics of the efficient proximate cause and concurrent causation doctrines. Whether or not Harry recovers under his policy depends on which event—the earthquake or the fire—is viewed as the *efficient proximate cause* of the property damage. In states that hold that the efficient proximate cause is the *moving* or *initiating* cause, the earthquake constitutes the efficient proximate cause of the loss, since the earthquake was the first event in the causal chain which set in motion the gas main explosion and the ensuing fire. Harry's insurance policy will not cover the loss because the efficient proximate cause of the damage is an excluded peril.

By contrast, the fire would most likely constitute the efficient proximate cause in jurisdictions that apply the *predominant* or *most important cause* approach. Harry's home had begun to shake violently from the force of the earthquake, but was ultimately destroyed by fire. Although the fire would not have started *but for* the earthquake, the fire is arguably the most important and predominant reason for the destruction of Harry's home. Harry's insurance policy will cover the loss because the efficient proximate cause of the damage is a covered risk.

Finally, if Harry's misfortune occurred in a concurrent causation jurisdiction, his loss would almost certainly be covered. Since a covered risk (the fire) contributed meaningfully to Harry's loss, Harry's insurance company must cover the claim, despite the fact that a non-covered risk (the earthquake) also contributed to the loss.

²¹ See, e.g., *Wallach v. Rosenberg*, 527 So. 2d 1386, 1387 (Fla. App. 1988) (“[T]he jury may find coverage where an insured risk constitutes a concurrent cause of the loss even where ‘the insured risk [is] not the prime or efficient cause of the accident.’”).

²² Phillips & Coplen, *supra* note 20, at 34.

II. The Anti-Concurrent Causation Clause

a. *Anti-Concurrent Causation Clauses—Generally*

Property insurers began to include ACC clauses in their policies to combat the ever-increasing application of the concurrent and efficient proximate cause doctrines in favor of policyholders.²³ ACC clauses operate to completely deny coverage for losses caused concurrently by a covered peril and an excluded peril—even where the covered peril is the efficient proximate cause of the loss.²⁴ A typical ACC clause provides: “We do not insure for such loss regardless of: a) the cause of the excluded event; or b) other causes of the loss; or c) *whether other causes acted concurrently or in any sequence with the excluded event to produce the loss.*”²⁵ In an all-risk property insurance policy, ACC language may lurk in a “lead in” paragraph preceding the enumerated exclusions, within an enumerated exclusion, or may exist as its own enumerated exclusion.²⁶

In essence, the ACC clause is a clever device that insurance companies can employ to “contract out” of the efficient proximate cause doctrine. In the words of one commentator, “[t]he potential danger of the concurrent causation language is that the insurer will try to use it to turn a policy providing all-risk coverage into one that provides no-risk coverage.”²⁷ Thus, if Harry Homeowner’s insurance policy contains such a clause, Harry’s claim may be denied in full

²³ 4 LEITNER, SIMPSON & BJORKMAN, *supra* note 1, at § 52:9.

²⁴ David J. Rosenberg, Kenneth M. Portner & Matthew Stool, *Insurance Industry Woes in the Aftermath of Hurricanes Katrina and Rita*, 73 DEF. COUNS. J. 141, 152 (April 2006).

²⁵ See Insurance Services Office’s 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) (emphasis added).

²⁶ Christopher L. Lynch, *Concurrent Causation Exclusion: Don’t Let Your Insurer Turn Your All-Risk Coverage Into No-Risk Coverage*, THE RISK MANAGEMENT LETTER, Vol. 25, Issue 5 (2005).

²⁷ *Id.*

because an excluded peril (the earthquake) partially contributed to the destruction of his home, even if the covered peril (the fire) is the efficient proximate cause of the loss.

b. *Judicial Response to the Anti-Concurrent Causation Clause*

The vast majority of states that embrace the efficient proximate cause doctrine have upheld ACC clauses²⁸ on the ground that they do not violate public policy.²⁹ A number of Federal Circuit Courts of Appeals have enforced ACC language as well. For example, in *TNT Speed & Sport Center, Inc. v. American States Insurance Co.*,³⁰ the Eighth Circuit held that the ACC clause in American States' insurance policy entitled it to deny recovery for water damage to the insured's property resulting from an act of vandalism to a levee system (an insured peril) which caused a flood (an excluded peril), regardless of whether the vandalism was the efficient proximate cause of the loss.³¹ The *TNT Speed* court surveyed Missouri cases and determined that the ACC clause at issue did not offend state law.³² Finally, the court acknowledged that the "plain meaning of the [ACC clause's] exclusionary language was to directly address, and contract out of, the efficient proximate cause doctrine."³³

