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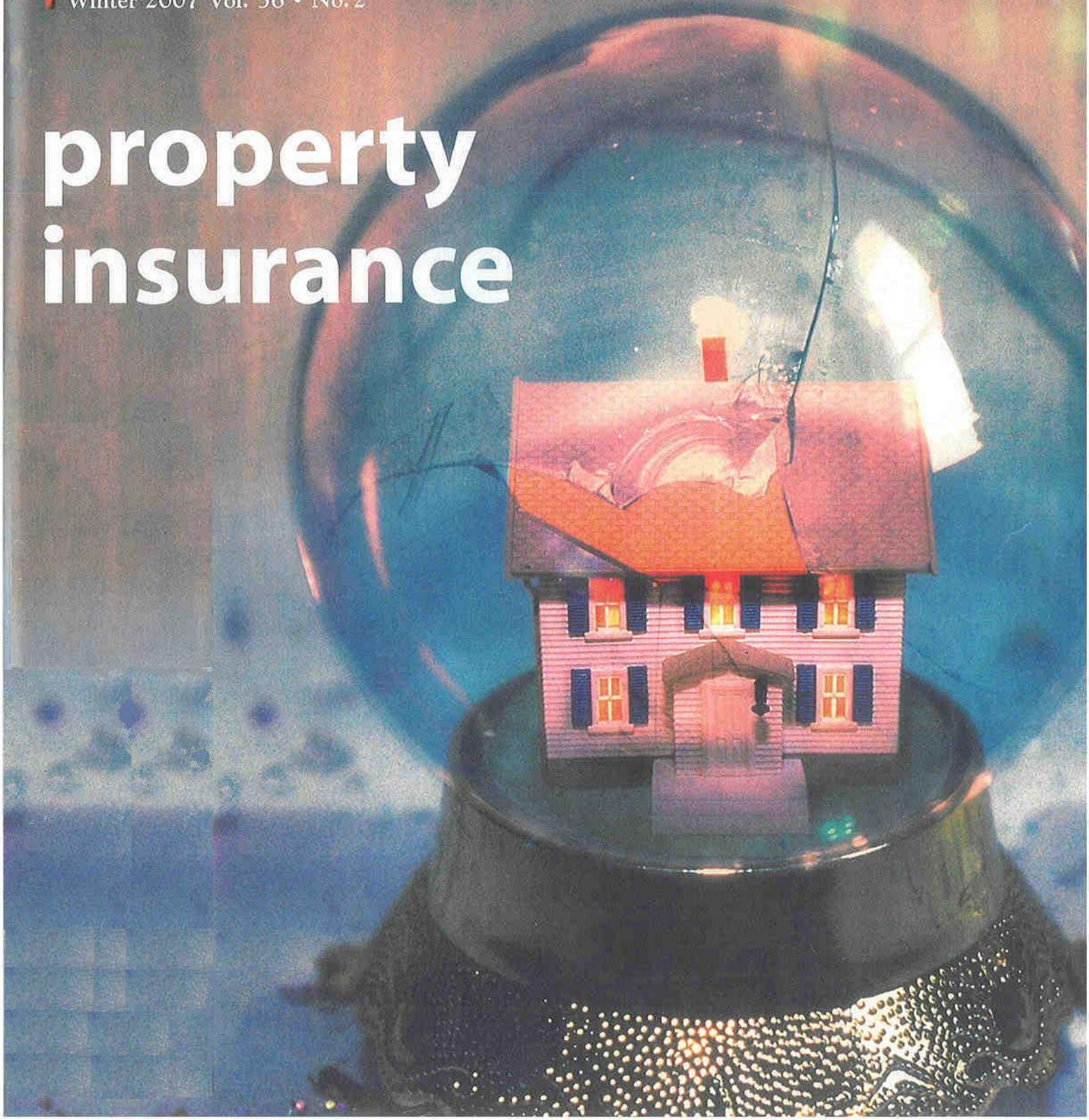
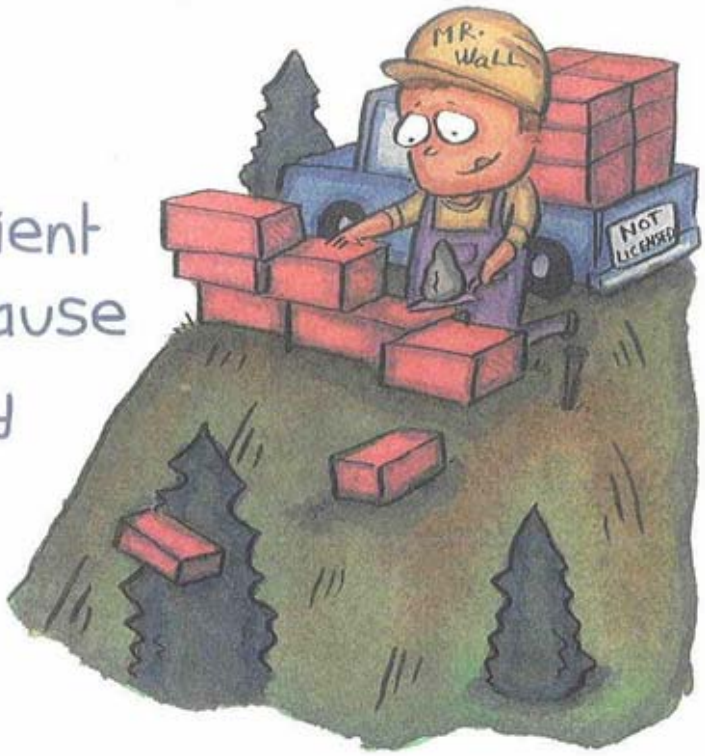


