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Insurance Causation: Texas Law on First-Party Claims

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ARTICLE

INSURANCE CAUSATION: TEXAS LAW ON FIRST-PARTY CLAIMS

Randall L. Smith and Fred A. Simpson[†]

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I. INTRODUCTION

Texans purchase first-party insurance policies with expectations of indemnity when covered perils strike their commercial or non-commercial properties or equipment. Most claims on first-party policies are rather straight-forward and uncomplicated. But complexities arise when losses occur from a combination of perils. This Article explores how Texas courts determine whether insurers must indemnify their insureds for single property losses caused by the combination of a covered peril and an excluded peril. However, this Article begins with an examination of the efficient proximate cause doctrine (the causation test used in the majority of jurisdictions) to compare efficient proximate cause to the unique rule of coverage applied in Texas.

There are important differences between causation in tort law and in insurance law. When courts seek causation for insurance law pur-

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poses, courts focus on the peril that caused the loss.¹ Tort law principles are somewhat different, however, with courts generally applying a two-step process to determine causation.² The first step seeks the “cause in fact” of injury or damage.³ The second step determines the legal or responsible cause.⁴ Cause in fact is the product of the underlying chain of events, embracing all events, active or passive, that led to the occurrence in question.⁵ Courts use two tests to determine cause in fact. The tests are known as the “but for” and the “substantial factor” tests.⁶ If a loss would not have occurred “but for” a certain peril or if that peril was a “substantial factor” in causing a loss, “[that peril] is part of the chain of causation in fact.”⁷ Courts then focus on the chain of events leading to the loss in order to determine the legally responsible or proximate cause of the loss.⁸

Over 50 years ago, Justice Felix Frankfurter recognized “the subtleties and sophistries of tort liability.” He explained why tort rules concerning liability for negligence should not apply to the covenants of insurance policies and defined insurance proximate cause this way:

“Proximate cause,” as a requirement of liability under an insurance policy, is not a technical legal conception but a convenient tag for the law’s response to good sense. It is shorthand for saying that there must be such a nexus between the policy term under which insurance money is claimed and the events giving rise to the loss that it can be fairly declared that the loss was within the risk assumed. The case is one of “common-sense accommodation of judgment to kaleidoscopic situations.”⁹

Proximate cause in tort law concerns culpability for injury or damage, assigning blame to tortfeasors who create harmful conditions.¹⁰ In the realm of property insurance, an insurer and an insured are not concerned with whether the insured is liable for damages to others; their only concern is determining what caused the loss.¹¹ That loss determination involves the chain of events and the legally responsible

1. See John P. Gorman, *A Reply to “Proximate Cause—First Party Coverage”*, 34 INS. COUNSEL J. 98, 99 (1967). Gorman’s article is a reply to an article written by San Francisco lawyer Bert W. Levit. See Bert W. Levit, *Proximate Cause—First Party Coverage*, 520 INS. L.J. 340 (1966).

2. Gorman, *supra* note 1, at 99. Gorman attributes this test to William L. Prosser. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 41–42 (5th ed. 1984).

3. Gorman, *supra* note 1, at 99.

4. *Id.*; see R. Dennis Withers, *Proximate Cause and Multiple Causation in First-Party Insurance Cases*, 20 FORUM 256, 257 (1985).

5. Gorman, *supra* note 1, at 99.

6. *Id.*

7. *Id.*

8. *Id.* at 100.

9. Standard Oil Co. v. U.S., 340 U.S. 54, 66 (1950).

10. LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D §101.41, at 101–31 (2005).

11. *Id.*

cause of loss. The manner in which courts in various jurisdictions search for the legally responsible cause depends on whether they use a tort-like analysis of causation and apply the principles of efficient proximate cause. The alternative is to search the terms of the insurance contract and look for a legally responsible cause to determine whether the cause in fact of a particular loss is a covered peril.

This Article is principally concerned with insurance causation in situations where concurrent and consecutive perils, one covered and one excluded, combine to cause a single loss to insured property. Under those conditions, the legally responsible cause of loss to insured property is identified under two distinctly different rules when both of these conditions exist: (1) there is no order of succession in time of two or more events; and (2) damages from each of the concurrent causes of resulting loss cannot be distinguished.

Under the first rule, the efficient proximate cause of loss is deemed the proximate cause.¹² The majority of jurisdictions apply this rule. Accordingly, when concurrent perils combine to cause loss, and the efficient proximate cause is a covered peril, the policy covers the entire loss, even though an excluded peril contributed to the loss.¹³

The second rule provides that when an excluded peril combines concurrently with a covered peril, and it is not possible to separate the amount of damage done by each of the perils, there is no coverage under the contract.¹⁴ In other words, to prove coverage for loss under this rule, the insured must either prove that loss was caused solely by a covered peril, or the insured must segregate damages caused by the covered peril from damages caused by the excluded peril.¹⁵ The insured's proof requires evidence and jury findings to support the insured's position on coverage. This rule, followed in Texas, allows insurers to write their contracts to preclude insureds from advocating the efficient proximate cause doctrine.¹⁶

II. EFFICIENT PROXIMATE CAUSE

Property insurance policy provisions provide indemnity when insured property suffers a covered loss.¹⁷ Proximate cause determines

12. See Peter Nash Swisher, *Insurance Causation Rules: The Legacy of Bird v. St. Paul Fire & Marine Ins. Co.*, 2 NEV. L.J. 351, 366–68 (2002) (defining and discussing the efficient proximate cause rule).

13. See *Sabella v. Wisler*, 377 P.2d 889, 896–97 (Cal. 1963).

14. See *Coyle v. Palatine Ins. Co.*, 222 S.W. 973, 975–76 (Tex. Comm'n App. 1920, holding approved).

15. *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971).

16. See Mark D. Wuerfel & Mark Koop, "Efficient Proximate Causation" in the Context of Property Insurance Claims, 65 DEF. COUNS. J. 400, 407 (1998).

17. Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385, 386 (1985).

whether a loss is covered.¹⁸ Proximate cause for insurance purposes is characterized in many different ways by courts and commentators.¹⁹

- “[It] is the ‘real efficient cause.’”²⁰
- “It is the ‘actual’ and ‘dominant’ cause.”²¹
- “It is the ‘predominant,’ or the ‘procuring’ and efficient cause.”²²
- “It is ‘the predominating or moving efficient cause of the loss.’”²³
- “It is ‘the efficient cause and not a merely incidental cause which may be nearer in time to the result.’”²⁴
- “It is the efficient cause ‘but for’ which the injury to the insured property ‘would not have happened.’”²⁵
- “It is the ‘direct, violent, and efficient’ cause.”²⁶
- “It is the cause which produces the result ‘in a natural and continuous sequence, unbroken by any new and intervening cause.’”²⁷
- “It is ‘the efficient cause—the one that sets others in motion— . . . the cause to which the loss is to be attributable, though . . . other causes may follow it and operate more immediately in producing’ the loss.”²⁸
- “It is ‘the active, efficient cause that sets in motion a chain of events which brings about a result without the intervention of any force started and working actively from a new and independent source.’”²⁹

18. *See id.*

19. Levit, *supra* note 1, at 342–43 (citing various courts’ and commentators’ definitions of proximate cause).

20. Levit, *supra* note 1, at 342; *see also* *Lanasa Fruit S.S. & Importing Co. v. Universal Ins. Co.*, 302 U.S. 556, 572 (1938); *Leyland Shipping Co. v. Norwich Union Fire Ins. Soc’y, Ltd.*, [1918] A.C. 350, 371 (appeal taken from K.B.).

21. Levit, *supra* note 1, at 342; *see also Lanasa Fruit*, 302 U.S. at 572; *Fireman’s Fund Ins. Co. v. Hanley*, 252 F.2d 780, 784 (6th Cir. 1958); *Commercial Carving Co. v. Manhattan Fire & Marine Ins. Co.*, 191 F. Supp. 753, 759 (M.D.N.C. 1961); *Berglund v. Hardware Dealers Mut. Fire Ins. Co.*, 381 S.W.2d 631, 633 (Tex. Civ. App.—Houston 1964), *rev’d*, 393 S.W.2d 309 (Tex. 1965).

22. Levit, *supra* note 1, at 342; *see also Anderson v. Conn. Fire Ins. Co.*, 43 N.W.2d 807, 812 (Minn. 1950); *Russell v. German Fire Ins. Co.*, 111 N.W. 400, 402 (Minn. 1907); *Pa. Fire Ins. Co. v. Sikes*, 168 P.2d 1016, 1019 (Okla. 1946).

23. Levit, *supra* note 1, at 342; *see also Sabella v. Wisler*, 377 P.2d 889, 895 (Cal. 1963).

24. Levit, *supra* note 1, at 342; *see also Lanasa Fruit*, 302 U.S. at 572; *Ins. Co. v. Boon*, 95 U.S. 117, 130 (1877).

25. Levit, *supra* note 1, at 343; *see also Jordan v. Iowa Mut. Tornado Ins. Co.*, 130 N.W. 177, 181 (Iowa 1911); *Hartford Fire Ins. Co. v. Nelson*, 67 P. 440, 440 (Kan. 1902); *Anderson*, 43 N.W.2d at 812.

26. Levit, *supra* note 1, at 343; *see also Bruener v. Twin City Fire Ins. Co.*, 222 P.2d 833, 835 (Wash. 1950) (en banc).

27. Levit, *supra* note 1, at 343; *see also Fed. Ins. Co. v. Bock*, 382 S.W.2d 305, 307 (Tex. Civ. App.—Corpus Christi 1964, writ ref’d n.r.e.).

28. Levit, *supra* note 1, at 343; *see also Sabella*, 377 P.2d at 895.

29. Levit, *supra* note 1, at 343; *see also Jiannetti v. Nat’l Fire Ins. Co.*, 178 N.E. 640, 642 (Mass. 1931); *Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co.*, 33 N.E. 690, 691 (Mass. 1893).