²⁸ 4 LEITNER, SIMPSON & BJORKMAN, *supra* note 1, at § 52:9; *see, e.g.*, *State Farm Fire and Cas. Co. v. Bongen*, 925 P.2d 1042 (Alaska 1996); *Assurance Co. of America, Inc. v. Jay-Mar, Inc.*, 38 F. Supp. 2d 349, 354 (D.N.J. 1999) (listing cases).

²⁹ *See, e.g.*, *Millar v. State Farm Fire & Cas. Co.*, 804 P.2d 822, 826 (Ariz. Ct. App. 1990) (holding that parties may "contract out of the efficient proximate cause doctrine without violating public policy"); *Assurance Co. of America, Inc. v. Jay-Mar, Inc.*, 38 F. Supp. 2d 349, 354 (D.N.J. 1999) ("[T]here is no violation of public policy when parties to an insurance contract agree that there will be no coverage for loss due to sequential causes even where the first or the last cause is an included cause of loss.").

³⁰ 114 F.3d 731 (8th Cir. 1997).

³¹ *TNT Speed & Sport Center*, 114 F.3d at 732.

³² *Id.* at 732-33.

³³ *Id.* at 733.

Only a handful of efficient proximate cause jurisdictions—California,³⁴ West Virginia,³⁵ North Dakota,³⁶ and Washington³⁷—have held that ACC clauses are unenforceable. California and North Dakota have invalidated ACC language by statute. Section 530 of the California Insurance Code provides that:

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.³⁸

The California Supreme Court reaffirmed the validity of Section 530 in *Howell v. State Farm Fire & Casualty Co.*, holding that an insurance contract that attempts to contract around the efficient proximate cause doctrine violates Section 530 and will not be enforced.³⁹

Similarly, the North Dakota legislature codified the efficient proximate cause doctrine:

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.⁴⁰

In *Western National Mutual Insurance Co. v. University of North Dakota*, the North Dakota Supreme Court added judicial weight to these words, emphasizing that North Dakota has

³⁴ *Howell v. State Farm Fire & Cas. Co.*, 267 Cal. Rptr. 708 (Cal. Ct. App. 1990).

³⁵ *Murray v. State Farm Fire and Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998).

³⁶ *W. Nat'l Mut. Ins. Co. v. Univ. of N.D.*, 643 N.W.2d 4 (N.D. 2002).

³⁷ *Safeco Ins. Co. of Am. v. Hirschmann*, 773 P.2d 413 (Wash. 1989) (en banc).

³⁸ CAL. INS. CODE § 530.

³⁹ *Howell*, 267 Cal. Rptr. at 714-15.

⁴⁰ N.D. CENT. CODE § 26.1-32-01 (2003).

statutorily adopted the efficient proximate cause doctrine and holding that insurance companies may not circumvent this legislative mandate.⁴¹

Even in the absence of a state statute, the highest courts in Washington and West Virginia have invalidated ACC language. In *Safeco Insurance Co. of America v. Hirschmann*, the Supreme Court of Washington held that an insurer may not employ exclusionary language in its insurance policies to circumvent the efficient proximate cause doctrine.⁴² Finally, in *Murray v. State Farm Fire and Cas. Co.*, the Supreme Court of Appeals of West Virginia refused to enforce an ACC clause because it was ambiguous and contrary to the reasonable expectations of the insured party.⁴³

III. Hurricane Katrina—The Most Recent and Most Significant Disaster Involving Anti-Concurrent Causation Clauses

a. Anti-Concurrent Causation Clauses and Hurricane Katrina

In late August 2005, the Gulf Coast of the United States endured one of the most powerful and destructive natural disasters in American History—Hurricane Katrina. Torrential rainfall and violent gusts of wind pummeled the U.S. Gulf Coast. Louisiana and Mississippi bore the brunt of the storm's wrath.⁴⁴ In New Orleans, the levee system that was designed to protect the city's residents from floodwaters monumentally failed, submerging much of the

⁴¹ *W. Nat'l Mut. Ins. Co. v. Univ. of N.D.*, 643 N.W.2d 4, 7 (N.D. 2002).

