Anti-Concurrent Causation and Its Effect on the Efficient Proximate Cause Doctrine In Today's American Jurisprudence

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INTRODUCTION

Consider the following scenario: Walter and Barbra Carter, a newly married couple, purchase a brand-new family home. The couple agrees to the terms and conditions of an all-risk homeowner's insurance policy by signing an insurance contract drafted by the insurance company. Before signing the policy, the insurance company explains to the Carters what an all risk insurance policy entails. Under an all risk insurance policy, if there is physical damage to the Carters' home the Carters would receive coverage unless the damage was caused by a peril specifically excluded in the policy. Within the policy there is also an anti-concurrent causation clause that reads: "loss or damage caused directly or indirectly by any of the following: [flooding, mudslides, earthquakes, and earth moving] such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[1]

After nine rainy years and no appreciable damage to the home, a sewer pipe begins to leak. Unbeknownst to the couple the home was built on land with subsidence. The pipe leak was caused by the earth failure and the heavy rainfall. The Carters' home sinks in many areas causing substantial damage to its foundation. The Carters attempt to have their insurance company cover the damages that were made to their home. The Carters explain to the insurance company that the pipe leak was caused by the contractor's negligence because their home was built on land with subsidence. The insurance company denies the Carters of any coverage because the policy does not cover flooding even if the flooding was not the proximate cause of the peril. The Carters commence an action against the insurance company for damages. The insurance company argues that since the damages were caused by a non-covered peril that was excluded from the Carters' policy, the Carters were barred from coverage because of the anti-concurrent causation clause. The

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

Carters argue that since the policy specifically did not exclude the contractor's negligence, the efficient proximate cause of the loss, the insurance company was obligated to provide coverage even if a non-covered peril contributed to cause the damages made to their home. The question now becomes how would the court decide. Would the court enforce the anti-concurrent causation clause, which would bar the Carters from any coverage; would the court find that the covered peril was the efficient proximate cause and require the insurance company to fully cover the damages made to the Carters' home; or would the court decide that the insurance company is only responsible to cover the damages caused by the covered peril under the Carters' policy.

This Essay addresses how courts would decide a case similar to the Carters'. Part I of this Essay addresses how courts decided property claim cases before insurance companies started to insert Anti-Concurrent Causation ("ACC") clauses in their insurance policies.[2] Courts in in the United States have applied two different approaches: (a) the dominant-cause approach ("efficient proximate cause doctrine") and (b) the pro-policyholder approach ("concurrent causation doctrine").[3] Part II of this Essay addresses the freedom of contract approach that most courts in the United States have taken after companies started to insert ACC clauses in their insurance policies.[4] Part II also discusses approaches courts, who follow the freedom of contract approach, have taken when a term in the ACC clause is ambiguous or conflicts with a state statute. Part III of this Essay addresses jurisdictions who have applied the efficient proximate cause doctrine even if an insurance policy contains an ACC clause.[5]

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[2] *Infra* Part I.

[3] Mark M. Bell, *A Concurrent Mess and A Call for Clarity in First-Party Property Insurance Coverage Analysis,* 18 Conn. Ins, L.J. 73,75 (2011).

[4] *Infra* Part II.

[5] *Infra* Part III.

I. PRE- ANTI-CONCURRENT CAUSATION CLAUSES IN INSURANCE POLICIES

Prior to the mid-1980s most insurance policies did not contain ACC clauses.[6] An ACC clause in an insurance policy is an attempt to contract out of the doctrines of efficient proximate cause and concurrent causation.[7] The efficient proximate cause doctrine holds that "a loss is covered if it was predominately caused by a covered peril, even though one or more excluded perils contributed to the loss."[8] The concurrent causation doctrine holds that "coverage is permitted whenever two or more perils appreciably contribute to the loss, and at least one of the perils is covered."[9]

Courts have struggled with the best way to decide cases that involve losses caused by multiple perils.[10] In cases where the insurance policy did not contain an ACC clause[11] courts have applied the following:[12] (1) the dominant-cause approach ("efficient proximate cause doctrine") and (2) the pro-policy holder approach ("concurrent causation doctrine").[13]

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[6] Bell, *supra* note 3, at 85.

