CAUSATION IN INSURANCE LAW

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**Introduction**

Perplexing complexities of insurance causation are divided into three coverage issues:

1. How did the loss happen?
2. If multiple forms of insurance are in effect, which ones, if any, cover the loss?
3. If there is more than one cause of loss, is there any coverage?

In the first category of coverage issues, when a loss occurs from a combination of two or more perils, insurance causation rules determine how the loss happened.3 Determining “how” a loss occurred is important to both insurers and insureds because money only changes hands as compensation when a loss is caused by a covered peril.4 For example, if an insurer provides coverage specifically against “direct loss resulting from windstorm,” but that same policy excludes coverage for direct loss resulting for the peril of snowstorm, a coverage issue may arise when a windstorm hits certain insured farm structure, but important facts are added. A few days after the windstorm, a snowstorm drops five inches of snow and the structure collapses. Insurance causation rules determine whether the loss of the structure was due to windstorm or snowstorm.5

In the second category of coverage issues, insurance causation rules decide questions of coverage under different types of insurance policies when there is a single bodily injury or property damage claim.6 When addressing coverage problems of this second category, courts

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3 Banks McDowell, *Causation in Contracts and Insurance*, 20 CONN. L. REV. 569, 570 (1988); R. Dennis Withers, *Proximate Cause and Multiple Causation in First-Party Insurance Cases*, 20 FORUM 256 (January 1985). When a single peril causes a loss, an insurer and insured may dispute the characterization of that peril as say “arson” or “friendly fire,” or “windstorm” or “wind,” or they may dispute which link in the chain of causation is responsible or proximate.

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

5 These facts are based on the Texas Supreme Court’s decision in McKillip.

determine coverage by considering the causal phrases of insuring agreements or policy exclusions such as “because of,”7 “caused by,”8 “resulting in,”9 “arising out of,”10 “resulting from,”11 “due to.”12 For example, assume an allegation that a homeowner negligently supervised her granddaughter at the time the granddaughter exited a motor vehicle because the granddaughter was struck by another vehicle. Further assume the grandmother was insured under both a homeowner’s policy and an automobile policy. Insurance causation rules would determine whether one policy, both policies or none of the policies, would provide coverage.13

In the final category of coverage issues, when multiple perils combine to cause a loss and not all perils are covered, courts in most jurisdictions decide whether the covered peril is remote cause of loss or a direct, efficient, dominant or responsible cause of loss.14 For example, assume

7 Tanks v. Lockheed Martin Corp., 417 F.3d 456, 465 (5th Cir. 2005) (“The words ‘because of,’ like the other broadly- construed words of causation . . . such as ‘arising out of,’ express the necessity of a nexus between the injury and employment.’” This nexus requires a showing of minimal causation: only a “rational connection [between] employment and injury” is necessary.).


9 S. Pac. Co. v. Ralston, 67 F.2d 958, 959 (10th Cir. 1933) (“resulting in” requires some degree of causation).


11 Carrigan v. State Farm Mut. Auto. Ins. Co., 140 Or.App. 359, 363-66, 914 P.2d 1088, 1089-91 (1996). (“Resulting from” the use, occupancy, or maintenance of motor vehicle is not a “but for” standard; rather, a judgment call must be made as to where along the continuum of causation fall the facts of each case); State Farm Lloyds v. Marchetti, 962 S.W.2d 58, 61 (Tex.App. -- Houston [1st Dist.] 1997, writ denied).

12 The causation phrase “due to” requires a more direct type of causation than “arising out of.” The phrase “due to” ties the liability of an insured to the manner in which the insured performed a service. Utica Nat’l Ins. Co. of Tex. v. American Indem. Co., 141 S.W.3d 198, 203 (Tex. 2004).


14 Banks McDowell, Causation in Contracts and Insurance, 20 Conn. L. Rev. 569, 571 (1988). One or more of the perils in a causal chain may be covered and other perils may be excluded or not named in the policy. Jeffrey W. Stemper, Interpretation of Insurance Contracts - Law and Strategy for Insurers and Policyholders.
an insured purchased a life insurance policy covering all loss of life “resulting directly and independently of all other causes from accidental bodily injury,” but the policy also excludes loss resulting from “bodily or mental infirmity or disease.” The insured is found dead in her automobile after her car crashed into a concrete culvert. Medical evidence established that the insured had a history of chronic arteriosclerosis and high blood pressure. Insurance causation rules will determine whether the insured’s death was caused by the covered peril of automobile accident or the excluded peril of disease.15

**Tort vs. Insurance Causation**

Over 50 years ago, Justice Felix Frankfurter recognized “the subtleties and sophistries of tort liability” and explained why tort rules concerning liability for negligence should not apply to the covenants of insurance policies, defining 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.”16

Proximate cause in tort law establishes tortfeasor culpability for damages, assigning blame to parties who create harmful conditions.17 In the realm of property insurance, insurers and insureds are not concerned with whether insureds are liable for damages to others; their only concern is what caused the losses.18 Also, the level of interest courts have with foreseeability

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18 Russ & Segalla, §101.41.
never rises to the heights courts have when considering tort law elements. In most jurisdictions, when losses result from the concurrence of two or more perils, proximate cause is attributed to the peril which is determined to be the efficient proximate cause of losses: the peril which sets subsequent perils in motion. An incidental or remote peril is not considered a proximate cause of loss, even though such a peril is more immediate to the loss in both time and place. After a court determines which peril is the efficient proximate cause of loss, the court should halt any consideration of a peril further back in time, because that peril is too remote, and a peril occurring after the efficient proximate cause would be incidental.

In Texas, an insured has the burden to prove that a loss falls within insuring agreements of a policy. An insurer then must prove that any policy exclusions apply. If an insurer establishes that a policy exclusion applies, an insured must then demonstrate that an exception to the exclusion, if any, also applies to negate the exclusion. An insureds may not recover under property insurance unless a loss results from a covered peril. When a covered peril and non-covered peril combine to cause loss, an insured is entitled to recover only for that part of the loss

21 RUSS & SEGALLA, § 101.44, p. 101-135. Sidney I. Simon, Proximate Cause in Insurance, 10 Am. Bus. J. 33, 35 (1972-73) (“The insurance rule is that only the proximate cause of the loss, and not the remote cause, is to be regarded in determining whether recovery may be had under an insurance policy, and that the loss must have been proximately caused by a peril insured against.”).
25 Fiess, 392 F.3d at 807 n. 14; Guar. Nat'l, 143 F.3d at 193; Venture Encoding, 107 S.W.3d at 733.
caused solely by the covered peril.\textsuperscript{27} An insured must produce some evidence that will enable a jury to allocate damages to the covered peril.\textsuperscript{28}

Our review discusses insurance causation applicable to both first-party and liability insurance. However, we pay particular attention to causation issues associated with liability insurance and what we refer to as “Partridge-Type Concurrent Causation” (“PTCC”).

**The Problem**

In the early years, property insurance and liability insurance forms covered discreet types of perils. For example, first party property insurance protected only against the risk of fire.\textsuperscript{29} Liability insurers sold “single promise-single risk” contracts of indemnity against loss. During this period when insurers marketed policies that promised indemnification only for a single risk, the Employer’s Liability Policy was the only form of liability insurance sold in the U.S.\textsuperscript{30} Insurers added other coverages through endorsements to the Employer’s Liability Policy form. As demand for coverage of a particular business risk became obvious, insurers would either create a new line of coverage, or address that risk through an endorsement to an existing form of coverage, sometimes adding an exclusion to previously existing form of coverage to eliminate that exposure.\textsuperscript{31} During the single promise-single risk period, a business owner was obliged to

\textsuperscript{27} *Travelers Indem. Co. v. McKilip*, 469 S.W.2d 160,163 (Tex. 1971).


purchase at least 18 separate policies to obtain “full coverage.” When causation was determined under these older single risk policies, traditional tort principles of proximate cause did not produce inappropriate results.

As a matter of evolution, substantial differences exist today not only between first-party insurance and liability insurance, but as to the multiple risk coverages offered in many policy forms. Coverage under a first-party property policy is typically phrased in terms of a loss caused by certain perils set forth in the policy, whereas coverage under a liability insurance policy typically refers to the legal obligation of an insured to pay damages for bodily injury or property damage caused by an “occurrence,” as that term is defined by the policy. The differences between these two forms of insurance have also caused insureds to have different expectations of coverage. These differences between types of insurance led some courts to find losses were caused solely by covered perils because existing case law mandated exclusion from coverage for the entire loss due to the fact that an excluded peril contributed to the loss. Determining whether events that cause a loss are covered under contemporary multiple risk policies is much

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more difficult. Frankfurter was right, applying classic tort proximate cause principles to insurance causation disputes simply does not work in the modern insurance scheme.

**Terminology**

The main thrust of this section is to look at insurance causation when two or more perils combine to cause a loss from which one peril must be designated the efficient proximate cause of loss. Case law addressing insurance causation falls into two broad categories:

- One of the perils that resulted in a loss is excluded from coverage;
- One of the perils that resulted in a loss falls outside the insuring agreements of the policy.

These two broad categories of case law break down into three classifications which address temporal sequencing and causal relationships between perils which resulted in a loss:

- **Covered peril A** (initiating peril) precedes and is acted upon by **excluded peril B**, and peril **B** (immediate cause) causes the loss.
- **Excluded peril B** (initiating peril) precedes and is acted upon by **covered peril A**, and peril **A** (immediate cause) causes the loss.
- **Perils A and B**, independent of each other, join in causing the loss, both perils being necessary to cause the loss because neither peril alone is sufficient to do so.

The following terms are important.

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37 William Conant Brewer, Jr., *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141, 1175-76 (1961). As to the third temporal sequence above, Brewer offers the following as an example:

Under a marine insurance policy, the insured vessel was torpedoed during World War I. The vessel made it to port but was later sunk by a storm. The vessel would not have sunk were it not first damaged by enemy fire.

Brewer cites *Leyland Shipping Co., Ltd. v. Norwich Union Fire Ins. Soc’y, Ltd.*, [1918] A.C. 350 (H.L. 1918). Brewer’s example distinguishes between perils which *arise* independently and perils which *operate* independently. The enemy attack on the vessel and the storm arose independently but the operation of both perils was necessary to cause the sinking of the ship.
Peril. Generally, a “peril” in insurance law is a fortuitous, active physical force that brings about a loss.\textsuperscript{38} Perils may include, but are not limited to, lightning, windstorm, hail, fire, explosion, flood, riot or civil commotion, smoke, vandalism, theft, falling objects, weight of snow, ice or sleet, negligence, snowstorm, collapse, surface waters, tidal wave, high water.\textsuperscript{39}

Named Perils Policy. A named perils policy lists the perils covered by the policy. Unnamed perils are not covered.\textsuperscript{40}

All-Risks Insurance Policy. This type of policy covers all-risks of accidental loss to the described property except when a loss is caused by a specifically excluded peril.\textsuperscript{41}

Causation. Causation is the connector between an occurrence or peril, on the one hand, and bodily injury/property damage or loss, on the other hand.\textsuperscript{42}

Immediate Cause. An “immediate cause” of loss is the peril closest in time or place.\textsuperscript{43}

Dominant Cause. A dominant cause of loss is the peril which other perils act upon to cause a loss.\textsuperscript{44}


\textsuperscript{39} The occurrence of a covered peril is the most important condition of the undertaking of an insurer as set forth in the insuring agreements of a policy. Edwin W. Patterson, Essentials of Insurance Law § 59, p. 267 (2d ed. 1957) (“Patterson”). A covered peril is the central link in a chain of causation. Patterson, § 59, p. 267. A covered peril is the cause of its subsequent consequences and is itself a consequence of antecedent perils. Patterson, § 57, p. 248.