⁴² *Safeco Ins. Co. of Am. v. Hirschmann*, 773 P.2d 413, 416 (Wash. 1989) (en banc).

⁴³ *Murray v. State Farm Fire and Cas. Co.*, 509 S.E.2d 1, 15 (W. Va. 1998).

⁴⁴ See, e.g., Rhonda D. Orin, *First-Party Coverage for Catastrophic Risks: Part I – Personal Lines*, 758 PLI/LIT. 89, 99 (April-May 2007).

city.⁴⁵ The storm claimed nearly 2,000 lives,⁴⁶ earning its place in history as one of the deadliest hurricanes to hit the U.S.⁴⁷ Katrina has caused approximately \$150 billion in uninsured property damage,⁴⁸ and total insurance claims have neared \$60 billion.⁴⁹

In addition to the devastating loss of loved ones, homes, and priceless family possessions, Katrina survivors must now deal with yet another disheartening blow: insurance carriers are pointing to ACC clauses in homeowners' property insurance policies as a justification for denying property loss claims. To the sympathetic layman watching the Hurricane Katrina coverage on television, the mass destruction appeared to originate from a single cause—the hurricane itself.⁵⁰ To the insurance industry, however, the damage was caused by a “series of wholly separate and unrelated events,”⁵¹ including wind, rain, high water, waves, and storm surges.⁵² Many insurance policies provide coverage for wind damage but not for water damage caused by flooding and tidal waves.⁵³ The highest courts of Louisiana and Mississippi have

⁴⁵ James A. Knox, Jr., *Causation, the Flood Exclusion, and Katrina*, 41 TORT TRIAL & INS. PRAC. L.J. 901, 904 (2006).

⁴⁶ Tarak Anada, *The Perfect Storm, an Imperfect Response, and a Sovereign Shield: Can Hurricane Katrina Victims Bring Negligence Claims Against the Government?*, 35 PEPP. L. REV. 279, 282 (2008) (“[O]ver 1,800 Americans lost their lives during Hurricane Katrina and its aftermath.”).

⁴⁷ *Id.*

⁴⁸ Spencer M. Taylor, *Insuring Against the Natural Catastrophe After Katrina*, 20 NAT. RESOURCES & ENV'T 26, 26 (2006).

⁴⁹ *Id.*

⁵⁰ Orin, *supra* note 44, at 91.

⁵¹ *Id.*

⁵² *Id.*

⁵³ KING, CRS REPORT FOR CONGRESS, *supra* note 5, at 1.

adopted the efficient proximate cause doctrine⁵⁴ and have allowed policyholders to recover under their policies if a covered peril (*e.g.*, wind) was the efficient proximate cause of their loss, even if an excluded peril (*e.g.*, flooding) contributed to the loss.⁵⁵ However, insurance companies have fortified their ability to deny claims by including ACC clauses in their policies.⁵⁶

In New Orleans, for instance, thousands of homes were completely destroyed by floodwaters that surged through the city after the levees broke. Many homeowners do not read or fully understand their homeowner's policies,⁵⁷ and Katrina victims were shocked when insurance companies denied their claims.⁵⁸ In the absence of ACC language, aggrieved policyholders could have successfully argued that the insured risks constituted the efficient proximate cause of the loss; after all, it was the Category 5 winds, an insured risk, that set the subsequent causes in motion.⁵⁹ However, many Hurricane Katrina victims' policies contain ACC language which could completely bar recovery if an insured risk, such as wind damage, acted concurrently with an excluded risk, such as floodwater, to cause a loss.⁶⁰ Lawmakers in states affected by Katrina have expressed their disapproval of this harsh result. Members of the

⁵⁴ *See, e.g.*, *Western Assurance Co. v. Hann*, 78 So. 232 (Ala. 1971); *Roach-Strayhan-Holland Post v. Continental Ins. Co.*, 112 So. 2d 680 (La. 1959); *Glens Falls Ins. Co. v. Linwood Elevator*, 130 So. 2d 262, 270 (Miss. 1961); *Evans Plantation, Inc. v. Yorkshire Ins. Co.*, 58 So. 2d 797, 798 (Miss. 1952).

⁵⁵ KING, CRS REPORT FOR CONGRESS, *supra* note 5, at 21.

⁵⁶ *See* Orin, *supra* note 44, at 93.