- “It is the ‘operative cause’ of the loss.”³⁰
- “It is the cause from which the loss ‘followed reasonably . . . if no intermediate controlling and self-sufficient cause intervened.’”³¹
- “It is the cause from which the result was ‘reasonable’ and ‘probable.’”³²
- “It is a cause from which a loss ‘was a reasonable and proper consequence, directly and naturally resulting.’”³³
- “It is the ‘cause which set the other in motion and clothed it with the power to harm at the time of the disaster.’”³⁴

Proximate cause inquiries present two questions: (1) which peril was nearest to the loss (proximity/remoteness analysis); and (2) which peril was the efficient proximate cause of loss (dominance analysis)?³⁵ Courts in most jurisdictions switched from an immediate (nearness) cause review to a proximity/remoteness analysis, referred to here as “efficient proximate cause,” to answer these questions.³⁶ An efficient proximate cause of loss is a “but for” cause of loss, but not necessarily sufficiently dominant to have set another peril in motion to which loss is to be attributed, even though the other peril may follow and operate closer in time or place.³⁷ A court applying efficient proximate cause is concerned with both temporal and spatial relationships between events contributing to a loss, as well as the actual loss itself.³⁸ When courts apply a dominance analysis, they focus on the “biggest action” that brought about the loss, even though that particular peril may have been remote in time or place from the immediate cause of the loss.³⁹ When the immediate cause of loss is an excluded peril, coverage may still exist if the efficient proximate cause of loss is a covered peril.⁴⁰ This rule reflects the fact that the efficient proximate cause of loss can be concurrent or remote in points of time and/or place.⁴¹

30. Levit, *supra* note 1, at 343; *see also* Marks v. Lumbermen’s Ins. Co., 49 A.2d 855, 856 (Pa. Super. Ct. 1946).

31. Levit, *supra* note 1, at 343; *see also* Norwich Union Fire Ins. Soc’y, Ltd. v. Bd. of Comm’rs, 141 F.2d 600, 601 (5th Cir. 1944).

32. Levit, *supra* note 1, at 343; *see also* Bird v. St. Paul Fire & Marine Ins. Co., 120 N.E. 86, 88 (N.Y. 1918).

33. Levit, *supra* note 1, at 343; *see also* *Jiannetti*, 178 N.E. at 642.

34. Levit, *supra* note 1, at 343; *see also* Princess Garment Co. v. Fireman’s Fund Ins. Co., 115 F.2d 380, 383 (6th Cir. 1940).

35. JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS 434 (1994).

36. *Id.* at 434–35.

37. *Id.* at 436.

38. *Id.* at 435.

39. *Id.* at 436.

40. *See* 29A AM. JUR. *Insurance* § 1134 (1960); Sidney I. Simon, *Proximate Cause in Insurance*, 10 AM. BUS. L.J. 33, 37 (1972–73).

41. 29A AM. JUR. *Insurance* § 1134 (1960); *see* Simon, *supra* note 40, at 37; State Farm Mut. Auto. Ins. Co. v. Partridge, 514 P.2d 123, 125, 128, 131 (Cal. 1973) (The negligent firing of the trigger on a pistol was an independent act of negligence that occurred prior in time to the insured’s negligent operation of his automobile, and that

The efficient proximate cause is therefore the peril that sets in motion a chain of events, unbroken by any independent peril that intervenes to produce loss and without which no loss would have occurred. Stated another way, an efficient proximate cause is the initiating peril on which a subsequent peril acts. An insurance policy provides coverage when a covered peril is the efficient proximate cause of loss. However, policies provide no coverage if excluded perils are the efficient proximate cause of loss.⁴² Efficient proximate cause applies only when two or more identifiable, dependent perils cause a loss in which one peril is covered and the other dependent peril is excluded, and both perils contribute to the loss.⁴³ Perils are considered dependent when an initiating peril creates a condition on which a subsequent peril acts to cause loss.⁴⁴ When different perils concur, the efficient proximate cause of loss is the peril to which the loss is to be attributed, even though another peril followed and operated more immediately in producing loss.⁴⁵ However, it is improper for courts to designate the initial peril in a chain of events as the efficient proximate causes of loss when that initial peril is remote in time or place.⁴⁶

A. Proximity/Remoteness Analysis

When analyzing a loss that may have been caused by at least two perils, it is necessary to consider whether the suspected perils have the requisite characteristics to be labeled as the “efficient proximate cause.” For example, assume the covered peril of windstorm strikes the insured farm. A barn collapses five days later when the excluded peril of snowstorm also strikes the farm. Does the covered peril of windstorm qualify as the dominant cause of loss? This type of question presents the problem of proximity/remoteness. If the covered peril of windstorm is not the efficient proximate cause of the barn’s collapse because the windstorm occurred too remotely in time, the loss would not be covered because the immediate cause of loss is the excluded peril of snowstorm.⁴⁷ However, if the windstorm is not too

both negligent acts were the proximate cause of the gun-shot wound sustained during the automobile accident.)

42. *Kelly v. Farmers Ins. Co.*, 281 F. Supp. 2d 1290, 1296 (W.D. Okla. 2003).

43. *Id.*

44. *See Sabella v. Wisler*, 377 P.2d 889 (Cal. 1963).

45. The efficient or initiating peril creates a condition which is acted on by a subsequent or immediate peril. *See id.* at 895. In *Sabella*, for example, a contractor’s negligent installation of a sewer line (a covered peril), caused waste water to leak into the loose soil fill of the former quarry on which a home was built. *See id.* at 895. The leaking waste water acted on the poor foundation soils, which led to the foundation settlement (an excluded peril). *See id.* Thus, the efficient proximate cause of loss was the negligent installation of the sewer line, not the defective way the contractor filled the quarry. *See id.* at 892–95.

46. *See Swisher, supra* note 12, at 368.

47. *See STEMPER, supra* note 35, at 435–37. Proximity/remoteness concerns the temporal and spatial relationship between a peril and a loss. *See id.* at 434–35. 68

remote, the trier of fact must decide which of the two perils is the dominant cause of loss.⁴⁸

*Bird v. St. Paul Fire & Marine Insurance Co.*⁴⁹ involved the famous “Black Tom Island” disaster of World War I.⁵⁰ Judge Benjamin Cardozo (later becoming a U.S. Supreme Court Justice) contemplated both spatial and temporal remoteness when finding no coverage for the loss, observing that most people think of relatedness in terms of both time and place.⁵¹

St. Paul insured a canal boat.⁵² The policy’s insuring agreement provided that “Touching the adventures and perils which the said Company are content to bear and take upon themselves by this policy, they are of the sounds, harbors, bays, rivers, canals and fires, that shall come to the damage of the said boat, or any part thereof.”⁵³ There was no express policy exclusion for a loss resulting from an explosion.⁵⁴

Years after the *Bird* decision, the United States government determined that German saboteurs set several fires in a railroad yard full of wooden freight cars loaded with 1,000 tons of TNT, ammunition, and dynamite.⁵⁵ After a series of small explosions, a final massive explosion (estimated to be the equivalent of 5.5 on the Richter Scale)⁵⁶ caused an air concussion which damaged the insured canal boat docked approximately 1,000 feet away.⁵⁷ The boat never caught fire; damage was caused solely by concussion from the explosion.⁵⁸ Judge Cardozo found that damage to the canal boat was not caused by the fires set by the saboteurs, stating:

[e]ven for the jurist, the same cause is alternately proximate and remote as the parties choose to view it. A policy provides that the insurer shall not be liable for damage caused by the explosion of a

A peril, which on the surface may appear remote, may, in fact, be substantial because that peril may have initiated the causal chain resulting in a loss. For example, assume the evidence in the illustration in the text above proves that the windstorm was of sufficient strength to have weakened the barn but not to have caused it to collapse, but that the combined actions of the two perils was necessary to have caused the collapse, and that snowstorm alone would not have caused the loss.

48. See STEMPEL, *supra* note 35, at 438.

49. *Bird v. St. Paul Fire & Marine Ins. Co.*, 120 N.E. 86 (N.Y. 1918).

50. *See id.* at 86.

51. *See id.* at 87.

52. *Id.* at 86.

53. *Id.*

54. *Id.*

55. See CHAD MILLMAN, *THE DETONATORS* 90–91 (2006). The ordinance was going to be shipped to Europe for the French and English to use in the war with Germany and Austria. *See id.* at 4.

56. N.J. Dep’t of Envtl. Prot., *Liberty State Park: Black Tom Explosion*, http://www.state.nj.us/dep/parksandforests/parks/liberty_state_park/liberty_blacktomexplosion.html (last visited Oct. 4, 2006).

57. *Bird*, 120 N.E. at 86.

58. *Id.*

boiler. The explosion causes a fire. If it were not for the exception in the policy, the fire would be the proximate cause of the loss and the explosion the remote one. By force of the contract, the explosion becomes proximate. A collision occurs at sea, and fire supervenes. The fire may be the proximate cause and the collision the remote one for the purpose of an action on the policy. The collision remains proximate for the purpose of suit against the colliding vessel. There is nothing absolute in the legal estimate of causation. Proximity and remoteness are relative and changing concepts.⁵⁹

B. *Efficient Proximate Cause Applied*

The California Supreme Court set out its efficient proximate cause test for the first time in 1963 when it reviewed *Sabella v. Wisler*.⁶⁰ This test is limited to claims where “there exists a causal or dependent relationship between covered and excluded perils, such that ‘two or more distinct actions, events, or forces combined to create the damage.’”⁶¹ “[T]hese multiple ‘actions, events, or forces’ are ‘concurrent’ in the sense that they must all occur” to produce a loss; but the *Sabella* test is not limited to claims where perils occur simultaneously or concurrently in time.⁶² The *Sabella* test is also appropriate where losses are precipitated by a chain of events that occur in a serial or lineal manner.⁶³

The *Sabella* court defined efficient proximate cause alternatively as the initiating peril that sets other perils in motion and as the “predominating or moving efficient cause.”⁶⁴ Because the initiating peril is not necessarily the predominating cause, courts tend to favor predominant or dominant cause.⁶⁵

Factually, *Sabella v. Wisler* reveals that Luciano and Diane Sabella sued J. W. Wisler after Wisler sold them a poorly constructed home on the site of a former quarry that had been filled.⁶⁶ National Union insured the Sabellas under an all-risks homeowner’s policy.⁶⁷ A few years after the Sabellas purchased their home, sewer pipes began to leak.⁶⁸ This leakage, combined with the defective way in which the

59. *Id.* at 88 (citations omitted).

60. *See Sabella v. Wisler*, 377 P.2d 889 (Cal. 1963).