[7] Dale J. Gilsinger, *Validity, Construction, and Application of Anti-Concurrent Causation Clauses in Insurance Policies*, 37 A.LR. 6th 657, (2008).

[8] *Id.*

[9] *Id.* at 9.

[10] Bell, *supra* note 3, at 75.

[11] *See Corban v. United Servs. Auto Ass'n*, 20 So. 3d 601 (Miss. 2009) (holding ACC clause void and unenforceable because of "in any sequence language" conflict with Mississippi law); *Sabella v. Wisler* 377 P.2d 889 (Cal. 1963) (holding sewer pipe damage was the efficient proximate cause to damage made to insured home thus, insurer must provide full coverage).

[12] Bell, *supra* note 3, at 75.

[13] *Id.*

A. THE DOMINANT-CAUSE APPROACH "THE EFFICIENT PROXIMATE CAUSE DOCTRINE"

The rationale behind the dominant-cause approach is to strike a balance between the insured and insurer. Moreover, the dominant-cause approach relies on "'equitable principles of fairness and the parties' reasonable expectations."[14] In *Sabella v. Wisler*, a home was damaged by settling that was caused by a leak in a sewer pipe.[15] The leak and the settling of the home was caused by Wisler, who built the home on land with subsidence and negligent installation of the pipes in the home.[16] Under the policy, the settling of the home was excluded but not Wisler's negligence.[17] The court explained, "[W]here there is a concurrence of different causes the efficient cause the one that sets others in motion is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster."[18] The court found that the leaking pipe was the efficient proximate cause of the loss because it set the other causes in motion thus, the damages made to the home must be fully covered.[19]

The facts in *Garvey v. State Farm Fire & Casualty,* are very similar to *Sabella*. The insured noticed that an addition of their home was beginning to separate from the main property.[20] The Garveys' policy covered "all risks of physical loss to the property covered, except as otherwise

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[14] *Id.*

[15] *Sabella v. Wisler,* 377 P. 2d 889 (Cal. 1963).

[16] *Id*. at 892.

[17] *Id.* at 890.

[18] *Id.* at 895.

[19] *Id.*

[20] *Garvey v. State Farm Fire & Cas. Co*., 770 P. 2d 704, 705.

excluded or limited."[21] One of the exclusions in the policy was earth movement.[22] The insured claimed that although the policy excluded earth movement, it implicitly provided coverage caused by contractor negligence. [23] The insurer claimed that the settling was the proximate cause of the loss and earth movement is excluded from coverage in the policy.[24] The California Supreme Court, explained that in a first-party property loss case, a loss is not covered just because a covered peril contributed to the loss.[25] Rather the standard of review is that the "reviewing court is to look at the facts of the case and determine which among the various contributing perils is the 'efficient proximate cause' of the loss."[26] The court quoted the language used in *Sabella* to define the meaning of the efficient proximate cause "the cause to which the loss is to be attributed though the other causes may follow it, and operate more immediately in producing the disaster." [27] Accordingly, the court remanded the case back to the trial court to apply the proper standard of review for efficient proximate cause analysis.[28] *Gavery*, stands for the proposition that the efficient proximate cause analysis is fact dependent. For example, if an uncovered peril set other causes in motion, then the insured would not receive coverage regardless of whether or not the other perils were covered under the policy.

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[21] *Id.*

[22] *Id.*

[23] *Id.* at 706.

[24] *Id.*

[25] *Id.*

[26] Bell, *supra* note 3, at 84.

[27] *Garvey v. State Farm Fire & Cas. Co.,* 770 P. 2d 704, 707 (Cal. 1973) (quoting *Sabella v. Wisler*, 377 P. 2d 889, 895 (Cal. 1963).

[28] *Id.* at 713.