⁵⁷ KING, CRS REPORT FOR CONGRESS, *supra* note 5, at 13 (“Many homeowners incorrectly believe that their standard homeowners policies automatically provide coverage against flooding, when in fact an additional flood policy will be needed.”).

⁵⁸ Michael F. Crusto, *The Katrina Fund: Repairing Breaches in Gulf Coast Insurance Levees*, 43 HARV. J. ON LEGIS. 329, 333 (2006).

⁵⁹ *See* Orin, *supra* note 44, at 100.

⁶⁰ *See, e.g.*, Rosenberg, Portner & Stool, *supra* note 24, at 155 (noting that ACC language in property insurance contracts “would exclude water damage even if the levee system contributed to allowing the water to enter the city”).

Louisiana legislature have striven to invalidate ACC clauses by statute.⁶¹ These legislative efforts have proven unsuccessful thus far.⁶²

b. Hurricane Katrina-related litigation

Insurance companies have denied multitudes of Katrina victims' property insurance claims, resulting in a high volume of litigation centered on causation issues and the enforceability of ACC clauses. Such lawsuits are expected to continue for quite some time.⁶³

To date, the most important court battles regarding the enforceability of ACC clauses have occurred in Mississippi. In two cases that were litigated in the District Court for the Southern District of Mississippi, Judge Senter held that the ACC clauses at issue are ambiguous and therefore unenforceable.⁶⁴ The Fifth Circuit overturned these rulings, holding in both cases that the ACC language is unambiguous, valid, and enforceable as a matter of Mississippi law.⁶⁵ In Louisiana, it remains to be seen whether an insurer may employ an ACC clause to override the efficient proximate cause doctrine when hurricane winds and water act concurrently to damage property.⁶⁶

⁶¹ See Orin, *supra* note 44, at 96 (“In 2005, and again in 2006, State Sen. Julie Quinn (R-Metairie) and State Rep. Tim Burns (R-Mandeville) have proposed legislation precluding the enforcement of these clauses. Both times, the proposed legislation died during the session.”).

⁶² *Id.*

⁶³ KING, CRS REPORT FOR CONGRESS, *supra* note 5, at 5 (noting that litigation “over the interpretation of ‘water damage’ exclusion and the ‘ACC’ clauses could continue for months and even years”).

⁶⁴ Leonard v. Nationwide Mut. Ins. Co., 438 F. Supp. 2d 684 (S.D. Miss. 2006); Tuepker v. State Farm Fire & Cas. Co., No. 1:05CV559 LTS-JMR, 2006 WL 1442489 (S.D. Miss. May 24, 2006).

⁶⁵ Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419 (5th Cir. 2007); Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346 (5th Cir. 2007).

⁶⁶ *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 222-23 (5th Cir. 2007) (The court declined to “address whether insurers may contract around the efficient-proximate-cause rule under Louisiana law” because, in the case at bar, “there are not two independent causes of the plaintiffs’ damages at play; the only force that damaged the plaintiffs’ properties was flood.”).

In *Leonard v. Nationwide Mutual Insurance Company*, Judge Senter refused to enforce the ACC language in a Nationwide homeowner’s insurance policy.⁶⁷ Plaintiffs Paul and Julie Leonard sued Nationwide, their property insurer, to recover under their homeowner’s policy for the extensive damage their home sustained during Hurricane Katrina. The Leonards’ Nationwide policy provided coverage for wind damage and “[d]irect loss caused by rain . . . driven through [the] roof or wall openings made by direct action of wind. . . .”⁶⁸ However, the policy contained an ACC clause which bars recovery if any insured loss acts concurrently with “flood, surface water, waves, tidal waves, overflow of a body of water . . . whether or not driven by wind.”⁶⁹ In short, the Leonards’ policy covers wind damage but not water damage, except for water damage caused by rain that enters through a wind-created opening in the structure.⁷⁰

The ground floor of the Leonard residence sustained extensive water damage after a storm surge inundated the house.⁷¹ Hurricane Katrina’s winds, however, caused minimal damage to the Leonards’ roof. The wind destroyed only a few shingles, and the water-tight integrity of the roof was not compromised.⁷² Following an appraisal by Nationwide’s adjuster, Nationwide sent a check to the Leonards for \$1661.17 to cover the damaged roof.⁷³ The Leonards’ experts, however, determined that the damages totaled \$130,235.59, and that

⁶⁷ *Leonard*, 438 F. Supp. 2d at 694.