61. *Berry v. Commercial Union Ins. Co.*, 87 F.3d 387, 389 (9th Cir. 1996) (citations omitted) (quoting *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 708 (Cal. 1989) and *Chadwick v. Fire Ins. Exch.*, 21 Cal Rptr. 871, 874 (Ct. App. 1993)) (inadequate labeling of fungicide’s effect on aluminum pipe and flushing of copper hydroxide based fungicide through the pipe).

62. *Id.* at 389–90.

63. *Id.* at 390.

64. *See Sabella*, 377 P.2d at 895.

65. *See Cal. Auto. Ins. Co. v. Hogan*, 5 Cal. Rptr. 3d 761, 765 (Ct. App. 2003); *Am. Nat’l Prop. & Cas. Co. v. Julie R.*, 90 Cal. Rptr. 2d 119, 123 (Ct. App. 1999).

66. *Sabella*, 377 P.2d at 890–91.

67. *Id.* at 891.

68. *Id.* at 892.

former quarry was filled, caused soils under the Sabella home to settle, which in turn caused damage to the home.⁶⁹ Loss caused by settlement of soils was an excluded peril, but loss caused by negligent construction was a covered peril.⁷⁰ Efficient proximate cause under California law is the initiating peril on which a subsequent peril acts—the initiating peril being the one to which the loss is to be attributed even though another peril follows and more immediately produces the loss.⁷¹ The court rejected National Union’s argument that the Sabelas’s loss would not have occurred “but for” the excluded peril of settling soil and that their damages were excluded from coverage under section 532 of the California Insurance Code.⁷² The court said:

But section 532 must be read in conjunction with related section 530 of the Insurance Code, and section 530 provides that “An insurer is liable for loss of which a peril insured against was the proximate cause, although a peril not contemplated by 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.” It is thus apparent that if section 532 were construed in the manner contended for by defendant insurer, where an excepted peril operated to any extent in the chain of causation so that the resulting harm would not have occurred “but for” the excepted peril’s operation, the insurer would be exempt even though an insured peril was the proximate cause of the loss. Such a result would be directly contrary to the provision in section 530, in accordance with the general rule, for liability of the insurer where the peril insured against proximately results in the loss.

It would appear therefore that the specially excepted peril alluded to in section 532 as that “but for” which the loss would not have occurred, is the peril proximately causing the loss, and the peril there referred to as the “immediate cause of the loss” is that which is immediate in time to the occurrence of the damage. The latter conclusion as to the meaning of section 532 of the Insurance Code suggests disapproval of language to the contrary in [prior case law] wherein the “but for” provision of section 532 was interpreted to refer to a cause without which the loss would not in fact have occurred, and without reference to companion section 530 of the Insurance Code.⁷³

The California Supreme Court ruled that policy exclusions are unenforceable if they conflict with section 530 and the efficient proximate cause doctrine.⁷⁴ The court ruled that Wisler’s negligent installation of the sewer pipe, rather than the soil settlement, was the efficient

69. *Id.* at 890–92.

70. *See id.* at 894–97.

71. *Id.* at 895.

72. *Id.* at 896–97.

73. *Id.* (citations omitted).

74. *Id.* at 896.

proximate cause of the loss.⁷⁵ The court was satisfied by the fact there was little or no subsidence damage over the first four years the Sabel-las lived in their home in concluding that Wisler's negligence and the subsequent sewer pipe leaking was the "predominating or moving efficient cause of the loss."⁷⁶

In 1989, the California Supreme Court considered an all-risks homeowner's policy that purported to exclude loss contributed to by any earth movement. In *Garvey v. State Farm Fire & Casualty Co.*,⁷⁷ there would be no coverage under the insurance policy if earth movement was a minor contributing cause of loss to an addition to the Garveys' home when the addition pulled away from the main structure.⁷⁸ State Farm denied coverage based on the earth movement exclusion.⁷⁹ The Garveys argued that the efficient proximate cause of loss was contractor negligence, an implicitly covered peril.⁸⁰ The court explained that when the court adopted efficient proximate cause, the court "impliedly recognized that coverage would not exist if the covered risk was a *remote* cause of loss, or if the excluded risk was the efficient proximate . . . cause of the loss."⁸¹ However, there could still be coverage if an excluded peril contributed to loss if that excluded peril was too remote.⁸² The court clarified matters by stating that the efficient proximate cause of loss is the "predominant," or most important, cause of loss.⁸³ The court concluded that by focusing its causal review on the most important cause of loss, the efficient proximate cause doctrine creates a "workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer."⁸⁴

The court remanded the case to the trial court so that a jury might determine whether earth movement was the efficient proximate cause of loss.⁸⁵ If so, there would be no coverage.⁸⁶ If contractor negligence was the efficient proximate cause of loss, the Garvey's claim then would be covered.⁸⁷ The court rejected State Farm's attempt to contract around efficient proximate cause, but enforced the exclusion to the extent that an excluded peril proximately caused the loss.⁸⁸

75. *See id.* at 897.

76. *Id.* at 895.

77. *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704 (Cal. 1989).

78. *Id.* at 705, 714-15.

79. *Id.* at 705-06.

80. *Id.* at 706.

81. *Id.* at 707.

82. *Id.*

83. *See id.* at 708.

84. *Id.*

85. *Id.* at 714-15.

86. *Id.* at 715.

87. *See id.*

88. *See id.*

In *Hahn v. M.F.A. Insurance Co.*,⁸⁹ Hahn sought recovery for damage to a shed and the farm machinery therein due to a combination of windstorm and snowstorm that caused the shed's roof to collapse.⁹⁰ The policy covered "direct loss" by windstorm and excluded loss caused directly or indirectly by snowstorm.⁹¹ M.F.A. refused coverage because, but for the snowstorm, the loss would not have occurred.⁹²

The insured's expert testified that the roof of the shed collapsed as the result of inadequate wind bracing.⁹³ The expert also asserted that the roof structure was strong enough to survive the snowstorm without the wind, even with inadequate bracing, and that the dominant cause of loss was wind pressure on the roof.⁹⁴ The jury found that the covered peril of windstorm was the efficient proximate cause of the loss.⁹⁵ The insured could recover under the policy even though another peril contributed to the loss, so long as the dominant cause of loss was a covered peril.⁹⁶ A windstorm policy does not require wind alone to cause loss.⁹⁷ Although the appellate court expressed doubt that the evidence supported the jury's finding that the covered peril, windstorm, was the efficient proximate cause of loss, the court refused to second guess the jurors.⁹⁸ There was sufficient evidence to support a theory that loss was caused by the combined perils of windstorm and negligence in failing to adequately brace the roof.⁹⁹

III. THE STRICT CONSTRUCTION RULE IN TEXAS

Texas courts have so far refused to apply efficient proximate cause because that doctrine was not embraced or contemplated by the contracts of insurance reviewed in reported opinions. Coverage determinations under property insurance policies in Texas depend on the wording of policy exclusions, not court-created concepts of causation.¹⁰⁰

89. *Hahn v. M.F.A. Ins. Co.*, 616 S.W.2d 574 (Mo. Ct. App. 1981).

90. *Id.* at 574.

91. *Id.*

92. *Id.*

93. *Id.* at 575.

94. *Id.*

95. *Id.*

96. *Id.* at 574.

97. Stephen M. Brent, Annotation, *What Constitutes "Direct Loss" Under Windstorm Insurance Coverage*, 65 A.L.R.3d 1128, § 2[a], at 1132 (1975).

98. *Hahn*, 616 S.W.2d at 575.

99. *Id.*

100. In most jurisdictions, efficient proximate cause was adopted by court rulings. However, California and North Dakota courts considered efficient proximate cause as statutory mandates in those states. *See, e.g., Sabella v. Wisler*, 377 P.2d 889, 896-97 (Cal. 1963) (construing CAL. INS. CODE §§ 530, 532 (1963)); *W. Nat'l Mut. Ins. Co. v. Univ. of N.D.*, 643 N.W.2d 4 (N.D. 2002) (construing N.D. CENT. CODE §§ 26.1-32-01, 26.1-32-03 (2002)). The States of Washington and West Virginia do not permit insurers to contract out of efficient proximate cause, even though neither state statutorily

Two different types of wordings are used in Texas policies to allow insurers to contract out of or into efficient proximate cause.¹⁰¹ For example, an exclusion might include these provisions:

We will not pay for loss or damage caused directly or indirectly by any of the following:

- ordinance or law;
- the enforcement of any ordinance or law;
- regulating the construction, use, or repair of any property;
- requiring the tearing down of any property, including the cost of removing its debris; or
- seizure or destruction of property by order of governmental authority.

*Such loss or damage is excluded, regardless of any other cause or event that contributes concurrently or in any sequence to the loss.*¹⁰²

The italicized sentence in the exclusion example contractually eliminates the efficient proximate cause doctrine because the language of that sentence excludes coverage when an excluded peril, ordinance or law, for example, “contributes concurrently” with a covered peril to cause loss.¹⁰³ Accordingly, when a “policy contains a concurrent cause provision, the parties have expressed their intent to contract out of the efficient proximate cause doctrine.”¹⁰⁴ If the insured can quan-

adopted it. *See* Safeco Ins. Co. of Am. v. Hirschmann, 773 P.2d 413, 414 (Wash. 1989); Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1, 14 (W. Va. 1998).

101. *See* Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 161–62 (Tex. 1971); Nat'l Fire Ins. Co. v. Valero Energy Corp., 777 S.W.2d 501, 506 (Tex. App.—Corpus Christi 1989, writ denied).

102. Hereinafter referred to as a “loss caused by” exclusion. Most “cause of loss” forms exclude “coverage for loss resulting from the enforcement of ordinances or laws that regulate construction, demolition, repair, or use of property.” 2 LINDA G. ROBINSON & JACK P. GIBSON, COMMERCIAL PROPERTY INSURANCE § VI.F.2 (2003).

In *Prytania Park Hotel v. General Star Indemnity Co.*, 896 F. Supp. 618 (E.D. La. 1995), the insured property was damaged by fire, which necessitated repairs. By ordinance, the insured was required to install a sprinkler system in the damaged area. *Id.* at 623. The insureds sought coverage for the installation of the sprinkler system. They argued that because the efficient proximate cause of loss was the covered peril of fire, not enforcement of the building code requirement of sprinkler system installation, the loss was covered. *Id.* at 620, 623. The court rejected this argument because the policy excluded coverage for loss arising from enforcement of an ordinance “regardless of any other cause or event that contributes concurrently or in any sequence to the loss.” *Id.* at 623.