An insurance policy contains two types of provisions limiting coverage in terms of causation. Patterson, § 57, p. 249. One limitation (an exception) addresses the consequences of a covered peril. Patterson, § 57, p. 249. The other type of limitation (an excluded event) addresses limitations placed upon the causes of a covered peril. Patterson, § 57, p. 249. An excluded peril is one which falls outside the insuring agreements of a policy, \textit{i.e.}, “all risks of physical loss”. Patterson, § 57, p. 249.


\textsuperscript{41} Mark R. Greene, James S. Trieschman, Sandra G. Gustavson, p. 84.

\textsuperscript{42} Banks McDowell, Causation in Contracts and Insurance, 20 Conn. L. Rev. 569, 575-77 (1988).

Efficient proximate cause. A doctrine based on the Latin maxim “causa proxima, no remota spectator,” meaning that the immediate cause is considered, not the remote cause.45 “[W]here there is a concurrence of different causes, the efficient cause, the one that sets others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster.”46 47

Remote Cause. When an initiating peril and the chain of events it sets in motion is broken by a new and independent peril (an “intervening cause”), the initiating peril becomes a remote cause of loss and not a dominant cause of loss.48

Intervening Cause. When a chain of events is unbroken by a new and independent peril, the initiating peril is the efficient proximate cause of loss.49 If a new and independent peril (an “intervening cause”) breaks the chain of events, the initiating peril is a remote cause of loss, not the efficient proximate cause of loss.50

Initiating Peril. An initiating peril is the earliest peril in a chain of events, which is not too remote in time.51

Dependent Perils. The initiating peril and the later peril or perils it sets in motion are referred to as dependent perils or dependent causes.52 Dependent perils must occur

50 RUSS & SEGALLA, §101.49, p. 101-143.
successively. Dependent perils are not “concurrent,” because concurrent perils or concurrent causes must operate at the same time, not successively.

**Independent Perils.** Perils or causes are independent when they arise and operate independently. When perils are independent, the peril nearest in time or place is the efficient proximate cause of loss.

**Concurrent Perils.** Concurrent perils or concurrent causes are two or more perils which run together and act contemporaneously to produce a loss. Concurrent perils or concurrent causes must be active simultaneously to efficiently produce the loss.

**Causation Rules**

Courts have developed at least five different causation rules to resolve coverage issues involving concurrences of covered and excluded perils or negligent acts:

- Traditional Rule,
- Concurrent Cause-First-Party Texas Rule,
- *Partridge*-Type Concurrent Cause (“PTCC”),
- Immediate Cause, and

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54 Richard A. Fierce, 10 S. Ill. U. L.J. at 534.


Efficient Proximate Cause. 63

Traditional Rule

Courts have applied the so-called traditional rule to both liability insurance and first-party insurance. The traditional rule provides that when a covered peril combines with an excluded peril to cause a loss, there is no coverage because insurers do not contract to pay losses caused in part by excluded perils. 64 Under the traditional rule, an insured must prove a loss was caused solely by a covered peril, whereas an insurer can establish a “no coverage” defense by proving either that the loss was caused solely by an excluded peril or that the loss was caused by dependent peril, one of which was excluded from coverage. 65 Texas courts have applied a variation of the traditional rule. 66

Traditional Rule Applied

In Cox v. Queen Insurance Company of America, 67 Paul Cox was insured by Queen against direct loss resulting from windstorm, hurricane or hail. 68 The policy excluded coverage for loss caused by tidal wave or high water. 69 Cox’s pier and bath house on Fulton Beach in

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63 See State, ex rel. State Fire & Tornado Fund of N.D. Ins. Dept. v. N.D. State Univ., 694 N.W.2d 225, 234 (N.D. 2005). The concurrent causation rule, which is often erroneously used interchangeably with efficient proximate cause, is entirely different. Under concurrent causation, when a loss results from multiple perils, the loss will be covered as long as any one peril is covered. Today very few states follow this rule. DAVID L. LEITNER, REAGAN W. SIMPSON & JOHN M. BJORKMAN, LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 52:7 (Thompson/West 2005).


65 Francis J. MacLaughlin, Third-Party Liability Policies: The Concurrent Causation Doctrine and Pollution Exclusions, 24-SPG Brief 20, 23 (Spring 1995).


67 370 S.W.2d 206 (Tex.Civ.App. -- San Antonio 1963, writ ref’d n.r.e.).

68 Queen Ins., 370 S.W.2d at 206.

69 Queen Ins., 370 S.W.2d at 206.
Aransas County, Texas, were damaged.\textsuperscript{70} The jury found the loss was caused by dependent perils: (a) windstorm (covered), and (b) high water (excluded), (not caused solely by windstorm).\textsuperscript{71} The court applied the traditional rule in finding no coverage.\textsuperscript{72} In this case windstorm was likely the initiating peril which acted upon the excluded peril of high water.

In \textit{Lydick v. Insurance Company of North America},\textsuperscript{73} brothers William and James Lydick were partners in a farming and cattle feeding business.\textsuperscript{74} INA insured the brothers against direct loss by windstorm.\textsuperscript{75} The policy excluded coverage for loss caused directly or indirectly by cold weather and for loss to livestock caused by freezing or snowstorm.\textsuperscript{76}

One winter morning, James went to the feed lot to tend to his cattle and found 99 of them dead in a pond.\textsuperscript{77} The cattle apparently drowned after they moved to the ice-covered pond and broke through the ice. At the time the cattle were found, the wind was blowing at a rate of 30 miles per hour with gusts up to 40 to 50 miles per hour, just as it had the day before.\textsuperscript{78} The Lydicks testified that the cattle appeared to have descended into the sheltered area around the ice-covered pond due to the cold and the windstorm where the temperature was estimated to be 15 to 20 degrees warmer.\textsuperscript{79} William testified that the cattle never would have gone onto the ice

\textsuperscript{70} \textit{Queen Ins.}, 370 S.W.2d at 206.  
\textsuperscript{71} \textit{Queen Ins.}, 370 S.W.2d at 206.  
\textsuperscript{72} \textit{Queen Ins.}, 370 S.W.2d at 206.  
\textsuperscript{73} 187 Neb. 97, 187 N.W.2d 602 (1971).  
\textsuperscript{74} \textit{Lydick}, 187 Neb. at 98, 187 N.W.2d at 603.  
\textsuperscript{75} \textit{Lydick}, 187 Neb. at 99, 187 N.W.2d at 604.  
\textsuperscript{76} \textit{Lydick}, 187 Neb. at 99, 187 N.W.2d at 604.  
\textsuperscript{77} \textit{Lydick}, 187 Neb. at 98, 187 N.W.2d at 604.  
\textsuperscript{78} \textit{Lydick}, 187 Neb. at 98, 187 N.W.2d at 603.  
\textsuperscript{79} \textit{Lydick}, 187 Neb. at 98, 187 N.W.2d at 604.
but for the fact that the ice was covered with snow and there was a windstorm.\textsuperscript{80} He also testified that the temperature was a little below zero.\textsuperscript{81}

Although many antecedent and contributing factors produced the loss, the court concluded that extreme cold was the dominant cause of loss.\textsuperscript{82} The loss was not directly caused by windstorm.\textsuperscript{83} The immediate or direct cause of the loss was the collapse of the ice covering the pond where the cattle were standing.\textsuperscript{84} The Lydicks argued that the temperature around the depressed area of the pond was warmer because it was sheltered from the cold wind. They argued that “but for” the windstorm, the cattle would never have sought shelter in the area of the pond.\textsuperscript{85} The insureds’ own testimony established that the cold weather and snow were dominant factors in causing the cattle to wander onto the pond.\textsuperscript{86} In denying coverage, the court found that the loss was not the direct result of windstorm. The court applied the traditional rule in denying coverage because wind was merely one of the prior conditions contributing to the loss. The covered peril of windstorm combined with the excluded peril of cold weather and snowstorm to cause the loss.\textsuperscript{87}

**Traditional Rule Not Applied**

In *Cagle v. Commercial Standard Insurance Co.*,\textsuperscript{88} Benny Stovall went to Allco Insurance Agency, to purchase an automobile - garage liability insurance policy.\textsuperscript{89} Allco placed

\textsuperscript{80} *Lydick*, 187 Neb. at 98, 187 N.W.2d at 604.
\textsuperscript{81} *Lydick*, 187 Neb. at 98, 187 N.W.2d at 604.
\textsuperscript{82} *Lydick*, 187 Neb. at 99, 187 N.W.2d at 604.
\textsuperscript{83} *Lydick*, 187 Neb. at 99, 187 N.W.2d at 604.
\textsuperscript{84} *Lydick*, 187 Neb. at 100, 187 N.W.2d at 604.
\textsuperscript{85} *Lydick*, 187 Neb. at 101, 187 N.W.2d at 605.
\textsuperscript{86} *Lydick*, 187 Neb. at 101, 187 N.W.2d at 605.
\textsuperscript{87} *Lydick*, 187 Neb. at 101, 187 N.W.2d at 605.
\textsuperscript{88} 427 S.W.2d 939 (Tex.Civ.App. -- Austin 1968, no writ).
Stovall’s coverage with National Automobile & Casualty Insurance Company (“National”).\textsuperscript{90} Cagle was one of the Allco partners.\textsuperscript{91} National later cancelled Stovall’s policy because of Stovall’s poor driving record.\textsuperscript{92} However, a day before the cancellation took effect, Stovall was involved in an accident for which National eventually paid $9,500 on behalf of Stoval. National sued Allco and its owners for failing to cancel the Stovall policy when instructed by National.\textsuperscript{93}

Commercial Standard provided Errors & Omissions coverage to Allco.\textsuperscript{94} When Commercial Standard denied Allco coverage, Allco and its partners sued Commercial Standard and National intervened.\textsuperscript{95} The Commercial Standard policy provided the insurer would:

\begin{quote}
[P]ay on behalf of the insured all sums which the insured shall become legally obligated to pay on account of any claim made against the insured and caused by any negligent act, error or omission of the insured or any other person for whose acts the insured is legally liable in the conduct of their business of General Agents, Insurance Agents or Insurance Brokers including all claims involving the liability of the insured to any Insurance Company for whom the insured as an Agent has issued a Policy, Covernote or Binder resulting in a Company being held liable for paying their Policyholder and thereafter claiming on the insured in respect of such liability which but for the error or omission on the part of the insured would not have involved liability on the Company concerned.\textsuperscript{96}
\end{quote}

The Commercial Standard policy excluded coverage for “any dishonest, fraudulent, criminal or malicious act, libel or slander.”\textsuperscript{97}

Commercial Standard moved for summary judgment, arguing that the Austin Court of Appeals, in its earlier decision in \textit{National Automobile & Casualty Insurance Co. v. Allco}
Insurance Agency, found that Cagle committed fraud against National Automobile when he failed to cancel the Stovall policy after Cagle promised the insurer he would, and that Commercial Standard was not liable under the terms of its policy issued to Allco. Cagle also moved for summary judgment, based also on a construction of the Allco Insurance Agency decision. Cagle claimed that his negligence was one of the grounds on which the earlier opinion was based: Cagle’s negligent failure to carry out the instructions given to him by National Automobile to cancel the Stovall policy.