⁶⁸ *Id.* at 688 (quoting the Nationwide policy).

⁶⁹ *Id.* (quoting the Nationwide policy).

⁷⁰ *Id.* at 693.

⁷¹ *Id.* at 689.

⁷² *Id.*

⁷³ *Id.* at 690.

\$47,365.41 was attributable to wind.⁷⁴ Ultimately, Judge Senter found that “[a]lmost all of the damage to the Leonard residence is attributable to the incursion of water,”⁷⁵ and therefore awarded a mere \$1,994.80 to the Leonards.

Turning his attention to the ACC clause issue, Judge Senter held that the ACC language in the Nationwide policy is ambiguous because the policy as a whole purports to provide coverage for wind damage, yet the ACC clause operates to deny coverage when wind (an insured peril) acts concurrently with water (an excluded peril) to cause a loss.⁷⁶ Judge Senter concluded that such a result would contravene well-established Mississippi law.⁷⁷

On August 30, 2007, the Fifth Circuit overruled Judge Senter’s ruling in *Leonard* with respect to the ACC clause, holding that Nationwide’s ACC language is enforceable as a matter of Mississippi law.⁷⁸ The court concluded that the ACC clause in Nationwide’s policy is unambiguous and does not violate Mississippi case law, public policy, or statutory law.⁷⁹ In reaching this conclusion, the *Leonard* court recognized that Mississippi follows the efficient proximate cause rule by default in insurance disputes.⁸⁰ Under this rule, a Mississippi policyholder would recover if she was able to show that wind was the efficient proximate cause of the loss, even if an excluded peril such as flooding contributed to the loss.⁸¹

⁷⁴ *Id.*

⁷⁵ *Id.* at 695

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007).

⁷⁹ *Id.* at 436.

⁸⁰ *Id.* at 431.

⁸¹ *Id.* at 432 (citing *Lititz Mut. Ins. Co. v. Boatner*, 254 So.2d 765, 767 (Miss. 1971)).

ACC language would abrogate the efficient proximate cause doctrine if found valid. Although Mississippi courts have upheld ACC clauses in earth-movement cases,⁸² the *Leonard* court noted that no Mississippi state court has definitively decided whether ACC clauses are valid in the context of property damage from a hurricane.⁸³ Thus, the Fifth Circuit concluded that Nationwide’s ACC language does not violate Mississippi case law and proceeded to make “an educated ‘*Erie* guess’ as to how the Mississippi Supreme Court would resolve the issue.”⁸⁴

Next, the court held that Nationwide’s ACC clause does not offend the public policy of Mississippi.⁸⁵ Mississippi contract law holds that parties may contract around common-law causation principles as long as the contract does not violate public policy, and the *Leonard* court emphasized that Mississippi’s adoption of the efficient proximate cause doctrine was not for public policy reasons.⁸⁶ Thus, the court reasoned, Nationwide’s ACC language is not inconsistent with public policy.

In addition, the court found no Mississippi statute that “mandate[s] that insurance policies reflect the efficient proximate causation doctrine.”⁸⁷ Finally, the court held that the ACC language is unambiguous.⁸⁸ In so holding, the court dealt a punishing blow to Plaintiffs

⁸² *Id.* at 433 (citing *Boteler v. State Farm Cas. Ins. Co.*, 876 So.2d 1067, 1069-70 (Miss. Ct. App. 2004) (upholding the validity of a State Farm policy which excluded all damage as a result of earth movement)). The *Leonard* court also cited a Mississippi insurance law treatise which states that the earth-movement cases demonstrate the “clear trend in Mississippi state and federal courts . . . to treat the issue of causation in this context as one controlled by the insurance policy, and not by public policy or common law.” MISS. INS. LAW & PRAC. § 15:15.

⁸³ *Leonard*, 499 F.3d at 431.

⁸⁴ *Id.*

⁸⁵ *Id.* at 435.

⁸⁶ *Id.* (noting that Mississippi was not motivated by public policy reasons in adopting the efficient proximate cause doctrine).

⁸⁷ *Id.* at 435.

⁸⁸ *Id.* at 436.

embattled with their insurance companies because the court's decision effectively removed the doctrine of *contra proferentum* from a Plaintiff's arsenal. Under the doctrine of *contra proferentum*, ambiguous contract provisions are construed against the drafter—*i.e.*, the insurer. Once ACC language is declared unambiguous, it will be given its plain meaning by the courts and will not be construed against the insurer.