In *Pan American World Airway v. Aetna Casualty & Surety Co*.,[29] a Pan American flight was hijacked.[30] The plane was hijacked by two men from the Popular Front for the Liberation of Palestine ("PFLP").[31] The men "forced the crew of the aircraft to fly to Beirut, where a demolitions expert and explosives were put on board."[32] The aircraft was then flown to Egypt, still under PFLP control, where passengers were told to evacuate.[33] The aircraft was then totally destroyed and as a result, Pan American sought coverage from Aetna, their insurance company.[34] Aetna, denied coverage because of a provision in Pan American's all risk policy. The provision stated the following:

> LOSS OR DAMAGE NOT COVERED . . . .OR… [t]his policy does not cover anything herein to the contrary notwithstanding loss or damage due to or resulting from1. capture, seizure, arrest, restraint or detention or the consequences thereof or of any attempt thereat, or any taking of the property insured or damage to or destruction thereof by any Government or governmental authority or agent (whether secret or otherwise) or by any military, naval or usurped power, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful … (hereinafter 'clause 1'); 2. war, invasion, civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not (hereinafter 'clause 2'); 3. strikes, riots, civil commotion (hereinafter 'clause 3').[35]

At trial Aetna offered evidence to established that the efficient proximate cause for the damage to the aircraft was excluded in the policy.[36] One of the claims asserted by Aetna was that PFLP

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[29] 505 F.2d 989 (1974).

[30] *Id.* at 993.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Pan Am. World Airway v. Aetna Cas. & Sur. Co*., 505 F.2d 989, 993 (1974).

[35] *Id.* at 994.

[36] *Id.* at 997.

operated independently of King Hussein's authority as a paramilitary quasi-government in Jordan.[37] "[Aetna] relied on the same kind of evidence and asserted PFLP's intent to overthrow King Hussein, to establish that the loss of the [aircraft] was caused by an 'insurrection' in Jordan."[38] The court found that the purpose of PFLP at the time of the destruction of the Pan American aircraft was to bolster the morale of Palestinians and to "call world order attention to the plight of Palestinian refugees."[39] The court concluded that the PFLP was a small, isolated group pursuing its own long term objectives.[40] The court held that Aetna failed to show that the efficient proximate cause of the loss was within the scope of any of the exclusions in the policy.[41] "[The court] found that the ancient marine insurance terms selected by the all risk insurers simply do not describe a violent and senseless intercontinental hijacking carried out by an isolated band of political terrorists."[42]

B. THE PRO-POLICYHOLDER APPROACH "CONCURRENT CAUSATION DOCTRINE"

The California Supreme Court in *State Farm v. Partridge*[43], was one of the first courts to adopt the pro-policyholder approach.[44] In *Partridge*, the insured was covered by two separate policies, one for his automobile and a homeowner's policy.[45] The insured's homeowner's policy provided

[37] *Id*. at 996.

[38] *Id.*

[39] *Pan Am. World Airway v. Aetna Cas. & Sur. Co.,* 505 F.2d 989, 998 (1974).

[40] *Id.*

[41] *Id.*

[42] I*d.*

[43] 514 P.2d 123 (Cal. 1973).

[44] Bell, *supra* note 3, at 76.

[45] *Partridge,* 514 P.2d at 125.

larger coverage than his automobile coverage.[46] The homeowner's policy provided coverage for general negligence but excluded losses "arising out of the use" of an automobile.[47] The facts of this case are unique: the insured had a rifle and filed a hair-trigger on the rifle to allow the rifle to discharge at the slightest touch.[48] One day, the insured and his friends went hunting for jackrabbits.[49] The insured saw a running jackrabbit crossing the road, and in order to keep up with the jackrabbit, the insured and his friends got back into the insured's automobile and drove off.[50] As the insured drove his vehicle, the vehicle hit a bump causing the hair-trigger rifle to fire.[51] The shot hit one of the passenger's left arm and penetrated down to her spinal cord resulting in paralysis.[52] The passenger sued the insured for $500,000 in damages and sought indemnity from the insured's insurance company.[53]

The court developed a new standard for liability losses that result from concurrent causes that are independent from each other.[54] The court held that "coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply a concurrent

[46] *Id.* at 126.

[47] *Id.* at 125.

[48] *Id.*

[49] *State Farm v. Partridge*, 514 P.2d 123, 125 (Cal. 1973).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 126.