Under the facts of Allco Insurance Agency, National Automobile sued Allco and its partners. National claimed that if Cagle had followed instructions to cancel the Stovall policy when first ordered to do so, the policy would not have existed to cover Stovall’s accident.

Cagle, as the agent for National, submitted Stovall’s application for an automobile-garage liability insurance policy. National wrote Cagle informing him that it would insure Stovall subject to a favorable report on all drivers who would be covered under the policy. Shortly thereafter, National determined that Stovall’s driving record was unacceptable. National wrote Cagle informing him he must return the policy for cancellation within ten days.

When time passed without any action from Cagle, National again wrote him to advise that unless the Stovall policy or other valid evidence of cancellation was received in five days the

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99 Cagle, 427 S.W.2d at 940.
100 Cagle, 427 S.W.2d at 940.
101 Cagle, 427 S.W.2d at 940.
102 Cagle, 427 S.W.2d at 940.
103 Cagle, 427 S.W.2d at 940.
104 Cagle, 427 S.W.2d at 941.
105 Cagle, 427 S.W.2d at 941.
106 Cagle, 427 S.W.2d at 941.
insurer would unilaterally cancel the policy.\textsuperscript{107} Cagle notified National that he had placed Stovall’s coverage with Western Alliance Insurance Company as a replacement to the National policy and that he had mailed the old Stovall policy to the insurer after he effectively cancelled the policy.\textsuperscript{108} In reality, Cagle neither procured replacement insurance, nor did he cancel and return the old policy to National. National then sent direct notice of cancellation to Stovall.\textsuperscript{109}

National sued Cagle, alleging that he failed to cancel the Stovall policy or return it for cancellation after being instructed to do so and that such failure was a breach of Cagle’s duty as an agent. The court began by noting that unless Cagle was under a duty as an agent for National to cancel the Stovall policy, his failure to do so, in the absence of fraud or estoppel, was not actionable.\textsuperscript{110} If Cagle was under a duty to National, he breached his contract by failing to cancel the policy.\textsuperscript{111} Cagle claimed he was not authorized to cancel policies issued by National, and that the insurer never asked him to cancel the Stovall policy.\textsuperscript{112} The court of appeals concluded that the agency agreement between Allco and National clearly gave Cagle authority to cancel all policies which were issued by him.\textsuperscript{113} National acted within the scope of its agreement with Cagle when asking him to cancel the Stovall policy, and that Cagle failed to discharge his duty as an agent to National.\textsuperscript{114} Cagle was estopped from denying liability to National because

\begin{itemize}
\item \textsuperscript{107} Cagle, 427 S.W.2d at 941.
\item \textsuperscript{108} Cagle, 427 S.W.2d at 941.
\item \textsuperscript{109} Cagle, 427 S.W.2d at 941.
\item \textsuperscript{110} Cagle, 427 S.W.2d at 941.
\item \textsuperscript{111} Cagle, 427 S.W.2d at 941.
\item \textsuperscript{112} Cagle, 427 S.W.2d at 941.
\item \textsuperscript{113} Allco Ins. Agency, 403 S.W.2d at 178.
\item \textsuperscript{114} Allco Ins. Agency, 403 S.W.2d at 179.
\end{itemize}
the agent falsely represented that he had cancelled the policy and by relying upon his representation, suffered injury.\textsuperscript{115}

The court noted that it previously held that Allco and Cagle were liable for breach of contract and fraud.\textsuperscript{116} Although the breach of contract claim was covered, the policy excluded coverage for fraud.\textsuperscript{117} Furthermore, the breach of contract was independent of the fraud practiced on National. Therefore, Commercial Standard was not relieved of liability by the exclusion of fraud.\textsuperscript{118} Commercial Standard, in denying coverage, mistakenly relied on the traditional rule and the decision in \textit{Cox v. Queen Insurance Company of America}.\textsuperscript{119} Commercial Standard argued that because the covered peril of breach of contract and the excluded peril of fraud combined to cause the loss, there was no coverage.\textsuperscript{120} The court refused to follow Queen, because Cagle’s breach of contract did not bring about the subsequent act of fraud. Cagle’s fraud did not contribute to or enlarge the amount of damages produced by the breach of contract, a covered peril under the Errors and Ommissions policy.\textsuperscript{121}

\textbf{First-Party Texas Rule}

When courts determine whether an exclusion in a property party policy applies to a loss, reported cases show that three different modes of analysis are applied. Courts in some

\begin{footnotesize}
\begin{enumerate}
\item[115] Cagle, 427 S.W.2d at 942.
\item[116] Cagle, 427 S.W.2d at 943
\item[117] Cagle, 427 S.W.2d at 943.
\item[118] Cagle, 427 S.W.2d at 943.
\item[119] 370 S.W.2d 206 (Tex.Civ.App. -- San Antonio 1963, writ ref’d n.r.e.).
\item[120] Cagle, 427 S.W.2d at 944.
\item[121] Cagle, 427 S.W.2d at 944.
\end{enumerate}
\end{footnotesize}
jurisdictions focus on the source of a loss. Other jurisdictions, such as Texas, courts pay close attention to the language of the policy. Finally, other courts consider chains of causation.

In Texas, determinations of causation under a first-party property insurance policy depends on the wording of policy exclusions. The two different wordings used in Texas allow insurers to contract out of or into the efficient proximate cause rule or doctrine, 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. Such loss or damage is excluded, regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

- 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.

The italicized sentence in the exclusion contractually eliminates the use of the “efficient proximate cause doctrine” because that language operates to exclude coverage when an excluded peril, ordinance or law, for example, “contributes concurrently” with a covered peril to cause loss. Accordingly, when a “policy contains a concurrent cause provision, the parties have expressed

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122 See Auten v. Employers Nat’l Ins. Co., 722 S.W.2d 468 (Tex.App. -- Dallas 1986, writ denied). In Auten, the policy at issue excluded coverage for “[l]oss caused by . . . contamination.” Auten, 722 S.W.2d at 470. The insureds argued that the covered peril of third-party negligence caused contamination of their home. Auten, 722 S.W.2d at 470. The court rejected this argument because, if approved, application of the exclusion would be limited to contamination caused by an excluded peril. Auten, 722 S.W.2d at 471.


124 Hereinafter referred to as a “loss caused by” exclusion.


their intent to contract out of the efficient proximate cause doctrine.”127 If the insured can quantify the extent of loss caused by the covered peril, the insured may recover that portion of loss attributable to the covered peril.128

The other type of exclusion used in Texas might preclude coverage for:

- loss or damage caused by rust, corrosion, frost or freezing unless resulting from a peril insured against;129
- cost of making good faulty workmanship, materials, construction or design, but this exclusion shall not be deemed to exclude physical loss or damage arising as a consequence of faulty workmanship, material, construction or design.130

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.”131

“Loss Caused By” Exclusion – Contracting Out Of Efficient Proximate Cause

The rule in Texas is based on the fact 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. An insurer contracts to bear the burden of a direct loss caused by a covered peril, although that loss may have been indirectly and incidentally enhanced by a peril for which neither the insurer nor the insured are responsible. An insured, by default, bears the burden of loss from excluded

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129 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 . . . provided such losses would otherwise be covered under this policy.” See Allstate Ins. Co. v. Smith, 450 S.W.2d 957 (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 Services Auto. Assoc., 192 S.W.3d 78, 92 (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).
131 Valero Energy, 777 S.W.2d at 506.
perils. Thus, when a loss is caused by a combination of a covered peril and an excluded peril, the damage suffered by the insured is affected by a peril in violation of the express agreement between the parties, and the insurer is not liable to pay the loss. The rule in Texas prevents courts from manipulating causation rules to bring a loss under coverage if it is caused in whole or in part by an excluded peril.

Texas case law is a product of the efforts by insurers to contractually circumvent the efficient proximate cause principle applied in most other jurisdictions. For example, the policy at issue in Palatine Insurance Co., Ltd. v. Coyle, excluded coverage for loss “occasioned directly or indirectly by . . . high water.” This type of policy exclusion causes coverage to be dependent on the relative importance of each individual covered peril. A Texas insured may recover either by proving the loss was caused solely by a covered peril or, that the loss was caused by a combination of covered and excluded perils and that the damage can be segregated and apportioned accordingly. Thus, an insured can recover only for that portion of the damage caused solely by the covered peril.

In Travelers Indemnity Co. v. McKillip, Travelers insured Troy McKillip under an all-risks policy which covered loss caused by windstorm but excluded loss caused by snowstorm.

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134 R. Dennis Withers, Proximate Cause and Multiple Causation in First-Party Insurance Cases, 20 FORUM 256, 262 (January 1985).

135 469 S.W.2d 160 (Tex. 1971).

136 McKillip, 469 S.W.2d at 161.
The events which led to the loss in this case began with a windstorm.\textsuperscript{137} The windstorm took an obvious path across McKillip’s farm, directly striking a barn on the premises.\textsuperscript{138} According to the evidence, the barn remained standing and appeared to have sustained no damage.\textsuperscript{139} Six days later, a snowstorm dropped five inches of snow on the area. Following the snowstorm, the barn collapsed and McKillip claimed collapse was due to the earlier windstorm.\textsuperscript{140} Travelers denied coverage, claiming the collapse of the barn was caused by the excluded peril of snowstorm.\textsuperscript{141}

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

- the barn was damaged by the windstorm,
- 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 windstorm,
- the collapse of the barn was not caused solely by the weight of snow.\textsuperscript{142}

\textsuperscript{137} McKillip, 469 S.W.2d at 161.
\textsuperscript{138} McKillip, 469 S.W.2d at 163.
\textsuperscript{139} McKillip, 469 S.W.2d at 163.
\textsuperscript{140} McKillip, 469 S.W.2d at 161.
\textsuperscript{141} McKillip, 469 S.W.2d at 161.
\textsuperscript{142} McKillip, 469 S.W.2d at 161.
Based on these findings, the trial court rendered judgment for the insureds in the amount of $7,450, and the appellate court affirmed that judgment.\textsuperscript{143} The Supreme Court of Texas reversed the courts below and remanded the case for a new trial because the trial court and court of appeals both erroneously assumed that courts in Texas apply the doctrine of efficient proximate cause to property damage claims.\textsuperscript{144} The Supreme Court cited the 1920 case of \textit{Palatine Insurance Co., Ltd. v. Coyle},\textsuperscript{145} for the proposition that the \textit{McKillip} case was improperly submitted to the jury upon the theory that if windstorm was the dominant efficient cause of the building collapse, although other causes may have contributed to the loss, the entire loss was covered.\textsuperscript{146} Under Texas law, the insured must prove either (a) the loss is caused solely by a covered peril, or (b) damages caused by the insured peril can be segregated from those caused by an excluded peril.

A more reasonable analysis of the facts in \textit{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 either that (a) the snowstorm alone caused the loss or, (b) the perils of windstorm and snowstorm had to act jointly because neither peril alone was

\textsuperscript{143} \textit{McKillip}, 458 S.W.2d at 537.
\textsuperscript{144} \textit{McKillip}, 469 S.W.2d at 162. The Supreme Court, after viewing the events most favorably in support of the verdict, concluded that the evidence did not support the findings of the jury. There was no evidence in the record that the windstorm had any direct effect on the barn. There was also no evidence in the record of any damage to the barn caused solely by the windstorm. The damages issue the jury responded to related solely to the condition of the barn after the windstorm, snowstorm and collapse of the barn. There was no evidence of costs of repairing or replacing the barn after the windstorm.
\textsuperscript{145} 222 S.W. 973 (Tex. 1920).
\textsuperscript{146} \textit{McKillip}, 469 S.W.2d at 162.
sufficient in strength to cause the loss. There is 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.