The *Leonard* court did acknowledge, however, that Nationwide's ACC clause does not negate the clause that permits recovery if "a policyholder's roof is blown off in a storm, and rain enters through the opening."⁸⁹ Thus, the policy unambiguously permits recovery for water damage if a policyholder's roof is blown off in a hurricane, allowing rain to enter and destroy the interior, but not if a storm surge enters through the same opening and causes identical water damage.

Barely two months after deciding *Leonard*, the Fifth Circuit in *Tuepker v. State Farm Fire & Casualty Co.*⁹⁰ reversed yet another of Judge Senter's ACC clause rulings, again holding that the ACC language at issue is unambiguous.⁹¹ Thus, "the ACC Clause in State Farm's policy overrides the efficient proximate cause doctrine."⁹² The State Farm policy in *Tuepker* is largely similar to the Nationwide policy in *Leonard* in that it covers wind damage but excludes losses caused by water damage from flood, tidal water, etc.⁹³ Unlike Nationwide's ACC clause, State Farm's ACC clause is preceded by the following language: "We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the

⁸⁹ *Id.* at 431.

⁹⁰ 507 F.3d 346 (5th Cir. 2007).

⁹¹ *Id.* at 354.

⁹² *Id.* at 356.

⁹³ *Id.* at 351.

following excluded events.”⁹⁴ Adhering to its decision in *Leonard*, the *Tuepker* court held that this language does not render State Farm’s ACC clause ambiguous.⁹⁵ In fact, this language arguably makes the State Farm policy more lenient than the Nationwide policy in *Leonard*. For example, if wind destroys a roof and a storm surge subsequently destroys the interior, the State Farm policy covers the damaged roof even though the storm surge is an excluded event.⁹⁶ After all, “such roof loss *did* occur in the absence of any listed excluded peril.”⁹⁷

IV. Impact on Public Adjusting

Public adjusters face a significantly more challenging task when representing a client whose insurance policy contains an ACC clause. Because insurance companies have the ability to deny recovery altogether by adding ACC clauses to their policies, and because most courts have bestowed their judicial blessings on this practice, public adjusters face an uphill battle when insured and uninsured risks contribute to a loss.

Until very recently, the practice of public adjusting by a non-attorney was illegal in Louisiana because it was considered to be the unauthorized practice of law.⁹⁸ Despite this fact, licensed public adjusters from foreign jurisdictions “flocked to [Louisiana] in the wake of [Hurricane Katrina]” to offer their services.⁹⁹ In response to this influx of foreign public

⁹⁴ State Farm policy, *cited in* *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007).

⁹⁵ *Tuepker*, 507 F.3d at 354.

⁹⁶ *Id.*

⁹⁷ *Id.* (emphasis in original).

⁹⁸ *See, e.g., Louisiana Claims Adjustment Bureau, Inc. v. State Farm Ins. Co.*, 877 So.2d 294 (La. Ct. App. 2004) (reaffirming the long-standing Louisiana position that non-lawyers who act as public adjusters engage in the unauthorized practice of law).

⁹⁹ Rosenberg, Portner & Stool, *supra* note 24, at 143.

adjusters, the Louisiana Insurance Commissioners promulgated Rule 16, which permits out-of-state public adjusters to work in Louisiana.¹⁰⁰ Rule 16 requires all such public adjusters to register with the state's Insurance Department and prohibits public adjusters from receiving contingent fees.¹⁰¹ Louisiana subsequently reversed its longstanding forbiddance of public adjusting by non-lawyers in 2006 with the enactment of The Louisiana Public Adjuster Act.¹⁰² This new Act regulates public adjusters by requiring that all prospective adjusters pass a licensing exam, among other things.¹⁰³ In keeping with Emergency Rule 16, public adjusters are prohibited from receiving contingent fees for their services.¹⁰⁴ The Mississippi Insurance Department enacted an emergency rule analogous to Louisiana's Emergency Rule 16 on September 16, 2005.¹⁰⁵ Soon afterwards, Mississippi passed House Bill No. 1524, which regulates the public adjusting profession.¹⁰⁶

Following the Fifth Circuit's decisions in *Leonard* and *Tuepker*, public adjusters working on behalf of Hurricane Katrina victims in Louisiana and Mississippi¹⁰⁷ may no longer successfully argue that an insured's policy contains an ambiguous ACC clause that should be construed against the insurer. Instead, public adjusters must now rely solely on the physical

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See GOV'T ACCOUNTABILITY OFFICE, NATIONAL FLOOD INSURANCE PROGRAM: GREATER TRANSPARENCY AND OVERSIGHT OF WIND AND FLOOD DAMAGE DETERMINATIONS ARE NEEDED 15 note a (Dec. 2007).