103. *See* Julie A. Passa, Case Note, *Adopting the Efficient Proximate Cause Doctrine, but Saying No to Contracting Out of It*, 79 N.D. L. REV. 561, 572 (2003) (“[Concurrent cause language] operates ‘to exclude certain perils from coverage if they are a cause of loss, regardless of any other perils acting concurrently or in sequence with them.’”) (quoting Mark D. Wuerful & Mark Koop, “Efficient Proximate Cause” in the Context of Property Insurance Claims, 65 DEF. COUNS. J. 400, 407 (1998)).

104. Passa, *supra* note 103, at 572.; *see also* TNT Speed & Sport Ctr. Inc. v. American States Ins. Co., 114 F.3d 731, 733 (8th Cir. 1997) (“The [District Court] found that the plain meaning of the exclusionary language was to directly address, and contract out of, the efficient proximate cause doctrine and exclude coverage for losses caused by water, regardless of the existence of any other contributing causes in any sequence.”); *Cadmus v. Aetna Cas. & Sur. Co.*, No. 95-5721, 1996 U.S. App. LEXIS 74

29443 at *5 (6th Cir. 1996) (per curiam) (“Thus, Tennessee follows the ‘concurrent causation doctrine.’ Neither side disputes that the rotted condition of the truss contributed to the roof collapse.”); Assurance Co. of Am., Inc. v. Jay-Mar, Inc., 38 F. Supp. 2d 349, 352–54 (D.N.J. 1999) (“Rules of construction favoring the insured cannot be employed to disregard the clear intent of the policy language. Therefore, the Court rejected [the insured’s] argument that [failure to apply efficient proximate cause] violates the state’s public policy. In addition, the Court recognizes that most courts which have addressed this issue have found that exclusionary language designed to avoid the ‘efficient proximate cause’ doctrine is enforceable Therefore, if [the insured’s] loss was caused in any part by flood or surface water, it may not recover from [the insurer].”) (citation omitted); ABI Asset Corp. v. Twin City Fire Ins. Co., No. 96 CIV.2067 (AGS) 1997 U.S. Dist. LEXIS 18265, at *4 (S.D.N.Y. 1997) (“Section 5 also contains what is referred to as an ‘anti-concurrent cause clause.’ New York courts have interpreted similar clauses to mean that where a loss results from multiple contributing causes, coverage is excluded if the insurer can demonstrate that any of the concurrent or contributing causes of loss are excluded by the policy. . . . In sum, we find that inherent vice and design defect at least contributed to, and perhaps caused, the collapse of the apartment building. In either event, these perils are specifically excluded under the terms of the insurance policy. We therefore grant [the insurer’s] motion for summary judgment and deny [the insured’s] cross-motion as moot.”) (footnote omitted); Prytania Park Hotel v. Gen. Star Indem. Co., 896 F.Supp. 618, 623 (E.D. La. 1995) (“[T]he policy language specifically states that losses arising from enforcement of an ordinance or regulation, such as the building code requirement for a sprinkler system, are excluded ‘regardless of any other cause or event that contributes concurrently or in any sequence to the loss.’”); State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 314 (Ala. 1999) (“We have a long-standing rule against rewriting unambiguous insurance policies ‘so long as they do not offend some rule of law or contravene public policy.’ We adhere to that rule today and conclude that the rule of efficient proximate causation adopted in [*W. Assurance Co. v. Hann*, 78 So. 232 (Ala. 1917)], does not require us to invalidate the earth-movement exclusion, which indicates [the insurer’s] efforts to contract for narrower coverage. Accordingly, we hold that [the insurer] was entitled to a preverdict JML . . . because the earth-movement exclusion unambiguously excludes coverage for any loss caused in any way by earth movement and because that exclusion is enforceable.”) (citation omitted); Kane v. Royal Ins. Co. of Am., 768 P.2d 678, 679 n.1, 680, 684–86 (Colo. 1989) (“‘An “all risk” policy is a special type of coverage extending to risks not usually covered under other insurance, . . . unless the policy contains a specific provision expressly excluding a particular loss from coverage.’ . . . Mere disagreement between the parties about the meaning of a term does not create ambiguity. . . . [W]e believe that the ‘efficient moving cause’ rule must yield to the language of the insurance policy in question The policies cover ‘all risk of direct physical loss,’ but only ‘subject to all the provisions contained herein.’ . . . Those provisions exclude coverage for ‘loss . . . caused by, resulting from, contributed to, or aggravated by . . . flood.’ . . . The language of the exclusion in the policies here specifically excludes loss ‘caused by, resulting from, contributed to, or aggravated by any of the following: . . . flood.’ (Emphasis added.) We would be rewriting the policy if we were to hold that the ‘efficient cause . . . is the cause to which the loss is to be attributed.’ The language of this exclusion qualifies or enlarges the phrase ‘caused by’ with ‘contributed to’ and ‘aggravated by.’ There is no doubt that the flood ‘contributed to’ or ‘aggravated’ the insureds’ loss. Therefore, we decline to apply the ‘efficient moving cause’ rule where it abrogates the language to which the parties agreed.”) (footnote and citations omitted); Chase v. State Farm Fire & Cas. Co., 780 A.2d 1123, 1130 (D.C. 2001) (“In other words, if earth movement was a contributing cause of the loss of [the insured’s] property, the policy does not cover that loss—even if earth movement was not the (efficient) proximate cause and there were more dominant causes involving covered risks. . . . This is a permissible outcome in the District of Columbia, as there is no statute or public policy requiring otherwise.”); Cameron v. USAA Prop. & Cas. Ins.

Co., 733 A.2d 965, 971 (D.C. 1999) (“The [insureds’] policy expressly provides that a loss caused by surface water ‘is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.’ In *Casey v. General Accident Ins. Co.*, 178 A.D.2d 1001, 578 N.Y.S.2d 337, 338 (1991), . . . plaintiff’s policy contained a similar provision, the court held that ‘[although] other factors, such as a clogged drain and a sloped roof, may have contributed to the loss is of no consequence under the language of the policy.’ The same is true here. . . . Notwithstanding our obligation to resolve any genuine ambiguities in the insurance policy in the [insureds’] favor, we are compelled to conclude that any reasonable reading of the exclusion from coverage of losses attributed to surface water sustains [the insurer’s] denial of the [insureds’] claim.”); Fla. Residential Prop. & Cas. Joint Underwriting Ass’n v. Kron, 721 So.2d 825, 826 (Fla. Dist. Ct. App. 1998) (“Our decision is further supported by the plain language of the lead-in clause to the exclusionary provision, which clearly states that this type of water damage is excluded, ‘regardless of any other cause or event contributing concurrently or in any sequence to the loss.’”); State Farm Fire & Cas. Co. v. Metro. Dade County, 639 So.2d 63, 65–66 (Fla. Dist. Ct. App. 1994) (“The provision declares that the existence of an excluded event will, regardless of any other forces involved, remove the loss from the purview of coverage. No ambiguities are present in this provision. . . . The exclusionary clauses are plain and unambiguous on their faces, allowing no room for interpretation. ‘The fact that an insurance policy requires analysis to comprehend its scope does not mean it is ambiguous.’ . . . Thus, the final summary judgment in the [insurer’s] favor must be reversed; the case is remanded for entry of judgment for [the insurer.]” (citations omitted)); Bd. of Educ. v. Int’l Ins. Co., 684 N.E.2d 978, 981 (Ill. App. Ct. 1997) (“Generally, an ‘all risk’ insurance policy creates a special type of coverage extending to risks not usually covered under other insurance, and recovery under an ‘all risk’ policy will, as a rule, be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage.”); Ramirez v. Am. Family Mut. Ins. Co., 652 N.E.2d 511, 516 (Ind. Ct. App. 1995) (“The exclusion unequivocally states that loss resulting from sump pump failure is not covered ‘regardless of any other cause or event contributing concurrently or in any sequence to the loss.’ Thus, the fact that the sump pump failure was preceded by a power outage resulting from the accumulation of ice on the power lines does not remove the [insureds’] claim from this exclusion. Their claim falls squarely within the exclusion, and thus, summary judgment in [the insurer’s] favor on the coverage issue was proper.”); Sunshine Motors, Inc. v. N.H. Ins. Co., 530 N.W.2d 120, 121 (Mich. Ct. App. 1995) (“[The policy] clearly and unambiguously excluded coverage for damage caused directly or indirectly by, among other things, flooding, surface water, water backing up from a sewer or drain, contributing weather conditions, or faulty or inadequate maintenance of property on or off the insured’s premises. The policy expressly excluded coverage for such losses ‘regardless of any other cause or event that contributes concurrently or in any sequence to the loss.’ . . . Plaintiff’s claim that the blocked drainage system was ‘the proximate cause’ of its losses misses the point: Whether the blocked drainage system was a direct or indirect cause of plaintiff’s water damage, or whether it was *the* principal factor or merely *a* contributing factor, the policy expressly excluded coverage. Accordingly, . . . [s]ummary disposition was proper.”); Toumayan v. State Farm Gen. Ins. Co., 970 S.W.2d 822, 826 (Mo. Ct. App. 1998) (“The parties to an insurance contract can contract out of the efficient proximate cause doctrine by exclusionary language. . . . [The insurer’s] policy contains exclusionary language in the lead-in clause (Clause 2) which excludes any loss which would not have occurred in the absence of earth movement *regardless of the cause of the loss or whether other causes acted concurrently or in sequence with* the earth movement to produce the loss. This exclusionary language is unambiguous and prevents application of the [efficient] proximate cause doctrine. . . . In addition, courts in other states have construed the exact exclusionary clause in [the insurer’s] policy to effectively contract out of the efficient proximate cause doctrine.”); Pakmark Corp. v. Liberty Mut. Ins. Co., 943 S.W.2d 256, 261–62 (Mo. Ct. App. 1997) (“The [insurance]

tify the extent of loss caused by the covered peril, the insured may recover that portion of loss attributable to the covered peril.¹⁰⁵

The other type of exclusion might preclude coverage for:

- loss or *damage* caused by rust, corrosion, frost or freezing unless resulting from a peril insured against;¹⁰⁶ or
- cost of making good faulty workmanship, materials, construction or design, but this exclusion shall not be deemed to exclude phys-

policy clearly provides that there is no coverage 'for loss or damage caused directly or indirectly,' among other things, flood water, and 'such loss or damage is excluded regardless of any other cause or event [i.e. sewage backup] that contributes concurrently or in any sequence to the loss.' Section B.1 of the [insurance] policy provides that an exclusion is an exclusion regardless of any other cause that contributes to the loss, either concurrently or in any sequence to the loss. . . . The trial court properly granted [the insurer's] motion for summary judgment because the policy unambiguously excluded coverage for loss caused directly or indirectly by flooding regardless of any sewage backup that contributed concurrently or in any sequence to [the insured's] loss. We are compelled to construe the policy as written, and therefore, affirm the granting of summary judgment."); *Bergeron v. State Farm Fire & Cas. Co.*, 766 A.2d 256, 260 (N.H. 2000) (discussing an example of a concurrent cause provision); *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1274-78 (Utah 1993) ("However, policy terms are not necessarily ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interests. . . . We decline to adopt a new definition of 'ambiguous' that would render an exclusion invalid simply because it conflicts with the stated coverage in some way. . . . It specifically excludes coverage for damage resulting from earth movement, despite the fact that the cause of the earth movement is a covered peril. In general, a court may not rewrite an insurance contract for the parties if the language is clear and unambiguous, and we cannot do so here. . . . 'This "lead-in" clause, apparently a relatively recent addition by [the insurer] to its policies, clearly excludes from coverage any loss from earth movement, combined with water, *regardless of the cause.* . . . In view of the lead-in language, we hold that the district court was correct in its interpretation that the policy was unambiguous and excluded coverage.' . . . We believe that the proper path to follow is to recognize the efficient proximate cause rule only when the parties have not chosen freely to contract out of it. . . . "The efficient proximate cause" rule, if it were adopted by this court, must yield to a well settled principle of law: namely, that courts will not rewrite a contract for the parties.' . . . We therefore affirm the grant of summary judgment for [the insurer].") (footnotes and citations omitted); *Village Inn Apartments v. State Farm Fire & Cas. Co.*, 790 P.2d 581, 583 (Utah Ct. App. 1990) ("In view of the lead-in language, we hold that the district court was correct in its interpretation that . . . coverage was excluded under the policy as a matter of law."); *State Farm Fire & Cas. Co. v. Paulson*, 756 P.2d 764, 769 n.2 (Wyo. 1988) ("If a policy did not contain a sequential exclusion, as did this one, coverage would exist if an otherwise excluded peril resulted in the occurrence of a covered peril, such as non-covered peril of vandalism resulting in breakage of water pipes which caused covered peril of water damage.").

105. See *McKillip*, 469 S.W.2d at 162.

106. Hereinafter referred to as an "unless resulting from" exclusion. This category of exclusion includes an "ensuing loss" provision which may provide that an excluded peril does not "apply to an ensuing loss caused by . . . *water damage*, or . . . provided such losses would otherwise be covered under this policy." *Allstate Ins. Co. v. Smith*, 450 S.W.2d 957, 959 (Tex. Civ. App.—Waco 1970, no writ). "An 'ensuing loss,' then, is a loss which follows as a consequence of some preceding event or circumstance." *Lundstrom v. United Servs. Auto. Ass'n*, 192 S.W.3d 78, 91 (Tex. App.—Houston [14th Dist.] 2006) (citing *Lambros v. Standard Fire Ins. Co.*, 530 S.W.2d 138, 141 (Tex. Civ. App.—San Antonio 1975, writ ref'd)).

ical loss or damage arising as a consequence of faulty workmanship, material, construction or design.¹⁰⁷

Under an "unless resulting from" exclusion, a loss will be covered "when the exclusion is qualified by the terms of the policy to allow recovery where the otherwise excluded peril is itself caused by a covered peril."¹⁰⁸

A. "*Loss Caused By*" Exclusion—*Contracting Out of Efficient Proximate Cause*

The rule in Texas recognizes that a covered peril can be affected by other perils. A loss associated with windstorm, for example, seldom results from that peril alone, but rather from a combination of perils, such as windstorm and rain or water, or windstorm and snowstorm. Insurers contract to bear the burden of direct losses caused by covered perils, although losses may have been indirectly and incidentally enhanced by a peril for which neither the insurer nor the insured are responsible. Insureds therefore bear the burden of losses from excluded perils. Thus, when losses are caused by a combination of covered perils and excluded perils, the insureds' damages are affected by perils that are outside the express agreements between the parties, and insurers are not liable for the losses. The rule in Texas is consistent with this logic and prevents courts from manipulating causation rules to bring losses under coverage if those losses are caused in whole or in part by excluded perils.

The rule in Texas allows insurers to contractually circumvent the efficient proximate cause doctrine applied in most other jurisdictions.¹⁰⁹ For example, the terms of the policy in *Coyle v. Palatine Insurance Co.*,¹¹⁰ excluded coverage for loss "occasioned directly or indirectly by . . . high water."¹¹¹ This type of policy exclusion causes coverage to be dependent on the relative importance of each individually covered peril. A Texas insured may recover by proving that either (1) the immediate cause of loss ("all direct loss or damage") was caused solely by a covered peril or (2) the loss was caused by a combination of covered and excluded perils, provided damages from each peril can be segregated and apportioned accordingly.¹¹² Thus, an in-

107. *Nat'l Fire Ins. Co. v. Valero Energy Corp.*, 777 S.W.2d 501, 505 (Tex. App.—Corpus Christi 1989, writ denied) (emphasis added).

108. *Id.* at 506 (citing *Adrian Assocs., Gen. Contractors v. Nat'l Sur. Corp.*, 638 S.W.2d 138, 141 (Tex. App.—Dallas 1982, writ ref'd n.r.e.)).

109. *See Coyle v. Palatine Ins. Co.*, 222 S.W. 973, 974–75 (Tex. Comm'n App. 1920, holding approved). The policy in *Coyle* excluded coverage for all direct loss caused by "water or rain, whether driven by wind or not." *Id.* at 974.

110. *See id.* at 974–75.

111. *Id.* at 974.

112. *See Coyle*, 222 S.W. at 973–76.

sured can recover only for that portion of the damages caused solely by the covered peril.¹¹³

In *Travelers Indemnity Co. v. McKillip*,¹¹⁴ Travelers insured Troy McKillip under an all-risks policy that covered losses from windstorm but excluded loss caused by snowstorm.¹¹⁵ Events leading to the loss in this case began with a windstorm.¹¹⁶ The windstorm took an obvious path across McKillip's farm, directly striking a barn on his premises.¹¹⁷ According to the evidence, the barn remained standing after the windstorm and appeared to have sustained no damage.¹¹⁸ Six days later, a snowstorm dropped five inches of snow on the area.¹¹⁹ Following the snowstorm, the barn collapsed and McKillip claimed that the collapse was due to the earlier windstorm.¹²⁰ Travelers denied coverage, claiming that the collapse of the barn was caused by the excluded peril of snowstorm.¹²¹

The case went to trial and the jury made the following findings:

- the barn was damaged by the windstorm;
- the windstorm was the dominant efficient cause of the collapse of the barn, although the weight of the snow may have contributed to the collapse;
- the fair market value of the barn immediately prior to the windstorm was \$11,400;
- the fair market value of the barn immediately after the windstorm was \$2,000;
- the fair market value of the barn immediately after collapse was \$2,000;
- the reasonable and necessary cost to repair or replace the barn after the windstorm was \$7,500;
- the reasonable and necessary cost to repair or replace the barn after it collapsed was \$7,500;
- the collapse of the barn was directly caused by the windstorm; and
- the collapse of the barn was not caused solely by the weight of snow.¹²²

113. Withers, *supra* note 4, at 262. This rule is based on decisions in *Coyle*, 222 S.W. 973 and in *McKillip*, 469 S.W.2d 160. Although the Courts in both of these cases construed a windstorm policy, the rule established in those cases has been extended to include coverage for property damage under other provisions of a homeowner's insurance policy. See, e.g., *Fiess v. State Farm Lloyds*, 392 F.3d 802, 807 (5th Cir. 2004) (applying the doctrine of concurrent causes to an insurance claim for flood-related mold contamination).

114. *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160 (Tex. 1971).

115. *Id.* at 161–62.

116. *Id.* at 161.

117. *Id.* at 163.

118. *Id.*

119. *Id.* at 161.

120. *Id.* at 163.

121. See *id.* at 161.

122. *Id.*

Based on these jury findings, the trial court rendered judgment for the insured in the amount of \$7,450, and the appellate court affirmed that judgment.¹²³ The Supreme Court of Texas reversed the courts below and remanded the case for a new trial because both lower courts erroneously assumed that Texas applies the doctrine of efficient proximate cause to property damage claims.¹²⁴ The Supreme Court cited the 1920 *Coyle* case to show an improper submission to the jury on the theory that the entire loss was covered if the windstorm was the dominant efficient cause of the building collapse, although other causes may have contributed to the loss.¹²⁵ Under Texas law, the insured must prove either (1) the loss is caused solely by a covered peril or (2) the damages caused by the covered peril can be segregated from those caused by an excluded peril.¹²⁶

A more reasonable analysis of the facts in *McKillip* is that the peril of windstorm was not the efficient proximate cause of loss because the barn remained intact for six days before the snowstorm occurred. Because the barn did not collapse during or immediately after the windstorm, the jury could have concluded that either (1) the snowstorm alone caused the loss or (2) the perils of windstorm and snowstorm acted jointly because neither peril alone was sufficient in strength to cause the loss.¹²⁷ The Authors find no record of what occurred on retrial of *McKillip*, but if a jury found that the peril of snowstorm alone caused the loss, the trial court should have denied any coverage.

The 1920 case of *Coyle v. Palatine Insurance Co.*¹²⁸ concerned insureds who sued Palatine to recover damages to their two-story apartment building caused by a 1915 hurricane and storm, which plagued the Island of Galveston over a two-day period.¹²⁹ The Palatine policy covered all direct loss by tornado, windstorm, or cyclone, and it excluded coverage for loss occasioned directly or indirectly by tidal wave, or for any loss or damage caused by water or rain,

123. *Id.*

124. *Id.* at 162–63. The Supreme Court viewed the events most favorably in support of the verdict and concluded that the evidence did not support the findings of the jury. *Id.* at 163. The record showed no evidence that the windstorm had any direct effect on the barn. *Id.* There was also no evidence in the record of any damage to the barn caused solely by the windstorm. *Id.* The jury responded solely to issues related to the condition of the barn after the windstorm, snowstorm, and after the collapse of the barn. *See id.* There was no evidence of costs to repair or replace the barn after the windstorm. *Id.*

125. *See id.* at 162.