In Palatine Insurance Co., Ltd. v. Coyle, insureds 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. The Palatine policy covered all direct loss by tornado, windstorm, or cyclone, and excluded coverage for loss occasioned directly or indirectly by tidal wave or for any loss or damage caused by water or rain, “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.” Palatine and the insureds stipulated that the total amount of damages caused by the storm was $4,512.43. The parties also agreed that (a) damage caused by the direct action of the wind was $500, (b) 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 (c) the remaining damages, $3,352.43, were due to the combined action of wind and water. Palatine offered to pay the insureds the two sums first mentioned,
aggregating $1,160, but the insureds demanded payment of all damages. The sole controversy was whether the damages caused by the combined action of wind and water were covered. The case was tried to the court on agreed facts. The trial court ruled in favor of the insureds, awarding damages totaling $4,512.43. Palatine appealed.

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. The hurricane was the initiating peril which set the excluded peril of water in motion, giving the latter peril the necessary strength to cause the loss. Furthermore, the insureds claimed that, because the insurer knew that Galveston was vulnerable to hurricanes and water damage caused during 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.” The court of appeals rejected this argument on the grounds that the policy excluded coverage for all damages caused directly or indirectly by water and waves. 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 combined actions of wind and water. The court of appeals ruled that Palatine was liable only for those damages caused by wind alone ($500), and

153 Coyle, 196 S.W. at 561.
154 Coyle, 196 S.W. at 561.
155 Coyle, 196 S.W. at 561.
156 Coyle, 196 S.W. at 561.
157 Coyle, 196 S.W. at 561.
158 Coyle, 196 S.W. at 564.
159 Coyle, 196 S.W. at 564.
160 Coyle, 196 S.W. at 565.
161 Coyle, 196 S.W. at 565.
for those damages to the interior, caused by water or rain entering through openings first made by the wind ($660).  

On further appeal, the Supreme Court of Texas found Palatine was not responsible for payment of any damages due to the combined actions of wind and water.\textsuperscript{163} The policy excluded loss caused by water only, or loss caused by water driven by wind.\textsuperscript{164} The court concluded that when a loss occurs as the result of a covered peril, windstorm in this case, and an excluded peril, water, both perils being active at the same time and where the damages caused by each peril cannot be distinguished, efficient proximate cause does not apply.\textsuperscript{165} As to the disputed loss caused concurrently by wind and water, the policy excluded coverage for those damages.\textsuperscript{166} 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. 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. 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.\textsuperscript{167} 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. However, this question was decided between the insureds and the insurer by their joint stipulation. The parties’ stipulation played such a prominent role in

\begin{footnotesize}
\textsuperscript{162} Coyle, 196 S.W. at 565.
\textsuperscript{163} Coyle, 222 S.W. at 975.
\textsuperscript{164} Coyle, 222 S.W. at 976.
\textsuperscript{165} Coyle, 222 S.W. at 976.
\textsuperscript{166} Coyle, 222 S.W. at 976.
\textsuperscript{167} Coyle, 196 S.W. at 563.
\end{footnotesize}
deciding coverage that one may question whether the court in Coyle actually applied the rule purportedly followed.

In United States Fire Insurance Co. v. Matchoolian, 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 tar paper from the roof which blocked drains on the roof. The drains clogged when 1.7 inches of rain fell within a twenty minute time period. When water accumulated on the roof, a portion of the roof collapsed. United States Fire argued that the loss was caused by the excluded peril of rain. At trial, Matchoolian’s expert witness testified that damage to the roof was caused by and excessive weight of the water, and the jury awarded damages to Matchoolian.

On appeal, the court noted that the Supreme Court of Texas refused to accept efficient proximate cause in Travelers Indemnity Co. v. McKillip, rejecting the idea that an insured could recover for loss caused by an excluded peril when a covered peril is the efficient proximate cause of loss. When an insurer pleads an exclusion such as rain, the insured must either prove that the loss was not caused to any extent by that excluded peril, or the insured must segregate the damages caused by a covered peril from those damages caused by the excluded peril, and then secure a jury finding on the amount of the damages caused by the covered peril alone. Matchoolian failed to request a jury issue segregating the damages caused by windstorm from

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168 583 S.W.2d 692 (Tex.Civ.App. -- Houston [14th Dist.] 1979, writ ref’d n.r.e.).
169 Matchoolian, 583 S.W.2d at 693.
170 Matchoolian, 583 S.W.2d at 693.
171 Matchoolian, 583 S.W.2d at 693.
172 469 S.W.2d 160 (Tex. 1971). Matchoolian, 583 S.W.2d at 693.
173 Matchoolian, 583 S.W.2d at 693.
those caused by rain. Matchoolian did secure 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 loss. Because 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.

“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 hardly surprising that an appellate court in this state would not follow those two decisions when confronted with a differently worded exclusion, which is what occurred in National Union Fire Insurance Company of Pittsburgh, Pa. v. Valero Energy Corp. National Union insured Valero, an oil refiner, under a builder’s risk policy. This policy was purchased to provide coverage for loss to Valero’s property as a result of work on the refinery expansion project. One of the objectives of the expansion project was to add a heavy oil cracker to the refinery. The cracker unit included a citrate scrubber. When Valero attempted to put the citrate scrubber into operation, it sustained substantial damage, which would later be attributed to faulty design. Valero made a claim for coverage under its policy with

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174 Matchoolian, 583 S.W.2d at 693.
175 Matchoolian, 583 S.W.2d at 694.
176 Matchoolian, 583 S.W.2d at 694.
178 Valero, 777 S.W.2d at 504.
179 Valero, 777 S.W.2d at 504.
180 Valero, 777 S.W.2d at 504.
181 Valero, 777 S.W.2d at 504.
182 Valero, 777 S.W.2d at 505.
National Union. The insurer responded that there was no coverage because the loss was caused by the excluded perils of rust and/or corrosion.\(^\text{183}\) The insurer also argued there was no coverage for “making good faulty workmanship, material construction or design.”\(^\text{184}\) However, this exclusion did not apply when “physical loss or damage” arose out of “faulty workmanship, material, construction or design.”\(^\text{185}\)

Valero sued for breach of contract and extra-contractual damages, and a jury found that Valero’s loss was covered.\(^\text{186}\) The trial court rendered judgment for Valero, and National Union appealed.\(^\text{187}\)

National Union continued to assert on appeal that the excluded perils of rust and/or corrosion precluded coverage for loss to the citrate scrubber.\(^\text{188}\) The court of appeals began its analysis by citing *Travelers Indemnity Co. v. McKillip*,\(^\text{189}\) and its holding that when loss results from two concurring perils, one insured and one not, loss is covered but only for the portion of damages that can be traced back to the covered peril.\(^\text{190}\) However, the *Valero* court departed from *McKillip*, because the exclusion was qualified to allow recovery when an excluded peril, which was the immediate cause of loss, was itself caused by a covered peril.\(^\text{191}\) In other words, the excluded peril was not the cause of loss, but rather the result of a covered risk. For this

\(^{183}\) *Valero*, 777 S.W.2d at 505.
\(^{184}\) *Valero*, 777 S.W.2d at 505.
\(^{185}\) *Valero*, 777 S.W.2d at 505.
\(^{186}\) *Valero*, 777 S.W.2d at 505.
\(^{187}\) *Valero*, 777 S.W.2d at 504.
\(^{188}\) *Valero*, 777 S.W.2d at 505.
\(^{189}\) 469 S.W.2d 160 (Tex. 1971).
\(^{190}\) *Valero*, 777 S.W.2d at 505.
\(^{191}\) *Valero*, 777 S.W.2d at 506.
reason, the court ruled that the excluded peril of rust did not cause the loss.\textsuperscript{192} The evidence established that sudden and unexpected corrosion occurred as the result of the covered peril of faulty design of the citrate scrubber.\textsuperscript{193} The policy contained an exception to the exclusion by creating coverage for loss “arising as a consequence of” faulty design.\textsuperscript{194} The court of appeals noted that the cause of loss could reasonably be characterized in two ways, one of which, faulty design, was covered.\textsuperscript{195} The court, citing the rule of construction which requires a court to construe policy exclusions in favor of an insured as long as the construction is not unreasonable, ruled that the loss was caused by the covered peril of faulty design.\textsuperscript{196} The rule applied in \textit{Valero} was in reality the same efficient proximate cause rule applied in other jurisdictions, but instead of being based on a statute, as in California, the insurer in \textit{Valero} contracted into this causation rule.\textsuperscript{197}

In \textit{Adrian Associates, General Contractors v. National Surety Corp.},\textsuperscript{198} National Surety insured Adrian Associates under a Builder’s Risk policy.\textsuperscript{199} An underground city water main ruptured, causing water to escape.\textsuperscript{200} The escaping water migrated below the surface of the ground.\textsuperscript{201} This water made its way underneath a concrete slab Adrian Associates recently

\begin{itemize}
\item \textsuperscript{192} \textit{Valero}, 777 S.W.2d at 506.
\item \textsuperscript{193} \textit{Valero}, 777 S.W.2d at 506.
\item \textsuperscript{194} \textit{Valero}, 777 S.W.2d at 506.
\item \textsuperscript{195} \textit{Valero}, 777 S.W.2d at 506.
\item \textsuperscript{196} \textit{Valero}, 777 S.W.2d at 506.
\item \textsuperscript{198} 638 S.W.2d 138 (Tex.App. -- Dallas 1982, writ ref’d n.r.e.).
\item \textsuperscript{199} \textit{Adrian Associates}, 638 S.W.2d at 138-39.
\item \textsuperscript{200} \textit{Adrian Associates}, 638 S.W.2d at 138.
\item \textsuperscript{201} \textit{Adrian Associates}, 638 S.W.2d at 138.
\end{itemize}
poured as the foundation for a warehouse.\textsuperscript{202} The water caused soil subsidence which destroyed the ground support for the slab.\textsuperscript{203} The slab was damaged and had to be rebuilt.\textsuperscript{204}

National Surety’s policy contained the following three water related 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 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.\textsuperscript{205}

The policy also excluded “loss, 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.”\textsuperscript{206}

National Surety claimed that these exclusions applied and denied coverage. When the insured sued, the trial court granted summary for the insurer and the insured appealed.\textsuperscript{207} 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 unnatural origin.\textsuperscript{208} As to exclusion (c)(3), National Surety argued that exclusion applied to all water whatever the

\textsuperscript{202} Adrian Associates, 638 S.W.2d at 138.
\textsuperscript{203} Adrian Associates, 638 S.W.2d at 138.
\textsuperscript{204} Adrian Associates, 638 S.W.2d at 138.
\textsuperscript{205} Adrian Associates, 638 S.W.2d at 139.
\textsuperscript{206} Adrian Associates, 638 S.W.2d at 139.
\textsuperscript{207} Adrian Associates, 638 S.W.2d at 138.
\textsuperscript{208} Adrian Associates, 638 S.W.2d at 138.
source. The court rejected National Surety’s contention that “water below the surface of the ground” included water from an unnatural or artificial source. Because exclusion (c)(3) did not apply, the trial court’s summary judgment based on the exclusion was error. Finally, 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 policy stated that the exclusion did not apply if the insured’s loss resulted from a peril not excluded. The court had previously ruled that underground water of an artificial origin is not water below the surface of the ground within exclusion (c)(3). The insured’s loss resulted from a peril “not excluded.”