[54] Bell, *supra* note 3, at 83.

proximate cause of the injuries."[55] Thus, under the standard set forth by the court, "so long as a covered peril substantially contributed to the loss, coverage would be afforded."[56]

While *Partridge* involved a third-party liability claim, courts have also begun to extend the pro-policyholder approach to first-party property cases as well.[57] For example, in *Safeco v. Guyton*, the 9th Circuit used the pro-policyholder approach when analyzing concurrent causations questions after Hurricane Kathleen.[58] The *Safeco* court, found that there were two concurrent causes of loss: (a) third-party negligence, which was a covered cause, in maintaining flood control plans and (b) flood loss (an excluded loss).[59] Even though, the flood was the dominant factor for the loss, the court held that because the third party contributed to the loss, the entire loss was covered. [60] The rationale behind the pro-policyholder approach is to ensure that the insured receives coverage for their loss even if the proximate cause was a peril that is excluded from the insured's policy.

II. COURTS INTERPRETING ANTI-CONCURRENT CAUSATION CLAUSES IN POLICES ("FREEDOM OF CONTRACT APPROACH")

In order to avoid courts applying the efficient proximate cause doctrine and concurrent causation doctrine to first-party property loss cases, insurance companies started to include ACC clauses in their policies. A typical ACC clause in an insurance policy would say the following: "loss or damage caused directly or indirectly by any of the following [exclusions]. Such loss or

[55] *State Farm v. Partridge*, 514 P.2d 123, 130 (Cal. 1973).

[56] Bell, *supra* note 3, at 83.

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

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

[59] Id. at 554.

[60] *Id.*

damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[61] The introduction of the ACC clause has been a powerful device for insurance companies to deny claims.[62] Most courts in the United States, have allowed insurance companies to insert ACC clauses in their policies under the freedom of contract approach. However, courts applying the freedom of contract approach have stated that insurance companies are not completely off the hook by simply inserting an ACC clause in their policies.[63] In interpreting insurance policies courts would apply the doctrine of *contra proferentem* ("against the drafter"), which allow courts to interpret ambiguous insurance policies in favor of policyholders.[64] Courts have also applied different approaches when an ACC clause conflicts with a state statue.

A. FREEDOM OF CONTRACT APPROACH

The freedom of contract approach is the most used approach by courts in the United States to address ACC clauses.[65] *Alf v. State Farm Fire and Cas. Co*., is the hallmark case that outlines the freedom of contract approach.[66] In *Alf ,* the parties agreed that the loss to the insured's home was due to a pipe on the Alf's property that broke because of low temperatures.[67] As a result, water escaped from the broken pipe and caused flooding and soil erosion.[68] Utah, the state that decided

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

[62] Bell, *supra* note 3, at 86.

[63] *See Cameron v. USAA Property and Cas. Ins. Co.,* 733 A. 2d 965, 966 (1996) (noting any ambiguous term in the insurance policy will be interpreted against insurer).

[64] *Id.*

[65] Michael C. Phillips & Lisa L. Coplen, *Concurrent Causation versus Efficient Proximate Cause in First-Party Property Insurance Coverage Analysis*, 36 Brief 32, 35 (2007).

[66] *Id.*

[67] *Alf v. State Farm Fire and Cas. Co*., 850 P.2d 1272 (Utah 1993).

[68] *Id.* at 1273.

Alf v. State Farm Fire, follows the efficient proximate cause doctrine.[69] If *Alf* were decided before insurance companies started inserting ACC clauses in their policies the *Alf* court would have followed the efficient proximate cause doctrine and the Alfs would have prevailed.[70]

Here, the parties agreed that the efficient proximate cause of the damage was the pipe just as in *Sabella v. Wisler*.[71] Unlike, *Sabella* the Alfs' policy included an ACC clause. The issue presented to the Utah Supreme Court was whether an insurer could contract out of the efficient proximate cause rule.[72] The court held that an insurance company could contract out of the efficient proximate cause doctrine because the doctrine is not an immutable rule of insurance law in Utah "but rather operates as a default rule 'only when the parties have not chosen freely to contract out of it."[73]

In *Cameron v. USAA Property and Cas. Ins. Co*., there was a series of snow storms in the District of Columbia.[74] As a result, there was about thirty inches of snow on the Camerons' uncovered outdoor patio.[75] Soon after the snow storms, the temperatures began to raise and the snow started to melt.[76] "The inclement weather had previously damaged two gutters on the Camerons' roof. The disabling of the gutters contributed to the accumulation of additional snow

[69] *Id.*

[70] *See supra* Part I. C.