Concurrent Causation Versus Efficient Proximate Cause in First-Party Property Insurance Coverage Analysis



By Michael C. Phillips and Lisa L. Coplen

Insurance coverage questions are not always cut and dried. In fact, those first-party property insurance claims that are litigated or challenged by insureds are usually quite complex. Yes, sometimes a tree does simply fall on a house. More often than not, however, a number of other potential causes could and should be investigated. Let us consider the following hypothetical scenario to begin our discussion of first-party coverage possibilities and causation theories.

During a violent windy rainstorm, a tree falls on a house belonging to Isaac and Ivy Insured, severely damaging the roof. The tree was planted on an outside patio, behind which the property extended up a hillside. A new brick retaining wall had been installed at the far end of the patio and the base of the hill by Charles Contractor three months earlier. The Insureds hired Charles based on a referral from a neighbor who had used him to lay new tile in a bathroom. Unbeknownst to the Insureds, Charles's general contractor's license had been revoked, nor had he ever built a retaining wall against a hillside. When the Insureds went outside to investigate after the storm, they discovered that the retaining wall had broken apart and mud and debris had fallen toward the tree. The Insureds immediately called their insurance company, Capital Carrier, which sent out Andy Adjuster to assess the damage.

Andy Adjuster briefly looked around the property and handed the Insureds a copy of their policy. The Insureds pointed out the broken retaining wall to Adjuster and explained that it had just been installed three months earlier. Adjuster then informed the Insureds that there would be no coverage for their loss because the policy excluded damage caused by earth movement, and this movement ultimately was the reason that the tree fell on the house. A week later, Capital Carrier sent the Insureds a letter advising that the claim had been denied under the provision from the policy that excludes earth movement:

> **Section I-Losses Not Insured**
> Applying to Coverage A – Dwelling
> We do not insure for loss either consisting of, or caused directly or indirectly by:
> 1. Earth Movement. Acts or omissions of persons can cause, contribute to or aggravate earth movement. Also, earth movement can occur naturally to cause loss, or com-

bine with acts or omissions of persons to cause loss. Whenever earth movement occurs, the resulting loss is always excluded under this policy, however caused; except we do cover direct loss by fire or explosions resulting from earth movement.

Unlike many homeowners policies, the Insureds' policy did not contain an exclusion for faulty, inadequate, or defective workmanship or the negligence of others. However, according to Capital Carrier, this would be irrelevant as the ultimate cause of the loss was earth movement, not the negligence of Charles Contractor.

Now, in our theoretical turn of events, we must consider the rain, the mud slide, and the potentially defective retaining wall. Multiple events may have contributed to the Insureds' loss. Further, while the contractor's negligence predates the damage by months, the rain, mud slide, and falling tree all occurred-more or less-together. In this article, we address how various insurance policies may respond to scenarios like the one just described and how U.S. courts in various jurisdictions may well vary in their interpretations of coverage for such a loss, when one cause of the loss is excluded under a policy (or possibly more than one). We similarly investigate the corollary issue of whether carriers should be permitted to draft specific policy language to ensure the application of a policy exclusion even when a covered cause of loss contributed to the insured's damages.

What Came First, and Does It Matter?

A property insurance policy provides an insured with benefits for accepted risks of loss in exchange for premiums. Even with most homeowners policies these days being identified as "all risks," this does not mean that all risks, losses, or damages are covered. The typical "all risks" policy begins with a broad insuring provision that states that the policy covers "direct physical loss or damages to covered property." The insurer then specifies which risks it will not assume by listing those causes of loss as policy exclusions.[1]

Analysis of coverage under the all risks policy becomes tricky when more than one cause of a loss needs to be assessed:

> In multiple cause cases, initial analysis should be directed to seeing whether all potential causes are included, or all potential causes are excluded; it is only when at least one cause would be included and at least one excluded that any true "concurrent cause" problem arises.[2]

More often than not, all of the potential causes will *not* be included or excluded under the policy. In such cases, those charged with analyzing the loss tend to focus on the classic chicken-or-the-egg dilemma. Some contend that if it can be determined which cause of loss came first, they will know how the coverage issue should be resolved. Unfortunately, it is not this simple.

Two schools of analysis are currently employed by courts across the country. A minority follows the doctrine of concurrent causation, where coverage is afforded as long as a covered cause of loss contributes in a meaningful way to the insured's damages. Courts following this doctrine ignore only remote causes of loss. By contrast, the majority of jurisdictions employ the doctrine of efficient proximate cause. In these states, coverage is afforded if the predominant cause of the loss is a covered cause of loss. Just which jurisdictions follow which doctrine is enumerated in Table 1 (see page 4), along with the leading cases that espouse those doctrines.

Both theories incorporate a framework for determining coverage that simply does not turn on whether one cause of loss is the chicken or the egg. Under these analyses, timing is simply not relevant.