¹⁰³ The Louisiana Public Adjuster Act, *codified at* LA. REV. STAT. ANN. § 22:1210.91, et seq. (2006).

¹⁰⁴ *Id.*

¹⁰⁵ See Rosenberg, Portner & Stool, *supra* note 24, at 146.

¹⁰⁶ Mississippi House Bill No. 1524.

¹⁰⁷ Louisiana and Mississippi, two of the three states affected by Hurricane Katrina, sit in the Fifth Circuit. They were hit hardest by Hurricane Katrina to boot.

evidence of property damage in arguing a claim. Unless a public adjuster can show that an ACC clause should not apply given the nature of the damage, the insured's claim will likely be denied in full if insured perils and excluded risks acted together to damage her home.

Perhaps the most obvious way that a public adjuster can demonstrate the inapplicability of an ACC clause is to argue that a single covered peril, rather than a combination of several different events, caused the damage to an insured's home. An insured who's lost her entire house to Hurricane Katrina will surely prevail if her public adjuster can show that the house was completely destroyed by a covered peril before the action of any excluded perils. For example, assume that an insurance adjuster decides that a policyholder's house was destroyed by the concurrent action of wind and flood. As a result, the insurer denies the policyholder's claim in full. If a public adjuster can demonstrate that the hurricane's winds completely destroyed the house before any flooding occurred, the policyholder is entitled to recover under her policy, notwithstanding the existence of an ACC clause. Even though ACC clauses purport to exclude coverage whenever "other causes acted concurrently or *in any sequence* with the excluded event to produce the loss,"¹⁰⁸ this language will only preclude recovery where excluded perils actually play a part in *causing* or *producing* a loss. Thus, if an insured risk entirely obliterates a structure before an excluded event arrives at the scene, the excluded event cannot have contributed to the loss. In other words, if floodwaters sweep away a home that had already been reduced to a pile of rubble by the wind, the water damage did not cause the loss in any way. Whenever possible, a public adjuster should argue that a single covered peril caused all of the damage before the advent of the excluded peril and that, as a result, ACC language does not apply. This approach portends great battles over causation and the exact sequence of events that caused the damage.

¹⁰⁸ ISO Special Form, *supra* note 25.

Public adjusters may also be able to recover partial losses for insureds whose homes sustained damage from both wind and water. Of course, a public adjuster faced with such a case will prevail only if the insured's policy contains a clause which permits partial recovery, such as the clause in the Tuepker's State Farm policy which denies coverage for damage which would not have occurred in the absence of an excluded peril.¹⁰⁹ This type of clause allows recovery for losses caused solely by an insured peril, even if an excluded peril subsequently causes further damage. If a public adjuster can show that the initial damage was caused by an insured peril (*e.g.*, wind) that occurred in the absence of an excluded peril (*e.g.*, storm surge), recovery is proper despite the presence of an ACC clause in the insured's policy. Great scientific battles over the sequence of events and the proportion of damage from wind versus water are expected.

Conclusion

The Fifth Circuit's judicial approval of ACC clauses in *Leonard* and *Tuepker* will likely produce harsh results for people whose homes perished in Hurricane Katrina. Although the presence of an ACC clause in an insured's insurance policy complicates the public adjuster's task, it is certainly possible for public adjusters to help their clients to recover under their policies. Indeed, the present landscape may likely generate a high volume of business for public adjusters, whose expertise is doubtless in especially high demand given the large-scale denial of Katrina victims' claims and the foreboding ACC language embedded in homeowners' policies. Because Louisiana has not yet seen much Hurricane Katrina-related litigation regarding the validity of ACC clauses under Louisiana law, public adjusters operating in Louisiana should keep abreast of the Louisiana legal scene and any developing changes in the law.

¹⁰⁹ State Farm policy, *cited in* *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007).