126. *Id.*

127. *See id.* at 162–63. Although, it was also possible that the peril of snowstorm, by itself, proximately caused the loss. Certainly, the Texas Supreme Court expressed doubt about whether the evidence in the case supported the jury's finding that windstorm alone caused the loss. *See id.*

128. *Coyle v. Palatine Ins. Co.*, 222 S.W. 973 (Tex. Comm'n App. 1920, holding approved).

129. *Id.*; *Palatine Ins. Co. v. Coyle*, 196 S.W. 560, 561 (Tex. Civ. App.—Galveston 1917), *aff'd*, 222 S.W. 973 (Tex. 1920).

whether driven by wind or not, unless the building insured . . . shall first sustain an actual damage to the roof or walls of same by the direct force of the wind, and shall then be liable only for such damage to the interior of the building . . . as may be caused by water or rain entering the building through openings in the roof or walls made by the direct action of the wind.¹³⁰

Palatine and the insureds stipulated that the total amount of damages caused by the storm was \$4,512.43.¹³¹ They also agreed that (1) damage caused by the direct action of the wind was \$500, (2) damage to interior spaces caused by water or rain entering through openings in the roof or walls made by the direct action of wind alone was \$660, and (3) the remaining damages, \$3,352.43, were due to the combined action of wind and water.¹³² Palatine offered to pay the insureds the two sums first mentioned, aggregating \$1,160, but the insureds demanded payment of all damages.¹³³ The sole controversy was whether the damages caused by the combined action of wind and water were covered.¹³⁴ The case was tried to the court on agreed facts.¹³⁵ The trial court ruled in favor of the insureds, for whom it awarded damages totaling \$4,512.43.¹³⁶ Palatine appealed.¹³⁷

The insureds argued that the hurricane forced water over Galveston's sea wall, flooding the island, and that the covered peril of hurricane was the efficient proximate cause of loss.¹³⁸ The hurricane was the initiating peril that set the excluded peril of water in motion, giving the latter peril the necessary strength to cause loss.¹³⁹ Furthermore, the insureds claimed that because the insurer knew that Galveston was vulnerable to hurricanes and water damage caused by hurricanes, an insurance policy covering hurricane "must, in order to give any effect to the policy, include liability for the natural incidental damage which uniformly attended the hurricane."¹⁴⁰ The court of appeals rejected these arguments on the ground that the policy excluded coverage for all damages caused directly or indirectly by water and waves.¹⁴¹ The court asked why it should go "hunting for the predominant, efficient, proximate, and responsible" cause of loss if the facts are that "'hurricanes are attended by high winds, high water, and high waves,' and the parties by plain and direct agreement have [excluded] . . . all damage caused or occasioned directly or indirectly by the water

130. *Coyle*, 222 S.W. at 974.

131. *Palatine Ins. Co.*, 196 S.W. at 561.

132. *Coyle*, 222 S.W. at 974.

133. *Palatine Ins. Co.*, 196 S.W. at 561.

134. *See id.*

135. *Coyle*, 222 S.W. at 974.

136. *Palatine Ins. Co.*, 196 S.W. at 561.

137. *See Coyle*, 222 S.W. at 974.

138. *Palatine Ins. Co.*, 196 S.W. at 564.

139. *Id.*

140. *Id.*

141. *See id.* at 565.

and the waves"¹⁴² The court questioned the need to hunt for a predominant cause of loss when the evidence clearly established that the loss was caused by the combination of wind and water.¹⁴³ The court of appeals ruled that Palatine was liable only for those damages caused by wind alone (\$500) and for those damages to the interior, which was caused by water or rain entering through openings first created by the wind (\$660).¹⁴⁴

On appeal, the Supreme Court of Texas found that Palatine was not responsible for payment of any damages due to the combined actions of wind and water.¹⁴⁵ The policy excluded loss caused by water only, or loss caused by water driven by wind.¹⁴⁶ The court concluded that when loss occurs as the result of a covered peril (windstorm in this case) and an excluded peril (water in this case) and both perils are concurrently active, in which damages caused by each peril cannot be distinguished, efficient proximate cause does not apply.¹⁴⁷ As to the disputed loss caused concurrently by wind and water, the policy excluded coverage for those damages.¹⁴⁸ Because the insureds and the insurer previously stipulated that they could not prove which part of the disputed loss was due to wind alone, those damages were not recoverable.¹⁴⁹ The determination of which peril was responsible for the loss was in reality an application of the provisions of the contract of insurance to the facts in this particular case.¹⁵⁰ The policy applied only to direct loss from windstorm and excluded coverage for any loss caused by water, unless the building first sustained actual damage to the roof or walls by the direct force of the wind.¹⁵¹ The question of causation was simply merged into the more fundamental question of whether the disputed loss was caused solely by the insured peril of windstorm/hurricane, as contemplated by the parties to the contract.¹⁵² However, this question was decided between the insureds and the insurer by their joint stipulation.¹⁵³ The parties' stipulation played such a prominent role in deciding coverage that one may question whether the court in *Coyle* actually applied the rule purportedly followed.

142. *Id.*

143. *Id.*

144. *Id.*

145. *See* *Coyle v. Palatine Ins. Co.*, 222 S.W. 973, 975 (Tex. Comm'n App. 1920, holding approved).

146. *Id.* at 975-76.

147. *See id.* at 976.

148. *See id.* at 975-76.

149. *See id.* at 975.

150. *See id.* at 973-75.

151. *Id.* at 973-74.

152. *See id.* at 975.

153. *See id.*

In *United States Fire Insurance Co. v. Matchoolian*,¹⁵⁴ Harold Matchoolian sought coverage for damages to his building caused by a thunderstorm accompanied by high winds and rain. Matchoolian asserted that the storm dislodged the roof's tar paper, which blocked drains on the roof.¹⁵⁵ The drains clogged when 1.7 inches of rain fell within 20 minutes.¹⁵⁶ When water accumulated on the roof, a portion of the roof collapsed.¹⁵⁷ United States Fire argued that the loss was caused by the excluded peril of rain.¹⁵⁸ At trial, Matchoolian's expert witness testified that damage to the roof was caused by the excessive weight of water, and the jury awarded damages to Matchoolian.¹⁵⁹

On appeal, the court noted that the Supreme Court of Texas refused to accept efficient proximate cause in *McKillip*, rejecting the idea that an insured could recover for loss caused by an excluded peril if a covered peril was the efficient proximate cause of loss.¹⁶⁰ When an insurer pleads an exclusion such as rain, the insured must either prove that the excluded peril of rain was not the cause of loss or segregate the damages caused by a covered peril, such as windstorm, from those damages caused by the excluded peril of rain, and then secure a jury finding on the amount of damage caused by the covered peril of windstorm alone.¹⁶¹ Matchoolian failed to request a jury issue segregating the damage caused by windstorm from damage caused by rain.¹⁶² Matchoolian secured a jury finding that rain was not a proximate cause of the collapse of the roof, but the court of appeals ignored this finding and ruled, as a matter of law, that the peril of collapse was the immediate cause of loss and that windstorm and rain had combined to cause the loss.¹⁶³ Because the loss resulted from the covered peril of windstorm and the excluded peril of rain, the insured could not recover because of his failure to segregate his damages.¹⁶⁴

B. "*Unless Resulting From*" Exclusion—Contracting into Efficient Proximate Cause

Given the Texas Supreme Court's strict construction of property insurance exclusions in *Coyle* and *McKillip*, it is no surprise that intermediate Texas appellate courts do not blindly follow those two decisions when confronted with policy exclusions that are worded dif-

154. *U.S. Fire Ins. Co. v. Matchoolian*, 583 S.W.2d 692 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

155. *Id.* at 693.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 694.

164. *See id.*

ferently than in those two cases. This occurred in *National Fire Insurance Company of Pittsburgh, Pa. v. Valero Energy Corp.*¹⁶⁵ National Union Fire Insurance Company (“National Union”) insured Valero’s oil refinery under a builder’s risk policy that provided coverage for losses to property as a result of work on the refinery’s expansion project.¹⁶⁶ One objective of the expansion project was to add a heavy oil cracker to the refinery, including a citrate scrubber.¹⁶⁷ When Valero attempted to put the citrate scrubber into operation, substantial damage was sustained.¹⁶⁸ Valero made a claim for coverage, and National Union responded that there was no coverage because the loss was caused by the excluded perils of rust and/or corrosion.¹⁶⁹ National Union also argued there was no coverage for “making good faulty workmanship, material construction or design.”¹⁷⁰ However, this exclusion did not apply when “physical loss or damage” arose out of “faulty workmanship, material, construction or design.”¹⁷¹

Valero sued for breach of contract and extra-contractual damages, and a jury found that Valero’s claim was covered.¹⁷² Based on the jury’s answers, the trial court rendered judgment for Valero, and National Union appealed.¹⁷³

National Union continued to assert on appeal that the excluded perils of rust and/or corrosion precluded coverage for losses to the citrate scrubber.¹⁷⁴ The court of appeals began its analysis by citing *Travelers Indemnity Co. v. McKillip*,¹⁷⁵ in which the Supreme Court of Texas ruled that when a loss results from two concurring perils, one insured and one not insured, the loss is covered, but only for the portion of damages that can be traced back to the covered peril.¹⁷⁶ However, the *Valero* court departed from *McKillip* because National Union’s exclusion had qualified wording that allowed for recovery when an excluded peril, the immediate cause of loss, was itself caused by a covered peril.¹⁷⁷ In other words, the excluded peril of rust was not the cause of loss. Rust was the result of the covered peril of faulty design.¹⁷⁸ The court considered that sudden and unexpected corrosion occurred as the result of the covered peril of faulty design of the

165. *Nat’l Fire Ins. Co. v. Valero Energy Corp.*, 777 S.W.2d 501 (Tex. App.—Corpus Christi 1989, writ denied).

166. *Id.* at 504.

167. *Id.*

168. *Id.* at 505.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 504.

173. *Id.*

174. *Id.* at 505.

175. *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160 (Tex. 1971).

176. *Valero Energy Corp.*, 777 S.W.2d at 505 (citing *McKillip*, 469 S.W.2d 160).