Concurrent Causation

In jurisdictions that follow a concurrent cause analysis, coverage is allowed whenever two or more causes contribute to a risk and at least one of them is covered under the policy. Determining exactly which event occurred

first, or even the degree to which the various causes of loss contributed, is completely unnecessary. As long as a covered cause of loss appreciably or meaningfully contributes, and is not remote or tenuous in nature, then the insurer must find coverage under·the policy.

Concurrent causation applies a "but for" analysis that is akin to the direct causation theory employed in tort law.[3] If the damages would not have occurred but for the contribution of a covered cause of loss, then there is coverage on the claim. This is the case even if multiple contributing causes are clearly excluded under the policy.

In *Spece v. Erie Insurance Group*,[4] the Superior Court of Pennsylvania addressed such a situation. The insureds brought an action against their homeowners insurance carrier to recover for loss caused by water flooding their basement. The flooding occurred when lightning struck a city transformer, causing an electrical power outage that shut down the home's sump pump. The relevant policy provisions cited by the carrier stated:

> Perils We Insure Against
>
> We pay for direct physical loss to property insured under the Dwelling, Other Structures, and Personal Property Cover ages, except as excluded or lim ited herein.

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What We Do Not Cover – Exclusions

Under the Dwelling, Other Structures, and Personal Property Coverages:

> We do not pay for loss resulting directly or indirectly from any of the following, even if other events or happenings contributed concurrently, or in sequence, to the loss:
>
> . . .
>
> 9. by water damage, meaning:
>
> . . .
>
> (b) water or sewage which backs up through sewers or drains or water which enters into and overflows from within a sump pump, sump pump well or any other system designed to remove subsurface water which is drained from the foundation area; or
>
> 10. by power interruption if the interruption takes place away from the residence premises.

Acknowledging that exclusions might apply in this case, the court noted that "but for the lightning striking the transformer, there would have been no power outage, the sump pump would not have failed, and the water would not have entered [the insureds'] home through the sump pump hole."[5] Further, the court noted that the policy did not exclude losses caused by lightning, and no policy language required that the lightning strike occur at the insureds' residence. Therefore, because a covered cause of loss contributed in a meaningful way to the flooding of the basement, the court found in favor of coverage.[6]

Unlike efficient proximate cause, jurisdictions applying concurrent causation do not weigh the causes of loss against each other to determine if one predominates over the others. "[T]he . jury may find coverage where an insured risk constitutes a concurrent cause of the loss even where 'the insured risk [is] not the prime or efficient cause of the accident.'"[7] The only condition precedent to applying this doctrine is that the cause of loss not be so remote that its connection to the insureds' damages is strained or tenuous. [8]

Efficient Proximate Cause

On the other hand, most jurisdictions have chosen to employ the doctrine of efficient proximate cause to determine if there is coverage for a loss. Just as concurrent causation is similar to the "but for" theory in tort law, efficient proximate cause is analogous to the proximate or legal causation analysis in tort law.[9] Thus, even if a cause factually contributes to a loss, if that cause is not the "lead ing" or "predominant" cause of it, that cause may not be considered in evaluating coverage.

Courts use varying terms - "proximate cause," "efficient proximate cause," "efficient cause," "predominant cause," or "moving cause" are among them – to describe this doctrine. As one court grappling with the meaning of the efficient proximate cause doctrine noted:

> Regardless of the name of the doctrine or· number of adjectives within it, the law requires a decision as to what event will be held accountable as the cause of the loss. . . . Given the weight of authority, [and] the similarity if not identicalness of efficient proximate cause to proximate cause . . . the Court finds that the predominating cause of the loss is the appropriate standard.[10]

Under this doctrine, once the predominant cause of the loss is identified, coverage turns on whether it is a covered or excluded cause of loss under the policy. If that predominant cause is excluded, the entire claim may be excluded, even if there are covered events that contributed along the chain of events.

Table 1: Cases Regarding Causation in First-Party Homeowners and Commercial Policy Cases

State	Key Cases	Concurrent Causation	Efficient Proximate Cause	Allows Anti–Concurrent Causation Language
AL	*State Farm Fire & Casualty Co. v. Slade,* 747 So. 2d 293 (Ala. 1999); *Western Assurance Co. v. Hann,* 201 Ala. 376, 78 So. 232 1917)		**X**	Yes
AK	*State Farm Fire & Casualty Co. v. Bongen*, 925 P.2d 1042 (Alaska 1996)		**X**[1]	Yes
AZ	*Millar v. State Farm Fire & Casualty Co.,* 804 P.2d 822 (Ariz. 1990); *Koory v. Western Casualty & Surety Co.* (737 P.2d 388 (Ariz. 1987)		**X**[2]	Yes
AR	*New Hampshire Insurance Co. v. Frisby,* 522 S.W.2d 418 (Ark. 1975)		**X**	
CA	*Garvey v. State Farm Fire & Casualty Co.,* 48 Cal. 3d 395, 770 P.2d 704 (Cal. 1989)		**X** (codified CAL. INS. CODE §§ 530, 532)	No
CO	*Kane v. Royal Insurance Co. of America*, 768 P.2d 678 (Colo. 1989); *Western Insurance Co. of Pittsburgh, Pa. v. Skass,* 171 P. 358 (Colo. 1918)		**X**	Yes
CT	*Sansone v. Nationwide Mutual Fire Insurance Co.,* 770 A.2d 500 (Conn. Super. Ct. 1999); *Frontis v. Milwaukee Insurance Co.,* 242 A.2d 749 (Conn. 1968)		**X**	-
DE	No published case law[3]			-
DC	*Cameron v. USAA Property & Casualty Insurance Co.,* 733 A.2d 965 (D.C. 1999); *Quadrangle Development Corp. v. Hartford Insurance Co.,* 645 A.2d 1074 (D.C. 1994); *Unklesbee v. Homestead Fire Insurance Co. of Baltimore,* 41 A.2d 168 (D.C. App. 1945)		**X**	Yes
FL	*Wallach v. Rosenberg,* 527 So. 2d 1386 (Fla. App. 1988)	**X**		-
GA	*Western Pacific Mutual Insurance Co. v. Davies,* 601 S.E.2d 363 (Ga. Ct. App. 2004)		**X**[4]	Yes[5]