[71] *Alf v. State Farm Fire and Cas. Co*., 850 P.2d 1272.

[72] *Id.* 1277.

[73] *Id.*

[74] 733 A. 2d 965 (1996).

[75] *Id.* at 966.

[76] *Id.*

and rain on the patio, and the water began to overflow."[77] The accumulation was so great that water began to run down a stairwell which then went under the Camerons' basement door.[78] The flooding damaged personal property inside the basement. The Camerons asked USAA to cover the damages.[79]

USAA denied coverage to the Camerons because the ACC clause in their policy excluded damage from surface water.[80] The Camerons argued that the cause of their loss was not surface water because the water did not "lie or flow naturally on the earth's surface."[81] The court, applying the doctrine of *contra proferentem,* found that "water which has collected on a man-made structure or surface is surface water."[82] The court concluded that the damage to the Camerons' personal property was surface water thus, the Camerons were barred from coverage.[83]

Under the freedom of contract approach, which is used in most jurisdictions in the United States, if the insurance company can point to an uncovered peril that caused the loss the insurer can deny coverage even if the uncovered peril caused 1% of the damage.

B. ACC CLAUSES THAT CONFLICT WITH STATE LAW

In *Stankova v. Metropolitan Property and Cas. Ins. Co.,*[84] a wildfire swept through Northern Arizona burning acres of vegetation. About one month after the fire was put out, "flooding and

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[77] *Id.*

[78] Id.

[79] *Cameron v. USAA Property and Cas. Ins. Co*., 733 A. 2d 965, 966 (1996).

[80] *Id.* at 967.

[81] *Id.* at 971.

[82] *Id.*

[83] *Id.*

[84] 788 F. 3d 1012 (2015).

mudslides in the area destroyed [the insured's] house."[85] The insured's homeowner's policy contained an ACC clause which covered loss directly caused by fire and excluded damages caused by flooding, mudslides, and earth movement.[86] The insurer denied coverage on the basis that since the fire was put out a month prior to the destruction of the home, fire could not be the direct cause of the peril.[87]

The court found that Arizona requires by statute that all fire insurance policies "conform to a standard policy, which is based on New York's standard fire policy."[88] If a policy conflicts with the standard policy the standard policy governs.[89] The standard policy states: "an insurer will provide coverage 'against all direct loss by fire, lightning and by removal from premises endangered by the peril insured against in this policy.'"[90] The court found that the fire was the direct cause of the flooding and mudslide and the ACC clause conflicted with the standard policy.[91] The court held that the ACC clause was unenforceable thus, the insured was entitled to coverage as a matter of law.[92]

C. THE ROSSMILLER APPROACH

In order to interpret policies that have ambiguous terms, courts would apply the doctrine of *contra proferentem.* This doctrine instructs courts to rule in favor of policyholders. Another recent

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[85] *Id.* at 1013

[86] *Id.*

[87] *Id.* at 1014.

[88] *Id.* at 1015.

[89] *Stankova v. Metropolitan Property and Cas. Ins. Co*., 788 F. 3d 1012, 1015 (2015).

[90] *Id.*

[91] *Id.* at 1017.

[92] *Id.*

approach is the Rossmiller approach, the only court that has applied it is Mississippi in *Corban v. USAA*.[93] This approach was developed by concurrent causation scholar/practitioner David Rossmiller in two law articles published in 2007 and 2008.[94]

According to David Rossmiller, there are two ways to interpret "concurrent" when used to refer to concurrent causation. "Under Rossmiller's view, concurrent should either refer to perils (a) acting in coordination or (b) acting in sequence."[95] For example, "assume that a fire and earthquake both operated to cause a loss (a) acting in coordination would occur if the earthquake worked in conjunction with the fire to cause the same damage; (b) acting in sequence would occur if the fire resulted from the earthquake; and (c) a non-concurrent result would occur if the fire merely occurred at the same time as the earthquake but was not brought about by the earthquake."[96]