In Allstate Insurance Co. v. Smith, Allstate insured Russell and Dorothy Smith under a homeowner’s policy. The Smiths’ home, built on a concrete slab, was approximately 3 years old at the time of loss. A copper water pipe embedded in the slab ruptured and water leaked from the pipe for an unknown period of time. The leaking water caused wooden beams in the walls of the house to rot. There was evidence that the copper pipe was ruptured either because the pipe was defectively manufactured or the pipe was crimped by a workman when it was

209 Adrian Associates, 638 S.W.2d at 139.
210 Adrian Associates, 638 S.W.2d at 141.
211 Adrian Associates, 638 S.W.2d at 141.
212 Adrian Associates, 638 S.W.2d at 141.
214 Smith, 450 S.W.2d at 959.
215 Smith, 450 S.W.2d at 959.
216 Smith, 450 S.W.2d at 959.
Allstate denied coverage, claiming the loss was caused by the excluded peril of “inherent vice.”

The insureds sued Allstate. The case was tried to the court without a jury which rendered judgment for the insureds. The trial court filed the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

- The policy of insurance was issued to plaintiffs by defendant, and was in full force and effect.
- A section of water pipe burst in September 1968, causing water damage to the insured premises.
- Water leaking from the ruptured pipe caused wooden beams in the vicinity of the pipe to rot.
- $452.33 was necessarily expended for repairs to plaintiffs residence, all of which repairs were necessitated and occasioned by the rupture of the water pipe.

**CONCLUSIONS OF LAW**

- The policy covered all risks of physical loss except as specifically excluded.
- Loss resulting from water damage was a risk of physical loss not otherwise excluded by the terms of the policy.
- The rotting and deterioration of the wooden beams 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 did not apply to water damage.

Although the policy excluded coverage for the peril of inherent vice, the exclusion contained an “ensuing loss” provision which provided that the inherent vice exclusion “shall not
apply to ensuing loss caused by . . . water damage, . . . provided such losses would otherwise be covered under this policy.” 222 The inherent vice in this case was the copper pipe. 223 The immediate cause of loss was the covered peril of water damage resulting from the unexpected leaking of the water pipe. 224 The court of appeals concluded there was no coverage for the costs incurred to replace the defective pipe, but there was coverage for the cost of tearing out the floor and wall to discover the leak and to replace the floor and wall. 225

**All-Risks Insurance and Coyle**

In *Hardware Dealers Mutual Insurance Co. v. Berglund*, 226 the insurer issued two separate policies to the Berglunds. 227 One policy covered their beach house against “all risks” of physical loss except as otherwise excluded. 228 The all risks provision in the policy covered hurricane damage to the insured structure. 229 This policy also included coverage for unscheduled personal property under a “named perils” format, for direct loss by windstorm, hurricane, and hail. 230 The second policy covered a boathouse against loss from windstorm and hurricane. 231 The policy covering the beach house contained an exclusion for loss caused by flood, surface water, waves or tidal water. 232 The policy covering unscheduled personal property excluded loss

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222 *Smith*, 450 S.W.2d at 959.
223 *Smith*, 450 S.W.2d at 959.
224 *Smith*, 450 S.W.2d at 959.
225 *Smith*, 450 S.W.2d at 959.
227 *Berglund*, 393 S.W.2d at 310.
228 *Berglund*, 393 S.W.2d at 311.
229 *Berglund*, 393 S.W.2d at 311.
230 *Berglund*, 393 S.W.2d at 311.
231 *Berglund*, 393 S.W.2d at 311.
232 *Berglund*, 393 S.W.2d at 311.
caused by tidal wave or high water.\textsuperscript{233} 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.\textsuperscript{234}

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

\textbf{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

\textbf{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:

\textbf{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?

Answer by stating the percentage, if any you find, in figures from zero (0\%) to one hundred (100\%) percent.\textsuperscript{235}

The jury found that the excluded peril of water caused 70\% of the damages to the beach house, 95\% of the damages to personal property and 100\% of the damages to the boathouse.\textsuperscript{236}

\textsuperscript{233} Berglund, 393 S.W.2d at 311.

\textsuperscript{234} Berglund, 393 S.W.2d at 311.

\textsuperscript{235} Berglund, 393 S.W.2d at 311-12.

\textsuperscript{236} Berglund, 393 S.W.2d at 312.
The Berglunds claimed on appeal that there was no evidence, or insufficient evidence, to warrant submission of the issues contained in the court’s charge to the jury, and that the jury’s answers to those issues were contrary to the great weight and preponderance of the evidence.\textsuperscript{237} They also argued 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.\textsuperscript{238} 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 the loss.\textsuperscript{239} Furthermore, 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.\textsuperscript{240} In other words, the insureds argued that 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 the loss.\textsuperscript{241}

The court of appeals refused to follow \textit{Palatine Insurance Co. Ltd. v. Coyle},\textsuperscript{242} because the insurance policy in \textit{Coyle} was not an “all risks” policy, but a “named perils” policy insuring

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{237} \textit{Berglund}, 393 S.W.2d at 313.
\item \textsuperscript{238} \textit{Berglund}, 393 S.W.2d at 313.
\item \textsuperscript{239} \textit{Berglund}, 393 S.W.2d at 313.
\item \textsuperscript{240} 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?” The following definitions were also requested:
\begin{itemize}
\item 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.
\item By the term ‘new and independent,’ 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.
\end{itemize}

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, where the excluded perils were set in motion or activated by a hurricane. \textit{Berglund}, 381 S.W.2d at 633.
\item \textsuperscript{241} \textit{Berglund}, 381 S.W.2d at 633.
\item \textsuperscript{242} 222 S.W. 973 (Tex. 1920). \textit{Berglund}, 381 S.W.2d at 634-35.
\end{itemize}
\end{footnotesize}
against “all direct loss or damage by tornado, windstorm or cyclone,” and excluding loss caused directly or indirectly by tidal wave or high water, water or rain.\textsuperscript{243} The court of appeals concluded that in order for there to be no coverage for a loss caused by the excluded peril of water, the peril of water must be the efficient proximate cause of loss.\textsuperscript{244} Thus, the policy covered damage to the beach house.\textsuperscript{245} The court of appeals reversed the trial court and ordered the case retried.\textsuperscript{246}

On further appeal to the Supreme Court of Texas, the Berglunds again argued \textit{Coyle} did not apply because of the policies were worded differently.\textsuperscript{247} The insuring agreements of the “named perils” policy in \textit{Coyle}, expressly covered direct loss resulting from tornado, windstorm or cyclone.\textsuperscript{248} Although the named perils policy did not mention loss by hurricane, the policy excluded coverage for loss caused directly by tidal wave, water, or rain.\textsuperscript{249} 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.\textsuperscript{250}

The only way the court could rule that water damage accompanied by a hurricane was covered under the policy was to give the words “high water” and “overflow,” found in the water peril exclusion, a different meaning from those same words when used in the insuring agreements of a policy covering loss from tornado, windstorm, and cyclone. The court

\textsuperscript{243} \textit{Berglund}, 381 S.W.2d at 635.
\textsuperscript{244} \textit{Berglund}, 381 S.W.2d at 635.
\textsuperscript{245} \textit{Berglund}, 381 S.W.2d at 635.
\textsuperscript{246} \textit{Berglund}, 381 S.W.2d at 635.
\textsuperscript{247} \textit{Berglund}, 381 S.W.2d at 635.
\textsuperscript{248} \textit{Berglund}, 393 S.W.2d at 313.
\textsuperscript{249} \textit{Berglund}, 393 S.W.2d at 313.
\textsuperscript{250} \textit{Berglund}, 393 S.W.2d at 313.
concluded that an all risks policy does not insure against all damages caused by a hurricane.\textsuperscript{251} The court affirmed the judgment of the trial court 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.\textsuperscript{252}

**Burden of Proof Satisfied**

In *Fiess v. State Farm Lloyds*,\textsuperscript{253} a tropical storm forced flood waters into the home of Richard and Stephanie Fiess.\textsuperscript{254} After they removed sheetrock in their damaged home and found large amounts of black mold, they filed a mold contamination claim with their insurer, State Farm.\textsuperscript{255} State Farm paid $34,425 on the claim but reserved its right to dispute coverage under the policy.\textsuperscript{256} The insureds sued State Farm seeking compensation for all their damages caused by mold on grounds that those damages were caused by pre-flood water leaks in their roof, plumbing, heating and air conditioning system, ventilation leaks, and exterior door and window leaks.\textsuperscript{257} State Farm’s policy excluded coverage for loss caused by mold, but covered ensuing loss caused by water if that ensuing loss was otherwise covered by the policy.\textsuperscript{258}

State Farm moved for summary judgment, arguing that the Fiess’ claim fell outside the insuring agreements of the policy.\textsuperscript{259} The district court granted State Farm’s motion, finding that

\textsuperscript{251} *Berglund*, 393 S.W.2d at 314.
\textsuperscript{252} *Berglund*, 393 S.W.2d at 315.
\textsuperscript{253} 392 F.3d 802 (5th Cir. 2004).
\textsuperscript{254} *Fiess*, 392 F.3d at 804.
\textsuperscript{255} *Fiess*, 392 F.3d at 804.
\textsuperscript{256} *Fiess*, 392 F.3d at 804.
\textsuperscript{257} *Fiess*, 392 F.3d at 804.
\textsuperscript{258} *Fiess*, 392 F.3d at 809 n. 25.
\textsuperscript{259} *Fiess*, 392 F.3d at 805.
the ensuing loss provision of the policy did not cover mold contamination caused by water.\textsuperscript{260}

The insureds then appealed to the Fifth Circuit, arguing that the evidence was sufficient to have allowed 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 \textit{Travelers Indemnity Co. v. McKillip}.\textsuperscript{261}

The court of appeals, citing \textit{McKillip}, stated that the insureds bore the burden of proving their loss was covered under the terms of the insuring agreements of the policy.\textsuperscript{262} When an insurer proves that a policy exclusion applies, the insured must then prove that an exception to the exclusion, if any, applies.\textsuperscript{263} When a covered peril and an excluded peril combine to cause loss, the insured may 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.\textsuperscript{264} The appellate court concluded that the insureds presented sufficient evidence to allow a jury to reasonably allocate damages due to the excess mold in the walls of their home attributable to continuous water leaks resulting from a peril other than floodwaters from the tropical storm.\textsuperscript{265} The insureds presented expert testimony which created a genuine issue of material fact over the amount of mold in their home prior to the flood.\textsuperscript{266} Although the evidence presented did not allow a jury to flawlessly segregate damages, the evidence was sufficient to afford a jury a

\textsuperscript{260} \textit{Fiess}, 392 F.3d at 805.

\textsuperscript{261} 469 S.W.2d 160 (Tex. 1971). \textit{Fiess}, 392 F.3d at 806. 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. \textit{Fiess}, 392 F.3d at 806.

\textsuperscript{262} \textit{Fiess}, 392 F.3d at 807.