1. Although the Alaska Supreme Court did not specifically disagree with the efficient proximate cause doctrine, it did not specifically adopt it. Nevertheless, the court impliedly analyzed *Bongen* under the efficient proximate cause doctrine and found the existence of coverage by enforcing the anti–concurrent causation language in the policy. Accordingly, based on the court's reasoning, it is likely the Alaska Supreme Court will eventually adopt efficient proximate cause.

2. The Arizona Supreme Court stated it has not adopted the efficient proximate cause doctrine. However, the cases follow a proximate cause analysis that is essentially the same.

3. The efficient proximate cause doctrine was followed in the unpublished case of *Olde Colonial Village Condominium Council v. Millers Mutual Insurance Co.* (Del. Super. Ct. 2002).

4. *Western Pacific* refers to efficient concurrent cause as an issue with no analysis. *Cf, Underwood v. U.S. Fidelity & Guaranty Co.,* 165 S.E.2d 874 (Ga. Ct. App. 1968), where the court upheld exclusion even where covered cause of loss "incipiently caused" the insureds' damages.

5. Dictum of *Western Pacific* suggests that the court would allow language if it is clear and nonambiguous.

Table 1. Cont'd

State	Key Cases	Concurrent Causation	Efficient Proximate Cause	Allows Anti–Concurrent Causation Language
HI	*Kee Kan v. Alliance Assurance Co. of London,* 16 Haw. 674 (Haw. Terr. 1905); *Hawaii Land Co. v. Lion Fire Insurance Co.,* 13 Haw. 164 (Haw. Terr. 1900)		**X**	-
ID	No case law			
IL	*Mammina v. Homeland Insurance Co.,* 9 N.E.3d 437 (Ill. App. Ct. 1937)		**X**	-
IN	*Ramirez v. American Family Mutual Insurance Co.,* 652 N.E.2d 511 (Ind. Ct. App. 1995)		**X**[6]	Yes
IA	*Qualls v. Farm Bureau Mutual Insurance Co.,* 184 N.W.2d 710 (Iowa 1971); *Jordan v. Iowa Mutual Tornado Insurance Co. of Des Moines*, 130 N.W. 177 (Iowa 1911)		**X**	-
KS	*Maryland Casualty Co. v. Cherryville Gas, Light & Power Co.,* 162 P. 313 (Kan. 1917); *Hartford Fire Insurance Co. of Hartford, Conn.,* 67 P. 440 1902)		**X**	-
KY	*State Farm Fire & Casualty Insurance Co. v. Aulick,* 781 S.W.2d 531 (Ky. Ct. App. 1989)	**X**[7]		-
LA	*Richie v. State Farm Fire & Casualty Co.,* 356 So. 2d 101 (La. Ct. App. 1978); *Roach-Strayhan-Holland Post No. 20, American Legion Club v. Continental Insurance Co. of N.Y.,* 112 So. 2d 680 (La. 1959); *Prytania Park Hotel v. General Star Indemnity Co.,* 896 F. Supp. 618 (E.D. La. 1995)		**X**	Yes
ME	No case law			
MD	*Hartford Steam Boiler Inspection & Insurance Co. v. Henry Sonneborn & Co.,* 54 A. 610 (Md. App. 1903); *Transatlantic Fire Insurance Co. of Hamburg, Germany v. Dorsey,* 56 Md. 70 (1881)		**X**	-
MA	*Jussim v. Massachusettes Bay Insurance Co.,* 597 N.E.2d 954 (Mass. 1993); *Alton v. Manufacturers & Merchants Mutual Insurance Co.,* 624 N.E.2d 545 (Mass. 1993); *Preferred Mutual Insurance Co. v. Meggison*, 53 F. Supp. 2d 139, 142 (D. Mass. 1999)		**X**	Yes

6. The insured argued an efficient proximate cause theory in Ramirez, but it was not considered by the court because the policy contracted around it. There are also several Indiana cases that concern health and accident policies that use an efficient proximate cause type of analysis to determine coverage., namely, *Rozek v. American Family Mutual Insurance Co.,* 512 N.E.2d 232 (Ind. Ct. App. 1987); *Nationwide Mutual Insurance Co. v. Neville*, 434 N.E.2d 585 (Ind. Ct. App. 1982).