Hurricane Katrina, was declared one of the "costliest hurricane[s] in American history, destroyed approximately 275,000 homes, caused total economic losses in excess of $100 billion and has spawned more than 1.6 million insurance claims."[97] Rossmiller claims that Hurricane Katrina did not actually involve concurrent causes of losses "because [both the wind and flood] acted separately to a create unique damage."[98] Rossmiller claimed the fact that both wind and

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

[94] *See* David P. Rossmiller, *Katrina in the Fifth Dimension: Hurricane Katrina Cases in the Fifth Circuit Court of Appeals, in New Appleman on Insurance*: Current Critical Issues in Insurance Law 71, 86 (Matthew Bender ed., 2008); David P. Rossmiller, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond, in New Appleman on Insurance*: Current Critical Issues in Insurance Law 43, 65 (Matthew Bender ed., 2007).

[95] *See* Rossmiller, Katrina, supra note 94; Rossmiller, Interpretation, supra note 94 (quoting Bell, *supra* note 3, at 92).

[96] Bell, *supra* note 3, at 92.

[97] James A. Knox Jr., *Causation, The Flood Exclusion, and Katrina*, 41 Tort Trial & Ins. Prac. L.J. 901, 905 (2006).

[98] Rossmiller, Interpretation, supra note 94 at 65.

flood were "products of the same larger phenomenon, a hurricane, is irrelevant."[99] Rossmiller's argument is that "losses are concurrent only where multiple causes produce the same damage, and losses are not concurrent when multiple causes result in multiple losses." [100]

The Corbans owned a home that was destroyed by Hurricane Katrina.[101] The insurance company determined that although the wind caused some damage to the roof and the second floor of the home, the vast majority of the damage made to the first floor was caused by flooding.[102] The insurance company only covered the damages made to the roof and the second floor because the policy covered wind damages but the insurance company denied coverage for the first floor because the policy did not cover flooding[103]. The issue presented to the court was whether the insurance company's denial was proper.[104] In order to solve the issue the court had to use the doctrine of *contra proferentem* to define "concurrent".[105] The court defined concurrent by using a narrow definition: "exclusion applies only in the event that the perils (1) act in conjunction, (2) as an indivisible force, (3) occurring at the same time, (4) to cause direct physical damage resulting in loss." Under the narrow definition of concurrent the insurer has the "burden of proving that two perils operate in conjunction and that the perils operated contemporaneously."[106]

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[99] *Id.*

[100] Bell, *supra* note 3, at 92.

[101] *Corban v. United Servs. Auto Ass'n*, 20 So. 3d 601, 605 (Miss. 2009).

[102] *Id.* at 606.

[103] *Id.*

[104] *Id.* at 614.

[105] *Id.*

[106] *Corban v. United Servs. Auto Ass'n,* 20 So. 3d 601, 614 (Miss. 2009).

Corban, stands for who has the burden of proof under Rossmiller narrow definition of concurrent. Under the narrower definition of concurrent the insurer has the burden of proof to show that two perils acted in conjunction and that they operated contemptuously. Legal scholars have predicted that the approach used in Corban may be used in other Hurricane Katrina cases in the state of Mississippi.

III. JURISDICTIONS THAT HAVE REJECTED THE FREEDOM OF CONTRACT APPROACH

There are only four states in the United States that have followed the substantial factor approach/efficient proximate cause doctrine and have rejected the freedom of contract approach. California and North Dakota have done so by legislation and Washington and West Virginia have done so by case law.[107]

Safeco Insurance v. Hirschmann, was the first case "to reject the freedom-of-contract approach without relying on insurance code regulations."[108] The Hirschmanns' home was completely destroyed because of a landslide that was caused by strong winds and heavy rain fall.[109] The expert at trial testified that the efficient proximate cause for the landslide was the heavy rainfall.[110] Safeco argued that if the Hirschmann's policy was interpreted before companies

[107] *See* Cal. Ins. Code §§ 530, 532 (West 2005) ("An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause."); N.D. Cent. Code § 26.1-32-01 (2010) ("An insurer is liable for a loss proximately caused by a peril insured against even though a peril not contemplated by the insurance contract may have been a remote cause of the loss. An insurer is not liable for a loss of which the peril insured against was only a remote cause. The efficient proximate cause doctrine applies only if separate, distinct, and totally unrelated causes contribute to the loss."); *Sprague v. Safeco Ins. Co. of Am.,* 241 P.3d 1276, 1278 (Wash. Ct .App. 2010) ("In analyzing coverage, Washington follows the efficient proximate cause rule. Under this rule, the predominant cause of the loss determines coverage.").