177. *Id.* at 506.

178. *See id.*

citrate scrubber.¹⁷⁹ National Union's policy contained an exception to the exclusion by creating coverage for a loss "arising as a consequence of" faulty design.¹⁸⁰ The court of appeals noted that the cause of loss could reasonably be characterized in two ways, one of which—faulty design—was covered.¹⁸¹ The court cited the rule that requires policy exclusions to be construed in favor of an insured as long as the construction is not unreasonable, and found the loss was caused by the covered peril of faulty design.¹⁸² The rule in *Valero* was in reality the same efficient proximate cause rule applied in the majority of other jurisdictions. But instead of being based on a statute, as is the rule in California,¹⁸³ the insurer in *Valero* contracted into this causation rule.¹⁸⁴

In *Adrian Associates, General Contractors v. National Surety Corp.*,¹⁸⁵ National Surety insured Adrian Associates under a builder's risk policy.¹⁸⁶ An underground water main owned by the city ruptured, which allowed water to escape.¹⁸⁷ The escaping water migrated below the surface of the ground underneath a concrete slab Adrian Associates had poured as the foundation for a warehouse under construction.¹⁸⁸ The water caused soil subsidence which destroyed the ground support for the slab.¹⁸⁹ The slab was damaged and had to be rebuilt.¹⁹⁰

National Surety's policy contained the following three water exclusions:

(c)(1) Flood, surface water, waves, tidal water, or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;

(c)(2) water which backs up through sewers or basement drains;

(c)(3) water below the surface of the ground, including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basements, or other floors, or through

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. See *Sabella v. Wisler*, 377 P.2d 889, 896–97 (Cal. 1963).

184. The court in *Valero* cited three cases for the same proposition: *Adrian Assocs., Gen. Contractors v. Nat'l Sur. Corp.*, 638 S.W.2d 138, 141 (Tex. App.—Dallas 1982, writ ref'd n.r.e.), *aff'd per curiam*, 650 S.W.2d 67 (Tex. 1983); *Allstate Ins. Co. v. Smith*, 450 S.W.2d 957 (Tex. Civ. App.—Waco 1970, no writ); and *Employers Cas. Co. v. Holm*, 393 S.W.2d 363, 366 (Tex. Civ. App.—Houston 1965, no writ). See *Valero Energy Corp.*, 777 S.W.2d at 506.

185. *Adrian Assocs., Gen. Contractors v. Nat'l Sur. Corp.*, 638 S.W.2d 138 (Tex. App.—Dallas 1982, writ ref'd n.r.e.), *aff'd per curiam*, 650 S.W.2d 67 (Tex. 1983).

186. *Id.* at 138–39.

187. *Id.* at 138.

188. *Id.*

189. *Id.*

190. *Id.*

doors, windows or any other openings in such sidewalks, driveways, foundations, walks or floors; unless loss by fire or explosion ensues, and then only for such ensuing loss.¹⁹¹

The policy also excluded:

[l]oss, damage or expense caused by or resulting from subsidence, settling, cracking, shrinkage, bulging or expansion of pavements, foundations, walls, sidewalks, driveways, patios, floors, roofs or ceilings unless such loss results from a peril not excluded in this policy. If loss by a peril not excluded ensues, then this Company shall be liable only for such ensuing loss.¹⁹²

National Surety claimed that these exclusions applied, and it denied coverage. When the insured sued, the trial court granted summary judgment for the insurer, and the insured then appealed.¹⁹³ The court of appeals concluded that exclusions (c)(1) and (c)(2) did not apply because (c)(1) applied to water of a natural origin and (c)(2) was limited to water of an artificial origin.¹⁹⁴ As to exclusion (c)(3), National Surety argued that the exclusion applied to *all* water, whatever its source.¹⁹⁵ The court rejected National Surety's contention that "water below the surface of the ground" included water from an artificial source.¹⁹⁶ Because exclusion (c)(3) did not apply, the trial court's entry of a summary judgment based on the exclusion was done in error.¹⁹⁷ The court ruled that the foundation exclusion did not apply because underground water of an artificial origin was not water below the surface of the ground within the meaning of exclusion (c)(3); the insured's loss resulted from a peril that was not excluded.¹⁹⁸ The court reversed and remanded the case back to the trial court.¹⁹⁹

In *Allstate Insurance Co. v. Smith*,²⁰⁰ Allstate insured Russell and Dorothy Smith under a homeowner's policy.²⁰¹ The Smiths' home, built on a concrete slab, was approximately three years old at the time of the loss.²⁰² A copper water pipe embedded in the slab ruptured and water leaked for an unknown period of time.²⁰³ The leaking water caused wooden beams in the walls to rot.²⁰⁴ There was evidence that the copper pipe ruptured either because the pipe was defectively

191. *Id.* at 140.

192. *Id.* at 139.

193. *Id.* at 138-39.

194. *Id.* at 140.

195. *Id.*

196. *Id.* at 141.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Allstate Ins. Co. v. Smith*, 450 S.W.2d 957 (Tex. Civ. App.—Waco 1970, no writ).

201. *Id.* at 958.

202. *Id.* at 959.

203. *Id.*

204. *Id.*

manufactured or because the pipe was crimped by a workman when it was installed.²⁰⁵ Allstate denied coverage, claiming the loss was caused by the excluded peril of inherent vice.²⁰⁶

The insureds sued Allstate, and after a bench trial, the court rendered judgment for the insureds, filing the following findings of fact and conclusions of law:

FINDINGS OF FACT

- 1) The policy of insurance was issued to plaintiffs by defendant, and was in full force and effect.
- 2) A section of water pipe burst in September 1968, causing water damage to the insured premises.
- 3) Water leaking from the ruptured pipe caused wooden beams and plates in the vicinity of the pipe to begin rotting.
- 4) \$452.33 was necessarily expended for repairs to plaintiffs [sic] residence, all of which repairs were necessitated and occasioned by the rupture of the water pipe.²⁰⁷

CONCLUSIONS OF LAW

- 1) The policy covered all risks of physical loss except as specifically excluded.
- 2) Loss resulting from water damage is a risk of physical loss not otherwise excluded by the terms of the policy.
- 3) The rotting and deterioration of the wooden beams and plates resulted from water leakage, and the [excluded peril of inherent vice] does not bar recovery, because the policy further provides that the [excluded peril of inherent vice] shall not apply to water damage.²⁰⁸

Although the policy excluded coverage for the peril of “inherent vice,” the exclusion also contained an “ensuing loss” provision which provided that the inherent vice exclusion “shall not apply to ensuing loss caused by . . . *water damage*, or . . . provided such losses would otherwise be covered under this policy.”²⁰⁹ In this case, the inherent vice was the copper pipe.²¹⁰ The immediate cause of loss was the covered peril of water damage resulting from the unexpected bursting of the pipe.²¹¹ The court of appeals concluded that there was no coverage for the replacement of the defective pipe, but there was coverage for the cost of tearing out the floor and wall to discover the leak, and for the cost of replacing the floor and wall.²¹²

205. *Id.*

206. *Id.* at 958.

207. *Id.*

208. *Id.*

209. *Id.* at 959.

210. *Id.*

211. *Id.*

212. *See id.*

IV. ALL-RISKS INSURANCE AND COYLE

In *Hardware Dealers Mutual Insurance Co. v. Berglund*,²¹³ the insurer issued two separate policies to the Berglunds.²¹⁴ One policy covered their beach house against "all risks of physical loss except as otherwise excluded."²¹⁵ The all risks provision in the policy covered hurricane damage to the insured structure.²¹⁶ This policy also included coverage for unscheduled personal property under a "named perils" format—for direct loss by windstorm, hurricane, and hail.²¹⁷ The second policy covered a boathouse against loss from windstorm and hurricane.²¹⁸ The policy covering the beach house contained an exclusion for loss caused by flood, surface water, waves, or tidal water.²¹⁹ The coverage for the boathouse excluded loss caused by tidal wave or high water.²²⁰ Hardware Dealers and the Berglunds stipulated that damage to the beach house was \$6,000, damage to personal property contained in the beach house was \$2,400, and damage to the boathouse was \$450.²²¹

The trial court submitted the following special issues to the jury:

Special Issue No. 1

Do you find from a preponderance of the evidence that no damage to Plaintiff's dwelling at Bayou Vista was caused by or resulted from flood, surface water, waves, tidal water or tidal wave, or spray from any of the foregoing, whether driven by wind or not?

Answer: 'No damage was so caused or resulted'

or

'Damage was so caused or resulted'

If you have answered Special Issue No. 1 'Damage was so caused or resulted,' and only in that event, then answer:

Special Issue No. 2

What do you find to have been the percentage of the damage to Plaintiff's dwelling which was caused by or resulted from such flood, surface water, waves, tidal water or tidal wave, or spray from any of the foregoing, whether driven by wind or not, if you have found that damage to Plaintiff's dwelling was caused by or resulted from such force?

213. *Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309 (Tex. 1965).

214. *Id.* at 310.

215. *Id.* at 311.

216. *See id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

Answer by stating the percentage, if any you find, in figures from zero (0%) to one hundred (100%) percent.²²²

The jury found that the excluded peril of water caused 70% of the damage to the beach house, 95% of the damage to personal property, and 100% of the damage to the boat house.²²³

The Berglunds claimed on appeal “that there was no evidence, or insufficient evidence, to warrant the submission of the issues contained in the court’s charge, and that the jury’s answers to those issues [were] contrary to the great weight and preponderance of the evidence”²²⁴ They also argued the following: the trial court erred in failing to submit certain issues they requested because the proximate cause of loss was the covered perils of windstorm or hurricane; the fact that the immediate cause of loss was tidal water was immaterial because windstorm or hurricane set in motion the chain of events which led to loss; and the chain of events was unbroken by any new and independent cause, and without the initiating covered peril of hurricane, no loss would have occurred.²²⁵ In other words, because water was a necessary component part of a hurricane, loss caused by “hurricane water” was an insured peril, and the insured peril of hurricane was the proximate cause of loss.²²⁶

The court of appeals refused to follow *Coyle* because the insurance policy in *Coyle* was not an “all risks” policy, but was a “named perils” policy insuring against “all *direct* loss or damage by tornado, windstorm or cyclone” and excluding any loss caused directly or indirectly by tidal wave or high water, water, or rain.²²⁷ The court of appeals

222. *Berglund v. Hardware Dealers Mut. Fire Ins. Co.*, 381 S.W.2d 631, 632 (Tex. Civ. App.—Houston 1964), *rev’d*, 393 S.W.2d 309 (Tex. 1965).