7. In *Aulick*, the court declined to follow the case of *United States Fidelity & Guaranty Co. v. Breslin*, 49 S.W.2d 1011 (1932), which drew a distinction between a proximate cause and a contributing cause. It held that the distinction was no longer viable and thus advocates the broader coverage position of concurrent causation.

Table 1. Cont'd

State	Key Cases	Concurrent Causation	Efficient Proximate Cause	Allows Anti–Concurrent Causation Language
MI	*Hayley v. Allstate Insurance Co.,* 686 N.W.2d 273 (Mich. Ct. App. 2004)		X[8]	Yes
MN	*Henning Nelson Cost Co. v. Fireman's Fund American Life Insurance Co*., 383 N.W.2d 645 (Minn. 1986); *Waseca Mutual Insurance Co. v. Noska,* 331 N.W.2d 917 (Minn. 1983)	X		-
MS	*Rhoden v. State Farm Fire & Casualty Co.*, 32 F. Supp. 2d 907 (S.D. Miss. 1998)			X
MO	*Toumayan v. State Farm General Insurance Co.,* 970 S.W.2d 822 (Mo. Ct. App. 1998); *Beauty Supplies, Inc. v. Hanover Insurance Co.,* 526 S.W.2d 75 (Mo. Ct. App. 1975)		X	Yes
MT	*Park Saddle Horse Co. v. Royal Indemnity Co.,* 261 P. 880 (Mont. 1927)		X	-
NE	*Curtis O. Griess & Sons, Inc. v. Farm Bureau Insurance Co. of Nebraska,* 528 N.W.2d 329 (Neb. 1995); *Brown v. Farmers Mutual Insurance Co. of Nebraska,* 468 N.W.2d 105 (Neb. 1991)		X	-
NV	*Schroeder v. State Farm Fire & Casualty Co.*, 770 F. Supp. 558, 561 (D. Nev. 1991)	uncertain[9]		Yes
NH	*Weeks v. Co-operative Insurance Companies*, 817 A.2d 292 (N.H. 2003)		X	-
NJ	*Simmonetti v. Selective Insurance Co.,* 859 A.2d 694 (N.J. Super. 2004); *Franklin Packaging Co. v. California Union Insurance Co.,* 408 A.2d 448 (N.J. Super. 1979); *Assurance Co. of America, Inc. v. Jay-Mar Inc.,* 38 F. Supp. 2d 349 (D.N.J. 1999)		X	Yes
NM	No case law			
NY	*Bebber v. CNA Insurance Companies,* 729 N.Y.S.2d 844 (N.Y. Sup. Ct. 2001); *Kosich v. Metropolitan Property & Casualty Insurance Co.,* 214 A.D.2d 992 (N.Y. 1995); *Kula v. State Farm Fire & Casualty Co.,* 212 A.D.2d 16 (N.Y. 1995)	uncertain[10]		Yes

8. Michigan case law is, at best, confusing on this issue. In Hayley, the Court of Appeals states that Michigan follows a theory of dual or concurrent causation, which is the equivalent of efficient proximate cause. However, the court also states that "Michigan has no precedential authority expressly adopting or denying the theory of dual or concurrent causation." Finally, the court references an unpublished case and an overturned case as authority that Michigan law permits insurers to contract around concurrent causation.

9. The district court wrote that Nevada had not decided whether to follow the doctrine of efficient proximate cause. However, the issue was irrelevant as the carrier had contracted out of any possible application of the doctrine.

10. In Kula, the New York Supreme Court Appellate Division (the first level appellate court) states that New York has not adopted the efficient proximate causation doctrine. Instead, "[o]nly the most direct and obvious cause should be looked to for purposes of [applying an] exclusionary clause. . . ." However, six weeks later in Kosich, the same appellate court stated that "[t]o determine causation, one looks to the 'efficient or dominant cause' of the loss. . . ." No cases after Kosich confirm that New York is following the efficient proximate cause doctrine. In fact, the 2001 case of Bebber applied a concurrent causation approach.