\textsuperscript{263} \textit{Fiess}, 392 F.3d at 807.

\textsuperscript{264} \textit{Fiess}, 392 F.3d at 807.

\textsuperscript{265} \textit{Fiess}, 392 F.3d at 808.

\textsuperscript{266} \textit{Fiess}, 392 F.3d at 808.
reasonable basis to make the required allocation. The insureds were not compelled to establish their covered losses with absolute mathematical precision.

**Burden of Proof Not Satisfied**

In *Wallis v. United Services Automobile Association*, Cecil and Darlene Wallis claimed foundation damage to their home was caused by plumbing leaks. After investigation, USAA concluded the foundation damage resulted from soil settlement caused by poor surface drainage. Although plumbing leaks were detected and fixed, foundation problems continued. USAA denied coverage for foundation damage based on the policy’s earth movement exclusion. USAA also asserted the insureds’ failure to produce evidence of what portion of their loss, if any, was the result of covered plumbing leaks, as required by *Travelers Indemnity Co. v. McKillip*.

The jury found loss was caused by a combination of earth movement, an excluded peril, and plumbing leaks, a covered peril. The jury determined that thirty-five percent of the damages claimed by the insureds were caused by covered plumbing leaks. When both parties moved for judgment, the court granted USAA’s motion for judgment notwithstanding the verdict (“JNOV”). As to the jury’s percentage finding, USAA lodged a legal sufficiency challenge arguing that, at best, the evidence showed that plumbing

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267 *Fies*, 392 F.3d at 808.

268 *Fies*, 392 F.3d at 808 n. 24.


270 *Wallis*, 2 S.W.3d at 301.

271 *Wallis*, 2 S.W.3d at 301-02.

272 *Wallis*, 2 S.W.3d at 302.

273 *Wallis*, 2 S.W.3d at 302.


275 *Wallis*, 2 S.W.3d at 302. The insureds claimed that USAA had the burden under then art. 21.58 of the *Tex. Ins. Code Ann.*, now Chapter 554, § 554.001-554.002, to prove that concurrent causes led to the loss. The court ruled that the doctrine of concurrent causation is not an affirmative defense under art. 21.58.
leaks only “contributed” to loss. Expert testimony in the case failed to quantify the amount of damage that was caused by the covered peril.  Because the evidence was insufficient to prove the impact of the covered peril on the insured home, the jury lacked any basis to find thirty-five percent of the damage was caused by plumbing leaks. The court of appeals agreed with USAA that the evidence did not support the verdict and that the trial court acted properly in granting a take-nothing judgment in favor of the insurer.

**Partridge-Type Concurrent Causation**

*Partridge-Type Concurrent Causation* (“PTCC”) is a doctrine created in 1973 by the Supreme Court of California in *State Farm Mutual Automobile Insurance Co. v. Partridge.*

State Farm Mutual Automobile Insurance Company insured Wayne Partridge’s automobile. State Farm Fire and Casualty Company insured Partridge’s home. Partridge, along with passengers, Vanida Neilson and Ray Albertson, were using Partridge’s automobile to hunt rabbits. Partridge drove off the road on rough terrain to follow a rabbit they spotted. Partridge was holding his pistol when the vehicle hit a bump. The pistol discharged and the bullet penetrated Neilson’s spinal cord and paralyzing her. (Partridge had previously modified his pistol to create a “hair-trigger” action.) Neilson sued Partridge. State Farm Mutual conceded that if Partridge’s pistol had accidentally discharged while he was walking down the street, bodily injury to another person would have been covered under his homeowner’s policy.

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276 *Wallis*, 2 S.W.3d at 303-04.
277 *Wallis*, 2 S.W.3d at 304.
278 *Wallis*, 2 S.W.3d at 304.
280 *Partridge*, 10 Cal.3d at 97, 514 P.2d at 125, 109 Cal.Rptr. at 812.
281 *Partridge*, 10 Cal.3d at 97, 514 P.2d at 125, 109 Cal.Rptr. at 812.
282 *Partridge*, 10 Cal.3d at 97, 514 P.2d at 125, 109 Cal.Rptr. at 812.
283 *Partridge*, 10 Cal.3d at 97, 514 P.2d at 125, 109 Cal.Rptr. at 812.
However, State Farm Fire contended that its homeowner’s policy did not cover bodily injury sustained by a passenger riding in an automobile because the policy, on its face, excluded coverage for bodily injury arising out of the use of a motor vehicle. State Farm Fire filed this declaratory judgment action, arguing there was no coverage under the homeowner’s policy.

According to the Supreme Court of California, the “crucial question presented is whether a liability insurance policy provides coverage for an accident caused jointly by an insured risk (negligently filing the pistol’s trigger mechanism) and by an excluded risk (negligent driving).”284 In the estimation of the court, Partridge’s use of his automobile was not the sole proximate cause of Neilson’s injury “but was only one of two joint causes of the accident.”285 The fact that Neilson was injured while a passenger in an automobile did override the fact the Partridge’s non-automobile related act of negligence, the modification of the pistol, was alone sufficient to render Partridge fully liable. When injury or damage results from multiple independent acts of negligence which are committed by the insured, coverage will exist under a policy so long as the policy covers one of the acts of negligence.286 Partridge’s use of his automobile did not have to be the proximate cause of Neilson’s injury in order for coverage to exist under the insuring agreements of the automobile policy.287 The causal connection between bodily injury and use of an automobile need only be slight, and that requirement was satisfied by the role the vehicle played in causing the pistol to discharge, notwithstanding the fact his negligence in modifying the pistol also contributed to Neilson’s injury.288 The insuring

284 Partridge, 10 Cal.3d at 102, 514 P.2d at 129, 109 Cal.Rptr. at 817.
285 Partridge, 10 Cal.3d at 102-103, 514 P.2d at 129, 109 Cal.Rptr. at 817.
286 Partridge, 10 Cal.3d at 102, 514 P.2d at 129, 109 Cal.Rptr. at 817.
287 Partridge, 10 Cal.3d at 100 n.7, 514 P.2d at 127 n.7, 109 Cal.Rptr. at 815 n.7.
agreements of an automobile policy must be interpreted broadly in favor of coverage, and an automobile exclusion in a homeowner’s policy must be interpreted narrowly against the insurer.\textsuperscript{289} An automobile exclusion applies only to bodily injury or property damage \textit{proximately caused} by use of an automobile.\textsuperscript{290} When use of an automobile is only incidental to a negligent act, coverage is not excluded.\textsuperscript{291} However, not just “any” causal connection between an automobile and bodily injury or property damage will suffice to establish the required causal connection.\textsuperscript{292}

PTCC only applies when concurrent negligent acts are independent and both acts are of sufficient dominance that each alone could cause bodily injury or property damage.\textsuperscript{293} Negligent acts are not independent when a subsequent negligent act arises out of the negligent act first in time.\textsuperscript{294} Stated another way, negligent acts are independent if a subsequent negligent act arises separately from the negligent act first in time. In \textit{Partridge}, the insured’s negligence in modifying his handgun and his negligent offroad operation of his motor vehicle were independent in origin. Partridge’s negligence in modifying the handgun, alone, was clearly capable of causing a gunshot injury under the right conditions. Also, his negligent operation of his motor vehicle could well have caused what is thought of as an automobile accident. In order to establish coverage under two different liability insurance policies by use of PTCC, injury or damage must be caused by two or more independent acts of negligence, both of which must fall

\textsuperscript{290} \textit{Warner}, 290 Pa.Super. at 276, 434 A.2d at 752.
\textsuperscript{293} Francis J. MacLaughlin, \textit{Third-Party Liability Policies: The Concurrent Causation Doctrine and Pollution Exclusions}, 24-SPG Brief 20, 21 (Spring 1995). This hypothetical bodily injury or property damage need not be of the same type under review.
\textsuperscript{294} Francis J. MacLaughlin, 24-SPG Brief at 21.
within the insuring agreements of both policies and outside all policy exclusions.\textsuperscript{295} PTCC has been applied to defeat the concept of “dovetailing” insurance policies which provides, for example, that a homeowner’s policy and an automobile policy are designed to fit together into a coordinated whole to provide non-duplicative or mutually exclusive insurance coverage.\textsuperscript{296} For example, a homeowner’s policy excludes coverage for automobile related risks while an automobile policy covers automobile related risks.\textsuperscript{297} Courts and commentators frequently confuse the issue of dual coverage under an automobile policy and a homeowner’s policy by erroneously focusing attention on the automobile exclusion rather than on the insuring agreements of the two policies.\textsuperscript{298} The insuring agreements of these policy forms are not the same. An automobile insurer agrees to pay all damages arising out of the use of an automobile, whereas a homeowner’s insurer agrees to pay all damages arising out of an occurrence.\textsuperscript{299} An automobile exclusion in a homeowner’s policy does not necessarily suggest that bodily injury or property damage arising out of the use of an automobile is excluded.\textsuperscript{300} Coverage under a homeowner’s policy is not mutually exclusive of coverage under an automobile policy, both may


\textsuperscript{298} 7A JOHN ALAN APPLEMAN & JEAN APPLEMAN, APPLEMAN ON INSURANCE LAW AND PRACTICE §4500 (1979). (“JOHN ALAN APPLEMAN & JEAN APPLEMAN”).

\textsuperscript{299} JOHN ALAN APPLEMAN & JEAN APPLEMAN, §4500.

\textsuperscript{300} JOHN ALAN APPLEMAN & JEAN APPLEMAN, §4500.
provide coverage for the same event. As shown in Partridge, when use of an automobile is only an incidental cause of bodily injury or property damage, coverage should not be excluded under a homeowner’s policy.

PTCC has also been used to determine coverage under a single policy where bodily injury or property damage is caused by independent covered and excluded acts of negligence.

Subsequent to the Partridge holding, courts correctly point out that PTCC applies only to liability insurance and not to first party insurance. The California Supreme Court noted in Garvey v. State Farm Fire & Casualty Co., that some appellate courts in that state had misinterpreted and misapplied earlier decisions in Sabella v. Wisler, and Partridge, by creating coverage under first party property insurance through use of PTCC instead of efficient proximate cause. The Corpus Christi Court of Appeals in Warrilow v. Norrell, also cautioned against improperly applying PTCC to property insurance in particular, because in most cases insureds can easily go forward or backward along the chain of events and identify some act of third party negligence, a covered peril, that contributed to the loss, along with an excluded peril. The identification of such negligence, “no matter how minor, would give rise to

301 JOHN ALAN APPLEMAN & JEAN APPLEMAN, §4500.
302 JOHN ALAN APPLEMAN & JEAN APPLEMAN, §4500.
306 59 Cal.2d 21, 377 P.2d 889, 27 Cal.Rptr. 689 (1963). Under a property insurance policy, an insured must prove not only that a loss has two or more causes but also that a covered peril was the efficient proximate cause of loss. Francis J. MacLaughlin, Third-Party Liability Policies: The Concurrent Causation Doctrine and Pollution Exclusions, 24-SPG Brief 20 n. 40 (Spring 1995).
307 Garvey, 48 Cal.3d at 398-99, 770 P.2d at 705, 257 Cal.Rptr. at 293.
308 791 S.W.2d 515 (Tex.App. -- Corpus Christi 1989, writ denied).
309 Warrilow, 791 S.W.2d at 527. See, e.g., Enserch Corp. v. Shand Morahan & Co. Inc., 952 F.2d 1485, 1494 (5th Cir. 1992) (The court reversed and remanded the case for findings to make necessary apportionment, explaining that “we cannot allow an insured to settle allegations against it (some of which might be covered by its insurance, some
coverage.”