223. *Hardware Dealers*, 393 S.W.2d at 312.

224. *Berglund*, 381 S.W.2d at 632.

225. *Id.* at 632–33. The Berglunds requested submission of the following issue:

Do you find from a preponderance of the evidence that Hurricane Carla was the proximate cause of the damage to the dwelling house of Clifford L. Berglund and wife, Robbie Mae Berglund? In connection with this issue the following definitions were also requested:

“You are instructed that the term ‘proximate cause,’ as used in this charge means the actual and dominant cause which sets in motion a series of events and which, unbroken by any new and independent cause, produces an event without which the event would not have occurred.”

“By the term ‘new and independent cause,’ as used in the foregoing definition of ‘proximate cause,’ is meant the act or omission of a separate and independent agency which destroys the causal connection between the original cause and the event in question and thereby becomes, in itself, the actual cause of such event.”

Id. at 633. These issues and definitions supported the Berglunds’ theory that a loss caused by a hurricane is covered, and that the asserted policy exclusions did not apply to a loss resulting from the combined actions of hurricane winds and tidal waters, or partially from hurricane, and partially from flood or surface waters, in which the excluded perils were activated or set in motion by a hurricane. *Id.*

226. *See id.*

227. *See id.* at 634–35.

concluded that in order for there to be no coverage for loss caused by the excluded peril of water, the peril of water must be the efficient proximate cause of loss.²²⁸ Thus, the policy covered damage to the beach house.²²⁹ The court of appeals reversed the trial court judgment and remanded for retrial.²³⁰

On further appeal to the Supreme Court of Texas, the Berglunds again argued that *Coyle* did not apply because of the difference in the wording of the policies.²³¹ The insuring agreements of the “named perils” policy in *Coyle* expressly covered direct loss resulting from tornado, windstorm, or cyclone.²³² Although the named perils policy in *Coyle* did not mention loss by hurricane, the policy excluded coverage for loss caused directly by tidal wave, water, or rain.²³³ The insureds asserted that because their policy did not exclude coverage for loss caused by hurricane, the peril of hurricane fell within the insuring agreements of the “all risks” coverage, subject to policy exclusions.²³⁴

The only way the court could rule for coverage of water damage accompanied by a hurricane was to give the words “high water” and “overflow,” in the water-peril exclusion, a different meaning from those same words when they were used in the insuring agreements of a policy covering loss from tornado, windstorm, and cyclone.²³⁵ The court concluded that an all-risks policy does not insure against *all* damages caused by hurricane, and the court affirmed the trial court’s judgment because the uncontroverted evidence established that when the beach house was swept away, about five feet of tidal water covered the area, and wind-driven waves and ocean spray were present at all times.²³⁶

V. INSURED’S BURDEN OF PROOF

A. *Burden of Proof Satisfied*

In *Fiess v. State Farm Lloyds*,²³⁷ a tropical storm forced flood waters into the home of Richard and Stephanie Fiess.²³⁸ After they removed the sheetrock in their damaged home and found large amounts of black mold, they filed a mold contamination claim with their insurer, State Farm.²³⁹ State Farm paid \$34,425 on the claim and reserved its

228. *See id.* at 635.

229. *See id.* at 634–36.

230. *Id.* at 636.

231. *Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309, 313 (Tex. 1965).

232. *See id.*

233. *See id.* at 312, 313.

234. *Id.* at 313.

235. *See id.* at 314.

236. *See id.* at 314–15; *Berglund*, 381 S.W.2d at 633.

237. *Fiess v. State Farm Lloyds*, 392 F.3d 802 (5th Cir. 2004).

238. *Id.* at 803–04.

239. *Id.* at 804–05.

right to dispute coverage.²⁴⁰ The Fiesses' lawsuit sought all damages caused by mold on grounds that those damages were caused by pre-flood water leaks in their roof; plumbing, heating, air conditioning and ventilation (HVAC) leaks; and exterior door and window leaks.²⁴¹ State Farm's policy excluded coverage for losses caused by mold but covered ensuing loss caused by water if that ensuing loss was otherwise covered by the policy.²⁴²

In its motion for summary judgment, State Farm argued that the Fiesses' claim fell outside the insuring agreements of the policy.²⁴³ The district court granted State Farm's motion, in which it found that the ensuing loss provision of the policy did not cover mold contamination caused by water.²⁴⁴ The insureds then appealed to the Fifth Circuit, in which they argued that there was sufficient evidence to allow the trier of fact to segregate the damages resulting from the covered peril of water leaks from those damages resulting from the non-covered peril of flood, under the holding in *Travelers Indemnity Co. v. McKillip*.²⁴⁵

The Fifth Circuit Court of Appeals stated that the insureds had the burden to prove that loss was covered under the terms of the insuring agreements of the policy.²⁴⁶ When an insurer proves that a policy exclusion applies, the insured must prove there is an exception to the exclusion, if any.²⁴⁷ When a covered peril and an excluded peril combine to cause loss, the insured may still recover those damages caused by the covered peril if the insured produces evidence that enables the trier of fact to segregate covered and non-covered damages.²⁴⁸ The appellate court concluded that the insureds presented sufficient evidence to allow a jury to reasonably allocate damages of the excess mold in the walls of their home, which was attributable to continuous water leaks resulting from a peril other than floodwaters from the tropical storm.²⁴⁹ The insureds presented expert testimony which created a genuine issue of material fact of how much mold was in their home prior to the flood.²⁵⁰ Although the evidence presented would not allow a jury to flawlessly segregate damages, that evidence was

240. *Id.* at 805.

241. *Id.* at 804–05.

242. *Id.* at 809 n.25.

243. *See id.* at 805.

244. *Id.*

245. *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160 (Tex. 1971); *Fiess*, 392 F.3d at 807. The insureds failed to preserve their right to appeal the question of whether coverage was extended to all mold contamination caused by water intrusions resulting from plumbing or HVAC leaks. *Id.* at 806.

246. *Fiess*, 392 F.3d at 807.

247. *Id.*

248. *Id.*

249. *Id.* at 808.

250. *Id.*

sufficient to afford a reasonable basis.²⁵¹ The insureds were not compelled to establish their covered loss with absolute mathematical precision.²⁵²

B. *Burden of Proof Not Satisfied*

In *Wallis v. United Services Automobile Association*,²⁵³ Cecil and Darlene Wallis claimed that foundation damage to their home was caused by plumbing leaks.²⁵⁴ After an investigation, United Services Automobile Association (“USAA”) concluded that the foundation damage resulted from, among other causes, soil settlement caused by poor surface drainage.²⁵⁵ Although the plumbing leaks were detected and fixed, the foundation problems continued.²⁵⁶ USAA denied coverage for the foundation damage, however, based on the USAA policy’s earth movement exclusion.²⁵⁷ USAA also asserted that the Wallises failed to produce evidence of what portion of their loss, if any, was the result of covered plumbing leaks, as required by *McKilip*.²⁵⁸ The jury found the loss was caused by a combination of earth movement and plumbing leaks, the former being an excluded peril and the latter being a covered peril.²⁵⁹ The jury determined that 35% of the damage claimed by the insureds was caused by covered plumbing leaks.²⁶⁰ When both parties moved for judgment notwithstanding the verdict, the court granted the insurer’s motion.²⁶¹ As to the jury’s percentage finding, USAA lodged a legal sufficiency challenge arguing that, at best, the evidence showed that plumbing leaks only “contributed” to the loss.²⁶² The expert testimony in the case failed to quantify the extent of damages caused by the covered peril.²⁶³ Because the evidence was insufficient to prove the impact of the covered peril to the home, the jury had no basis to find that 35% of the damage was caused by plumbing leaks.²⁶⁴ The court of appeals agreed with USAA that the evidence did not support the verdict and that the

251. *Id.*

252. *Id.* at 808 n.24.

253. *Wallis v. United Servs. Auto. Ass’n*, 2 S.W.3d 300 (Tex. App.—San Antonio 1999, pet. denied).

254. *Id.* at 301.

255. *Id.* at 301–02.

256. *Id.* at 302.

257. *Id.* at 301–02.

258. *See id.* at 302–03.

259. *Id.* at 302.

260. *Id.* The insureds claimed that USAA had the burden under then Article 21.58 of the Texas Insurance Code, now chapter 554, sections 554.001 to 554.002, to prove that concurrent causes led to the loss. *Id.* at 303. The court ruled that the doctrine of concurrent causation is not an affirmative defense under Article 21.58. *Id.* at 302.

261. *Id.*

262. *Id.* at 303.

263. *Id.* at 303–04.

264. *Id.* at 304.

trial court acted properly in granting a take-nothing judgment in favor of the insurer.²⁶⁵

VI. CONCLUSION

Efficient proximate cause, or “EPC,” is the doctrine, principle, or rule applied in most jurisdictions to determine first-party insurance policy coverage when a single loss occurs as the result of two or more perils acting together. EPC designates the cause of loss as that particular initiating peril which sets all other perils in motion. Claims are paid by insurers if that initiating peril is a covered peril. When applying EPC as a strict doctrine, courts ignore the fact that policy terms exclude those subsequent perils. EPC therefore compels coverage even though a peril, which may be closer to the loss, is actually an excluded peril.

EPC is applied among the various jurisdictions for one of several reasons. First, statutes may compel EPC. Second, public policy may be a factor. Third, *stare decisis* is the rationale used by courts that follow precedent without seeming to read policy language.

Texas courts resist the use of EPC unless individual policies are worded in such a way that clearly shows the parties’ intention to apply the EPC principle or doctrine. Reported Texas cases such as *McKilip*, *Coyle*, and *Valero* prove how Texas courts determine coverage after carefully construing policy terms. EPC therefore exists in Texas when and only if policy terms expressly permit EPC to be applied. Otherwise, Texas insureds face two challenges when attempting to prove coverage when their single losses result from both covered perils and excluded perils. First, insureds must prove that their losses were caused solely by the covered perils, independent of the excluded perils. Alternatively, insureds must have jury findings on the amounts of damages attributable to each of those perils, covered and excluded. There will be no coverage for Texas insureds who fail to secure that proof.

265. *Id.*