Table 1. Cont'd

State	Key Cases	Concurrent Causation	Efficient Proximate Cause	Allows Anti–Concurrent Causation Language
NC	*Erie Insurance Exchange v. Bledsoe,* 540 S.E.2d 57 (N.C. Ct. App. 2000); *Avis v. Hartford Fire Insurance Co.,* 195 S.E.2d 545 (N.C. 1973)	**X**		-
ND	*State Fire & Tornado Fund of the North Dakota Insurance Dep't v. North Dakota State University,* 694 N.W.2d 225 (2005); *Western National Mutual Insurance Co. v. University of North Dakota,* 643 N.W.2d 4 (N.D. 2003)		X (codified N.D.CENT. CODE § 26.1-32-01)	No
OH	*Front Row Theatre, Inc. v. American Manufacturer's Insurance Companies,* 18 F.3d 1343 (6th Cir. 1994); *Boughan v. Nationwide Property & Casualty Co.*, 2005 WL 126781 (Ohio Ct. App. 2005) (not published)		**X**[11]	Yes
OK	*TNT Speed & Sport Center, Inc. v. American States Insurance Co.,* 114 F.3d 731, 733 (W.D. Okla. 2003); *Shirey v. Tri-State Insurance Co.,* 274 P.2d 386 (Okla. 1954)		**X**	Yes
OR	*Naumes, Inc. v. Landmark Insurance Co.,* 849 P.2d 554 (Or. Ct. App. 1993); *Gowans v. Northwestern Pacific Indemnity Co.*, 260 Or. 618 (1971); *Point Triumph Condominium Ass'n v. American Guaranty Liability Insurance Co.*, 2000 WL 34474454 (D. Or. 2000)		**X**[12]	
PA	*Spece v. Erie Insurance Group,* 850 A.2d 679 (Pa. Super. Ct. 2004)	**X**		-
RI	*Jerry's Supermarkets, Inc. v. Rumford Property & Liability Insurance Co.,* 586 A.2d 539 (R.I. 1991)		**X**[13]	-
SC	*King v. North River Insurance Co.,* 297 S.E.2d 637 (S.C. 1982)		**X**	-
SD	*Lummel v. National Fire Insurance Co. of Hartford,* 210 N.W. 739 (S.D. 1926)		**X**	-
TN	*Hall & Hawkins v. National Fire Insurance Co.,* 92 S.W. 402 (Tenn. 1906)		**X**	-
TX	*Warrilow v. Norrell,* 791 S.W.2d 515 (Tex. App. 1989); *Travelers Indemnity Co. v. McKillip,* 469 S.W.2d 160 (Tex. 1971)	**X**		Yes[14]

11. Although the phrase "efficient proximate cause" is not used, the *Boughan* court follows such an analysis in this case by enforcing an exclusion despite a contribution from a covered cause of loss (the predominant cause of the loss was excluded).

12. Although Oregon is an efficient proximate cause state, its courts frequently do not use that moniker. The courts have been known to omit the word "efficient" and refer to the doctrine as the "proximate cause" or "dominant cause."

13. Although the phrase "efficient proximate cause" is not used, the *Jerry's Supermarkets* court followed such an analysis in this case by finding coverage because the predominant cause of the loss was not excluded.

14. The language was allowed in the unpublished case of *Wong v. Monticello Insurance Co.,* 2003 WL 1522938 (Tex. App. 2003).

Table 1. Cont'd

State	Key Cases	Concurrent Causation	Efficient Proximate Cause	Allows Anti–Concurrent Causation Language
UT	*Alf v. State Farm Fire & Casualty Co.,* 850 P.2d 1272 (Utah 1993)		**X**	Yes
VT	No case law			
VA	No case law			
WA	*Wright v. Safeco Insurance Co. of America*, 109 P.3d 1 (Wash. Ct. App. 2004); *Safeco Insurance Co. v. Hirschmann,* 773 P.2d 413 (Wash. 1989)		**X**	No
WV	*West Virginia Fire & Casualty Co. v. Mathews,* 543 S.E.2d 664 (W. Va. 2001); *Murray v. State Farm Fire & Casualty Co.,* 509 S.E.2d 1 (W. Va. 1998)		**X**	No
WI	*American Motorists Insurance Co. v. R&S Meats, Inc.,* 526 N.W.2d 791 1994); *Lawyer v. Boling,* 238 N.W.2d 514 (Wis. 1976)	**X**		Yes[15]
WY	*State Farm Fire & Casualty Co. v. Paulson*, 756 P.2d 764 (Wyo. 1988); *Miles v. Continental Casualty Co.,* 386 P.2d 720 (Wyo. 1963)		**X**[16]	Yes

15. In an unpublished case, *Valet One Systems, Inc. v. Sentry Insurance,* 599 N.W.2d 666 (Wis. Ct. App. 1999), the court implied that the jurisdiction will permit anti–concurrent causation language. In this particular case, however, the language was ambiguous so the court would not enforce it.

16. The *Miles* case, which most clearly described use of an efficient proximate cause doctrine, involved a health and accident policy.

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When examining whether coverage exists for a loss under a first-party insurance policy when the loss is caused by a combination of covered and specifically excluded perils, the loss is covered by the policy if the covered peril was the efficient proximate cause of the loss. No coverage exists for a loss if the covered risk was only a remote cause of the loss, or conversely, if an excluded risk was the efficient proximate cause of the loss. The efficient proximate cause is the risk that sets others in motion. It may not be the last act in a chain of events, nor may it be the triggering cause. The efficient proximate cause doctrine looks to the quality of the links in the chain of causation. The efficient proximate cause is the predominating cause of the loss.[11]

In a case cited by many other jurisdictions, the California Supreme Court in *Garvey v. State Farm Fire & Casualty Co.*[12] held that the doctrine of efficient proximate cause should apply to a first-party homeowners insurance case. In *Garvey*, the insured homeowners began to notice that a 15-year-old addition to their house was pulling away from the main structure. An insurance claim was made, and State Farm denied it based on the policy exclusion for earth movement. The Garveys sued, arguing that the policy did not contain an exclusion for contractor negligence and therefore that the claim should be covered. The California Supreme Court rejected the insured's contention that a concurrent causation analysis should apply and instead held that efficient proximate cause would control.[13] However, the court could not determine coverage because there was no conclusive evidence from the parties' experts regarding whether contractor negligence or settlement (i.e., earth movement) was the predominant cause of the loss.[14] The supreme

court thus remanded the case back for a factual determination.