An insured cannot reasonably expect coverage for a property loss when the efficient proximate cause of loss is an expressly excluded peril.

Insurers now reinforce the idea that PTCC does not apply to their particular forms of first party insurance by including “Anti-Concurrent Cause” provisions in their policies. These anti-concurrent cause provisions permit insurers and insureds to contract around efficient proximate cause.

Anti-concurrent cause or anti-efficient proximate cause provisions are intended to

of which might not) for its policy limits and then seek full indemnification from its insurer when some of that settled liability may be for acts clearly excluded by that policy.”); Soc’y of Professionals in Dispute Resolution, Inc. v. Mt. Airy Ins. Co., 1997 WL 711446 p. 7 (N.D.Tex. 1997) (The court found that the insurer was not precluded from contesting coverage of certain claims for purposes of apportionment of settlement amounts where settlement did not address whether any part of liability was covered by policy.); Wilcox v. American Home Assurance Co., 900 F.Supp. 850, 856 (S.D.Tex. 1995). (The court ruled that damages recited in judgment or settlement of underlying lawsuit must be apportioned between covered and noncovered claims.); Winn v. Cont’l Cas. Co., 494 S.W.2d 601, 605 (Tex.Civ.App. -- Tyler 1973, no writ) (The court found there was no evidence indicating attempt on appellant’s part to apportion settlement between alleged civil coverage and admitted criminal noncoverage where appellant had burden as the insured.).

In Comsys Info. Tech. Services, Inc. v. Twin City Fire Ins. Co., 130 S.W.3d 181, 198 (Tex.App. -- Houston [14th Dist.] 2003, no pet.), the court made the following statement about concurrent causation:

The doctrine of concurrent causation is not an affirmative defense or an avoidance issue; instead, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy. The insured must present some evidence upon which the jury can allocate the damages attributable to the covered peril. Because the insured can recover only for covered events, the burden of segregating the damage attributable solely to the covered event is a coverage issue for which the insured carries the burden of proof. Otherwise, failure to segregate covered and noncovered perils is fatal to recovery. (Citations omitted).

While a smattering of cases seem to support this statement by the court about allocation, made in connection with the construction of a liability insurance policy, a closer look proves this statement is incorrect. The court is citing the rule established in Travelers Indem. Co. v. McKillip, 469 S.W.2d 160 (Tex. 1971). McKillip applies to property insurance, not liability insurance.

311 Garvey, 48 Cal.3d at 408, 770 P.2d at 711, 257 Cal.Rptr. at 299.
313 TNT Speed & Sport, 114 F.3d at 733.
exclude coverage for any loss caused in part by a covered peril which concurrently contributes in any sequence to a loss. \(^{314}\)

**Proving Coverage Under More Than One Policy**

In *Warrilow v. Norrell*,\(^ {315}\) William Kerr accidentally shot his hunting companion, Carlton Norrell.\(^ {316}\) At the time of the shooting, Kerr was intending to help change a tire on the vehicle that Norrell and Kerr were using on their hunting trip.\(^ {317}\) In preparation to change the tire, Kerr removed his fully loaded pistol from its holster in order to place the firearm in the vehicle. However, he dropped the pistol and it discharged, striking Norrell in the temple, eventually causing his death.\(^ {318}\)

Kerr belonged to the National Rifle Association. As a member of the NRA, Kerr was covered under a master liability insurance policy, written by Lloyd’s of London, providing coverage for bodily injury caused by an occurrence arising out of the use of firearms while a member was engaged in hunting.\(^ {319}\) The policy excluded coverage for bodily injury arising out of maintenance of an automobile.\(^ {320}\) Kerr was also insured under his own homeowner’s policy issued by Foremost Insurance Company, which also contained an automobile exclusion.\(^ {321}\) Lloyd’s denied coverage on grounds that Kerr was in the process of performing automobile maintenance when his friend was shot. Foremost paid its policy limit under the homeowner’s


\(^{315}\) 791 S.W.2d 515 (Tex.App. -- Corpus Christi 1989, writ denied).

\(^{316}\) *Warrilow,* 791 S.W.2d at 517.

\(^{317}\) *Warrilow,* 791 S.W.2d at 517.

\(^{318}\) *Warrilow,* 791 S.W.2d at 517.

\(^{319}\) *Warrilow,* 791 S.W.2d at 517.

\(^{320}\) *Warrilow,* 791 S.W.2d at 578.

\(^{321}\) *Warrilow,* 791 S.W.2d at 578.
The issue in the case was whether Norrell’s death arose out of Kerr’s maintenance of an automobile or his other acts of negligence that were non-automobile related: failing to have his defective weapon repaired and failing to keep an empty chamber under the hammer.

In order to prove its coverage defense Lloyd’s had to present evidence that the two covered acts of negligence arose out of the excluded act of automobile maintenance. If the two otherwise covered acts of negligence arose out of the act of automobile maintenance, those acts of negligence would not be independent causes of injury and PTCC would not apply. The court of appeals, citing Partridge, ruled that Norrell’s death was the result of two covered independent concurring acts of negligence. The fact that Kerr was preparing to perform automobile maintenance when the accident occurred was “mere happenstance.”

**Proving Coverage Under Single Policy**

In *Guaranty National Insurance Co. v. North River Insurance Co.*, North River insured Texarkana Memorial Hospital under a primary CGL policy which contained an endorsement excluding coverage for negligently performed professional services. United States Fire Insurance Company insured the hospital under a Hospital Professional Liability Insurance Policy. Guaranty National provided excess insurance over North River’s primary CGL policy.

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322 *Warrilow*, 791 S.W.2d at 578.

323 *Warrilow*, 791 S.W.2d at 525. Kerr’s pistol was manufactured by Sturm-Ruger. The pistol model owned by Kerr was known to accidentally discharge and was the subject of a factory recall for a free correction of the defect. Kerr knew about the recall but never had the pistol repaired.


325 *Warrilow*, 791 S.W.2d at 526. In other words, the automobile was the place where Norrell was shot. See Shawn McCammon, *Just What Does “Arising Out of the Operation, Use or Maintenance” Actually Mean in Automobile Insurance Agreements*, 28 W. St. U. L. REV. 177, 189-94 (2001).

326 909 F.2d 133 (5th Cir. 1990).

327 *Guaranty Nat’l*, 909 F.2d at 134.

328 *Guaranty Nat’l*, 909 F.2d at 134.
Ranger Insurance Company provided a second layer of excess insurance over both the North River and Guaranty National policies.

Margret Wagner had previously been admitted to the hospital for psychiatric care. She was housed in the less secure “open unit” of the hospital when she jumped to her death from a window in her fourth floor room. Wagner’s estate sued the hospital. A jury found the hospital was negligent for failing to monitor Wagner; negligent for failing to properly secure the window in her room and negligent for failing to maintain an adequate and qualified staff.

North River claimed that the professional services exclusion precluded coverage because the liability of the hospital was founded in part on its failure to maintain adequate staffing, a professional peril. Guaranty National and Ranger argued that North River’s policy provided coverage because the jury also found that the hospital negligently failed to secure the window in Wagner’s hospital room, which was a non-professional independent concurrent cause of Wagner’s death. The court ruled that the policy issued by North River did provide coverage based on PTCC under Texas law.

PTCC Not Applied

In Bituminous Casualty Corp. v. Maxey, Bituminous insured L&R Timber Company and Triple L Express under a CGL policy. Kristen Tucker was injured in an automobile-

329 Guaranty Nat’l, 909 F.2d at 134.
330 Guaranty Nat’l, 909 F.2d at 134.
331 Guaranty Nat’l, 909 F.2d at 134.
332 Guaranty Nat’l, 909 F.2d at 134.
333 Guaranty Nat’l, 909 F.2d at 135.
334 Guaranty Nat’l, 909 F.2d at 135-37.
335 Guaranty Nat’l, 909 F.2d at 137.
tractor/trailer accident involving Terrence Rose, a truck driver who worked for Triple L.\textsuperscript{337} Triple L leased the tractor from Mike Lout Trucking, and the trailer from L&R. Kathy Maxey, individually, and as next friend of Kristen Tucker, sued L&R, Triple L, Rose, and Billy Wiggins, who maintained the brakes on the tractor/trailer.\textsuperscript{338} Maxey claimed that L&R negligently maintained the tractor/trailer and Rose/Triple L negligently operated the tractor/trailer.\textsuperscript{339}

Maxey argued that the CGL policy covered the accident under PTCC because faulty maintenance of the brakes on the tractor by Wiggins/L&R and negligent operation of the tractor/trailer by Rose/Triple L were two separate and independent causes of the accident which combined to cause Tucker’s injury.\textsuperscript{340} The court of appeals rejected Maxey’s argument because both negligent acts fell within the exclusion for bodily injury arising out of ownership, maintenance, use or entrustment of an automobile.\textsuperscript{341}

In \textit{Commercial Union Insurance Co. v. Roberts},\textsuperscript{342} Patrick and Ann Zahasky alleged their daughters were sexually molested by Dr. Stephen Roberts.\textsuperscript{343} The court of appeals opinion, while not entirely clear, suggests that Roberts may have molested the children while acting as the children’s’ treating physician and/or during other times when he was acting as their Sunday school teacher.\textsuperscript{344} Commercial Union insured Roberts under a homeowner’s policy.\textsuperscript{345} The Zahaskys claimed that Roberts negligently failed to treat his pedophilia and that this negligence

\textsuperscript{337} \textit{Bituminous Cas.}, 110 S.W.3d at 207.
\textsuperscript{338} \textit{Bituminous Cas.}, 110 S.W.3d at 207.
\textsuperscript{339} \textit{Bituminous Cas.}, 110 S.W.3d at 207.
\textsuperscript{340} \textit{Bituminous Cas.}, 110 S.W.3d at 215.
\textsuperscript{341} \textit{Bituminous Cas.}, 110 S.W.3d at 209.
\textsuperscript{342} 7 F.3d 86 (5th Cir. 1993).
\textsuperscript{343} \textit{Roberts}, 7 F.3d at 87.
\textsuperscript{344} \textit{Roberts}, 7 F.3d at 87.
\textsuperscript{345} \textit{Roberts}, 7 F.3d at 87.
set in motion the chain of events which led to molestations of their children.\footnote{Roberts, 7 F.3d at 88.} The court found that sexual molestation of their children did not result from Roberts’ negligent failure to treat his pedophilia.

Two points about the position taken by Mr. and Mrs. Zahasky: (1) in pleading their claim, they revealed that, in their view, the events which led to the molestations were dependent negligent acts which were part of a single chain of events, (2) because they were asserting dependent causes, they were, in reality, making an efficient proximate cause argument, not PTCC. The court applied a “cause-in-fact” analysis in concluding that “but for” the excluded acts of sexual molestation there would have been no basis for a negligence claim against Roberts.\footnote{Roberts, 7 F.3d at 89-90.} In other words the efficient proximate cause of bodily injury was sexual molestation. The alleged covered act of negligence, failing to treat his pedophilia, could only arise as a potential cause of action if Roberts actually committed the dependent excluded acts of sexual molestation.\footnote{Roberts, 7 F.3d at 90.} The court distinguished this situation from 

\textit{Warrilow v. Norrell},\footnote{791 S.W.2d 515 (Tex.App. -- Corpus Christi 1989, writ denied). Roberts, 7 F.3d at 89.} and \textit{Guaranty National Insurance Co. v. North River Insurance Co.},\footnote{909 F.2d 133 (5th Cir. 1990).} both of which were PTCC cases.