[108] Bell, *supra* note 3, at 88.

[109] *Safeco Insurance v. Hirschmann,* 773 P. 2d 413 (Wash. 1989).

[110] *Id.* at 414.

started to insert ACC clauses in their policies the Hirschmanns would be covered for their loss.[111] Safeco claimed that even though the state of Washington follows the efficient proximate cause doctrine, the ACC clause in the policy precluded the Hirschmanns from coverage.[112] The court rejected Safeco's argument and held that the efficient proximate cause doctrine "represents an immutable principle of Washington insurance law, and that the parties cannot contract around it."[113] Because the efficient proximate cause of the loss included a covered peril the Hirschmann's entire loss was covered.

In *Western National Mutual Insurance Company v. North Dakota University*, the insured (the University of North Dakota) purchased a Boiler and Machinery Policy from the insurer.[114] In April of 1997, the Red River, located in North Dakota, experienced significant flooding.[115] As a result, the campus of the insured was evacuated and two sewer lift stations were shut down.[116] After this shut down, sewage water entered the insured's buildings, causing damage to boilers and machinery.[117] The policy provided coverage for "direct damage to Covered Property caused by a Covered Cause of Loss 'but excluded coverage for' loss or damage caused directly or indirectly 'by flood' regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[118] Loss from sewage backup was not excluded in the policy. The insurer argued that

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[111] *Id.*

[112] *Id.*

[113] *See id* at 415 (quoting Bell, *supra* note 3, at 89).

[114] *Western Nat. Mut. Ins. Co. v. North Dakota University*, 643 N.W.2d 4 (N.D. 2002).

[115] *Id*. at 7.

[116] *Id.*

[117] *Id*

[118] *Id.*

the policy excluded coverage because flood was the cause of the loss.[119] The jury found that sewer backup was the efficient proximate cause for the loss.[120] The insurer not satisfied with the jury's verdict appealed.

The North Dakota Supreme Court held that the efficient proximate cause doctrine was applicable to insurance policies. The efficient proximate cause doctrine as codified in N.D.C.C. §§ 26.1-32-01 and 26.1-32-03 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 which the peril insured against was only a remote cause.... When a peril is excepted specially in an insurance contract, a loss which would not have occurred but for that peril is excepted although the immediate cause of the loss was a peril which was not excepted.[121]

The court found that the jury could have reasonably concluded that sewage backup was the efficient proximate cause for the loss.[122] Moreover, the court held that insurance companies cannot contract around the efficient proximate cause doctrine in its policies.[123]

The jurisdictions who have adopted the efficient proximate cause doctrine by case law or legislation bars insurance companies from contracting around the efficient proximate cause doctrine. Courts in California, North Dakota, Washington, and West Virginia apply the same efficient proximate cause analysis used before the introduction of the ACC clause.

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[119] *Western Nat. Mut. Ins. Co. v. North Dakota University*, 643 N.W.2d 4, 8 (N.D. 2002).

[120] *Id.*

[121] N.D.C.C. §§ 26.1-32-01, 26.1-32-03.

[122] *Western Nat. Mut. Ins. Co. v. North Dakota University*, 643 N.W.2d 4, 29 (N.D. 2002).

[123] *Id.*

IV. CONCLUSION

Circling back to the hypothetical in the introduction of this Essay, there is no clear cut answer as to how a court would decide the Carters' case. Courts in the United States have not been consistent in deciding first-party property loss cases that involve ACC clauses in their insurance policies. However, the majority of states in the United States would enforce ACC clauses under the freedom of contract approach. It is very rare that a court would enforce the efficient proximate cause doctrine, doctrine of *contra proferentem,* or the Rossmiller approach unless you are in one of the jurisdictions that do not follow the freedom of contract approach or the court finds a term in the policy that is ambiguous which may allow the insured to prevail.