The California Supreme Court recently addressed the doctrine once again in *Julian v. Hartford Underwriters Insurance Co.*[15] As in our hypothetical, the insured submitted a claim for a rain-induced landslide. The policy contained an exclusion for "weather conditions" upon which Hartford relied to deny the claim. The supreme court agreed with Hartford that the landslide was not an independent causal agent in the Julians' loss but was dependent on the weather condition of heavy rains. The court noted that "the peril of rain inducing a landslide is a genuine one, not a mere drafting fiction."[16] Thus, the rain was a properly excluded cause of loss and, as the predominant cause of the loss, could operate to bar coverage under the doctrine of efficient proximate cause.[17]

As the Garvey and Julian cases make clear, whether a cause of loss is the efficient proximate cause of the loss is a question of fact.[18] Nonetheless, where the facts are undisputed, the issue can be resolved in a motion for summary judgment.[19] However, even where that may be an option, courts can still be reluctant to find that the efficient proximate cause of a loss is an undisputed fact, particularly where the opinions of experts have been submitted by the parties.

Further, keep in mind that, just as in the concurrent causation framework, a cause that is remote can never be considered as a basis for granting coverage under an efficient proximate cause analysis. In *Beauty Supplies, Inc. v. Hanover Insurance Co.*[20] for example, the insured sustained a loss when burglars entered its building and stole plumbing fixtures, tearing them out of the walls and causing water to flood the premises and damage the insured's property. The policy excluded losses caused by theft but covered vandalism and malicious mischief. The court explained:

> The burglary is not a factor in determining the proximate cause of the damage from water leakage. "An antecedent contributing circumstance is generally ignored in determining the proximate cause. That is to say, a situation which merely sets the stage for the later event is not regarded as being the proximate cause merely because it made possible the subsequent loss. For example, the explosion of gas, and not the lighting of a match, is the proximate cause of loss, where the explosion is caused by the lighting of a match in a room filled with gas. Likewise, the destruction of a plate-glass window, shattered when gas exploded upon its ignition by a lighted match being used to locate a gas leak, is by explosion, and not by fire, within an exception in a policy insuring the window against loss by fire."[21]

The court concluded that "the burglary was an antecedent contributing circumstance but not a proximate cause; that the theft, while a concurrent cause, was not the predominating, efficient cause; that the proximate cause of the loss was the vandalism, a specifically insured risk."[22]

Finally, when the damage is not caused by two distinct causes but rather "a single cause, albeit one susceptible to various characteriza-

tions," the efficient proximate cause analysis has no application. According to the court in *Chadwick v. Fire Insurance Exchange,*[23] "[f]or the efficient proximate cause theory to apply. . . there must be two separate or distinct perils which 'could each, under some circumstances, have occurred independently of the other and caused damage.' "[24]

In the case of *Tento International, Inc. v. State Farm Fire & Casualty Co.*,[25] although it appeared that the causes of the loss were indistinguishable, the court was able to characterize the losses independent of one another and the proximate cause was determined. In that case, a roofing contractor was hired to replace the roof over an electronics store. During the repair process, there was rainfall and the electronics were damaged. The court commented that

> [t]he mixture of causes present in this case--rain and the contractor's negligence--parallels the causes in Allstate Insurance Co. v. Smith, 929 E2d 447 (9th Cir. 1991), in which a roofer similarly failed to cover exposed premises, allowing rain to damage property within. We held that, "although rain 'operated more immediately in producing the disaster,' it was the contractor's failure to cover the premises that 'set in motion' the chain of events leading to Smith's losses. The roofer's failure to cover the exposed premises, therefore, was the efficient proximate cause of Smith's losses."
>
> The efficient proximate cause is "the predominating" or "most important cause of the loss." Here, the contractor's failure to cover the roof was "the predominating" or "most important cause" of Tento's loss, and thus it was the efficient proximate cause under Garvey. Because the contractor's negligence was the efficient proximate cause, Tento's loss would be covered.[26]

Contracting around Multiple Causation Theories

The practical reality of both the concurrent causation and efficient proximate cause doctrines is that insurers are often held to afford coverage on losses even when a peril that they intended to exclude comes into play and contributes to the ultimate damage. Many insurers believe that these doctrines create an unfair bias against them, taking away their right to exclude certain risks. Therefore, in an effort to circumvent courts applying these doctrines, many carriers have added language just before listing the specifically excluded causes of loss. Usually, that language states: "Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss."

To date, most jurisdictions have permitted the use of this "anti-concurrent causation" language,[27] but other jurisdictions have not. (See Table 1 on page 35 for details.) Courts that have disallowed it have explained that the law or public policy of the state has an interest in enforcing the efficient proximate cause doctrine and the insurer cannot contract around that possible scenario. Two of these states - California and North Dakota-have codified the doctrine of efficient proximate cause in their statutes.[28] A third, West Virginia, articulated that the efficient proximate cause doctrine was the law of the state and thus insurers could not avoid it with clever drafting.[29] Finally, a Washington court has disallowed such language, but only because the policy before it was ambiguous. Therefore, the claim was resolved in favor of the insured, and coverage was found.[30]

All other jurisdictions have been silent on the issue or have allowed insurers to draft around the doctrines of concurrent causation and efficient proximate cause. Those jurisdictions that allow carriers to write language avoiding application of the efficient proximate cause doctrine cite "long-standing rulers] against rewriting unambiguous insurance policies 'so long as they do not offend some rule of law or contravene public policy.'"[31] These courts then pronounce that the doctrine of efficient proximate cause is neither a rule of law nor public policy that must be upheld. Thus, provided that the policy language is clear and unambiguous, policy exclusions may be applied strictly and narrowly in conjunction with the anti-concurrent causation language.

Conclusion: Reconsidering Our Scenario

Returning to our opening hypothetical, we can see that whether a jurisdiction employs a concurrent causation or an efficient proximate cause analysis is vital to determining coverage. Where concurrent causation applies, the claim would be covered if just one meaningful or appreciable cause of loss is covered under the policy. Hence, because Isaac and Ivy Insureds' policy does not contain an exclusion for faulty workmanship or negligence, the claim may well be covered. It could be argued that but for the failure of the retaining wall and the negligence of the contractor, the Insureds would not have suffered this loss. If the wall had held, the hillside would not have slid down and pushed over the tree that damaged that house. The failure of the retaining wall is not remote.

In a jurisdiction where efficient proximate cause applies, the conclusion is considerably less certain. The fact finder would need to determine what is the predominant or most significant cause of loss. If it is the failure of the wall or even the rainstorm, then the policy will cover the damage. If, however, the predominant cause of the loss is the mud slide, then that is an excluded cause of the loss

and Capital Carrier was correct in denying the claim on that basis. Weighing the facts and the theories, what do you think? ■

Notes

1. *See* Mut. Fire Ins. Co. of Calvert County v. Ackerman, 872 A.2d 110 (Md. App. 2005); Morgan v. Auto Club Family Ins. Co., 899 So. 2d 135 (Md. App. 2005); Jordan v. Allstate Ins. Co., 116 Ca\. App. 4th 1206 (2004).

2. COUCH ON INSURANCE 3D § 101:55.

3. *See, e.g.*, Ang v. Martin, 114 P.3d 637 (Wash. 2005); Hurd v. Williamsburg County, 611 S.E.2d 488 (S.C. 2005).

4. 850 A.2d 679 (Pa. Super. 2004).

5. *Id*. at 683 n.3. The court actually commented that some of the exclusionary language was ambiguous, but not those that we have quoted. Ultimately, that did not affect the analysis and the conclusion regarding coverage.

6. *Id.* at 684 ("We specifically disagree with [the insurer's] contention that the loss in this case occurred solely because of water and that the lightning strike was a 'remote cause.'").

7. Wallach v. Rosenberg, 527 So. 2d 1386, 1387 (Fla. App.1988).

8. Midwest Family Mut. Ins. Co. v. Schmidt, 651 N.W2d 843 (Minn. App. 2003) (the covered cause of loss must not be remote and could operate independently to cause the insured's loss).

9. *See* Palsgraf v. Long Island Ry. Co., 162 N.E. 99 (N.Y. 1928).

10. Pioneer Chlor Alkali Co., Inc., v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 863 F. Supp. 1226, 1231 (D. Nev. 1994) (emphasis added).

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

12.48 Ca\. 3d 395 (1989).

13. *Id*. at 395.

14. *Id.*

15.35 Cal. 4th 747 (2005).

16. *Id.* at 760.

17. *Id.* at 761.

18. *See also* W. Nat'l Mut. Ins. Co. v. Univ. ofN. Dak., 643 N.W2d 4 (N.D. 2003).

19. Safeco Ins. Co. v. Hirschmann, 773 P.2d 413 (Wash. 1989); Holcomb v. U.s. Fire Ins. Co., 279 S.E.2d 50 (N.C. 1981); Perotta v. Tri-State Ins. Co., 317 So. 2d 104 (Fla. App. 1975).

20.526 S.W2d 75 (Mo. App. 1975).

21. *Id.* at 76-77 (quoting 18 COUCH ON INSURANCE 2D, § 74:714, at 618).

22. *Id*.

23. 17 Ca\. App. 4th 1112 (1993).

24. *Id*. at 1117.

25. 222 F.3d 660 (9th Cir. 2000).

26. *Id.* at 662-63 (citations omitted).

27. *See, e.g.,* Schroeder v. State Farm Fire & Cas. Co., 770 F. Supp. 558,561 (D. Nev. 1991) ("the parties could, as they did, contract out of the efficient proximate cause doctrine without violating public policy"); Millar v. State Farm Fire & Cas. Co., 804 P.2d 822, 826 (Ariz. 1990); Kane v. Royal Ins. Co. of Am., 768 P.2d 678 (Colo. 1989) ("the 'efficient moving cause' rule must yield to the language of the insurance policy in question").

28. Howell v. State Farm Fire & Cas. Co., 218 Ca\. App. 3d 1446, 1452 (1990) (citing CAL.INS. CODE §§ 530 and 532; W Nat'l Mut. Ins. Co. v. Univ. of N. Dak., 643 N.W2d 4 (N.D. 2003) (citing N.D. CENT. CODE § 26.1-32-01).

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

30. Safeco Ins. Co. v. Hirschmann, 773 P.2d 413 (Wash. 1989).

31. State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 313-14 (Ala. 1999) (quoting Northam v. Metro. Life Ins. Co., 163 So. 635, 636 (Ala. 1935)).