**Immediate Cause Doctrine**

In early times, courts applied tort proximate cause principles to insurance coverage disputes.\footnote{William Conant Brewer, Jr., \textit{Concurrent Causation in Insurance Contracts}, 59 Mich. L. Rev. 1141, 1167 (1961).} Proximate cause is a concept that embraces the chain of events set in motion by the initiating covered peril which contributes to a loss, when “but for” the occurrence of the
initiating covered peril, there would have been no loss.\textsuperscript{352} Peril A is a cause in fact of Peril B, if and only if the happening of Peril A is a necessary condition to the happening of Peril B. In determining causation in fact, which is also referred to as “but for” causation, courts ask, “but for Peril A, would Peril B have occurred”? Conversely, if Peril B would have occurred if Peril A never took place, then Peril A is not a “but for” cause of Peril B. A preexisting passive condition, as well as an omission of an insured or a failure of some event to occur, may also serve as a cause in fact. The initiating peril which is a necessary condition to the action of a subsequent peril, is the cause in fact of a loss.\textsuperscript{353}

The proximate cause test in tort law of “but for” did not translate well to insurance coverage issues because an insured can always trace a necessary causal antecedent of a peril back to the beginning of time, and may also trace a causal consequence of a peril indefinitely into the future. For this reason, the bare tort concept of causation in fact failed to provide a way to select from among all the necessary causal antecedents or causal consequences of a single peril that would justify designation of that particular peril as responsible for a loss.\textsuperscript{354} In other words, a given loss may have an infinite number of causes and each cause of loss can be described in an infinite number of ways.\textsuperscript{355} Courts needed a principle of causation to determine which peril caused loss. “But for” proximate cause also did not work in resolving insurance disputes because there could be more than one “but for” cause of loss.\textsuperscript{356} Courts across the


\textsuperscript{353} WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS §41 (5th ed. 1984) (“PROSSER & KEETON”).

\textsuperscript{354} See generally Sidney I. Simon, Proximate Cause in Insurance, 10 AM. BUS. L.J. 33, 35 (1972-73); PROSSER & KEETON, §41.

\textsuperscript{355} Michael E. Bragg, Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers, 20 FORUM 385 (Spring 1985).

country seem to be of one mind that designating a single peril as the cause of loss is the proper way to proceed.\textsuperscript{357} Judicial disdain for use of “but for” proximate cause in answering insurance causation questions led courts to adopt the maxim of \textit{causa proxima non remota spectatur} (“the immediate not the remote cause is considered”).\textsuperscript{358} This \textit{causa proxima} doctrine became the “immediate cause” doctrine in the United States.\textsuperscript{359} Under the immediate cause doctrine, courts determine which peril is most immediate to loss in question and then designate that peril as the proximate cause of loss, ignoring the “but for” proximate cause.\textsuperscript{360} Courts look for the immediately operating peril that caused loss or, the peril closest in time and place.\textsuperscript{361} If the immediate cause of loss is the last peril in a chain of events and that peril is excluded from coverage, that loss is not covered.\textsuperscript{362}

The immediate cause doctrine has largely been replaced by efficient proximate cause because immediate cause, while it narrowed the scope of but-for causation, did not eliminate the need for courts to continue to have to decide two issues: (1) which peril was nearest in time to loss, and (2) which peril was the dominant cause of loss.\textsuperscript{363} Furthermore, some courts refused to

\textsuperscript{357} Michael E. Bragg, 20 \textit{FORUM} at 387.

\textsuperscript{358} Blaine Richards, 635 F.2d at 1054.

\textsuperscript{359} Blaine Richards, 635 F.2d at 1054.

\textsuperscript{360} R. Dennis Withers, \textit{Proximate Cause and Multiple Causation in First-Party Insurance Cases}, 20 \textit{FORUM} 256, 267-68 (1985).

\textsuperscript{361} R. Dennis Withers, 20 \textit{FORUM} at 267.


\textsuperscript{363} JEFFREY W. STEMPEL, \textit{INTERPRETATION OF INSURANCE CONTRACTS - LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS} §17.1, pp. 433-34 (1994). Mr. Stempel discusses the procedure a court may follow in deciding an insurance causation issue. First, a court will determine whether the policy provides coverage. If there is coverage, the court will determine whether bodily injury or property damage resulted from a covered peril. A court may consider the application of a policy exclusion at either time. If an exclusion potentially applies, a court may also construe the exclusion to determine whether the exclusion is ambiguous. If an exclusion applies only when certain perils have combined to cause a loss, construction of that exclusion will normally occur when court evaluates the weight of the covered peril. JEFFREY W. STEMPEL, §17.1, p. 434. See R. Dennis Withers, \textit{Proximate Cause and Multiple Causation in First-Party Insurance Cases}, 20 \textit{FORUM} 256, 257 (1985).
apply the immediate cause doctrine because application of that rule in some cases led to outcomes contrary to common sense and reasonable judgment.\textsuperscript{364} By applying efficient proximate cause, courts eliminated the need to search the chain of events for the peril nearest in time and place to loss. Instead, courts could limit their searches to the peril which was the dominant cause of loss.\textsuperscript{365}

**Immediate Cause Excluded**

If the immediate cause of loss is an excluded peril, there is no coverage.\textsuperscript{366} In the Georgia case of *Ovbey v. Continental Insurance Co.*,\textsuperscript{367} a basement wall collapsed in the home of David and Nora Ovbey. One expert opined that the immediate cause of loss was a combination of hydrostatic pressure and inadequate wall strength.\textsuperscript{368} However, the facts showed that water had accumulated near the collapsed wall due to a combination of: (a) improper soil compacting; (b) an unfinished yard sodding project; (c) improper yard drainage; and (d) no foundation drain.\textsuperscript{369}

The policy excluded coverage for physical loss or damage resulting from the peril of “latent defect,” which in this case was inadequate strength of the wall.\textsuperscript{370} The policy also excluded coverage for loss caused directly or indirectly by the peril of water below the surface of the ground, which water exerted pressure on the wall of the basement.\textsuperscript{371} In trying to establish


\textsuperscript{365} *Freeman v. Mercantile Mut. Accident Ass'n*, 156 Mass. 351, 353, 30 N.E. 1013, 1014 (1892).

\textsuperscript{366} Peter Nash Swisher, 2 Nev. L.J. at 366.

\textsuperscript{367} 613 F.Supp. 726 (D. Ga. 1985), aff’d without opinion, 782 F.2d 178 (11th Cir. 1986).

\textsuperscript{368} *Ovbey*, 613 F.Supp. at 727.

\textsuperscript{369} *Ovbey*, 613 F.Supp. at 727.

\textsuperscript{370} *Ovbey*, 613 F.Supp. at 727.

\textsuperscript{371} *Ovbey*, 613 F.Supp. at 728.
coverage for the collapse of the basement wall, the insureds mistakenly focused on the events which created the build up of water.\textsuperscript{372} Although these various antecedent events set the stage for the collapse of the basement wall, the loss was caused by the excluded peril of latent defect.\textsuperscript{373} The court concluded there was no coverage.\textsuperscript{374}

**Immediate Cause Covered**

In *Hanover Fire Insurance Co. v. Newman’s Inc.*\textsuperscript{375} Hanover insured Newman’s dry goods store under a sprinkler leakage policy. The policy covered all direct loss to stock caused by sprinkler leakage.\textsuperscript{376} The policy excluded loss caused by windstorm, cyclone or tornado and loss caused directly or indirectly by water from any source other than the sprinkler system.\textsuperscript{377} A tornado struck the town of Gainesville, Georgia, where Newman’s store was located.\textsuperscript{378} Heavy rains followed the tornado.\textsuperscript{379} Two customers in the store when the tornado struck testified that the force of the wind coming through the open front door was strong enough to knock them down, and that water fell on them, even though it was not raining.\textsuperscript{380} Hanover argued that the

\textsuperscript{372} Ovbye, 613 F.Supp. at 728.

\textsuperscript{373} Ovbye, 613 F.Supp. at 728-29.

\textsuperscript{374} To see the difference between the immediate cause doctrine and efficient proximate cause, compare Ovbye with *Safeco Ins. Co. v. Hirschmann*, 52 Wash.App. 469, 760 P.2d 969 (1988). In *Hirschmann*, the combination of wind and rain caused a mudslide, which damaged the property of the insureds. The policy excluded coverage for loss caused by mudslide. Safeco argued there was no coverage for the loss because the immediate cause of loss, mudslide, was excluded. The insureds argued the policy provided coverage because the efficient proximate cause of loss was the covered, perils of wind and rain. The court ruled the loss was covered.

\textsuperscript{375} 108 F.2d 561 (5th Cir. 1939), cert. denied, 309 U.S. 680 (1940).

\textsuperscript{376} Newman’s, Inc., 108 F.2d at 562.

\textsuperscript{377} Newman’s, Inc., 108 F.2d at 562.

\textsuperscript{378} Newman’s, Inc., 108 F.2d at 562.

\textsuperscript{379} Newman’s, Inc., 108 F.2d at 562.

\textsuperscript{380} Newman’s, Inc., 108 F.2d at 562.
excluded peril of tornado was the proximate cause of loss because the storm disrupted the sprinkler system causing it to leak.\textsuperscript{381}

The district court submitted the case to the jury to determine whether any part of the building fell before the sprinkler system leaked, and the amount of damages caused solely by the sprinkler system leaks. The district court concluded that if sprinkler leakage was the immediate cause of loss to plaintiff’s goods and loss occurred before the building collapsed, those damages attributable to leaks were covered regardless of the fact that the excluded peril of tornado caused the sprinkler system to leak. The jury found that the immediate cause of loss was water leaking from the sprinkler system.\textsuperscript{382} The policy did not exclude coverage for sprinkler leakage caused by an outside force such as a tornado.\textsuperscript{383} The court of appeals affirmed the judgment, and the determination that the tornado exclusion did not preclude coverage for damages caused by sprinkler leakage set in motion by a tornado.

\textbf{Efficient Proximate Cause}

Causation inquiries focus on identifying the peril which causes loss.\textsuperscript{384} Generally, a two-step process is applied to identify the loss-producing peril.\textsuperscript{385} The first step requires a court to identify the actual cause in fact of a loss.\textsuperscript{386} Next, the court must determine whether a suspected peril was sufficiently strong by itself to cause loss.\textsuperscript{387} A cause in fact of loss is the product of the

\textsuperscript{381} Newman’s, Inc., 108 F.2d at 562.
\textsuperscript{382} Newman’s, Inc., 108 F.2d at 563.
\textsuperscript{383} Newman’s, Inc., 108 F.2d at 563.
\textsuperscript{385} John P. Gorman, 34 INS. COUNSEL J. at 99.
\textsuperscript{386} John P. Gorman, 34 INS. COUNSEL J. at 99.
\textsuperscript{387} John P. Gorman, 34 INS. COUNSEL J. at 99. R. Dennis Withers, Proximate Cause and Multiple Causation
underlying chain of events. A cause in fact of loss embraces all events which contributed to loss, whether those events are active or passive. Courts have used two tests to determine the actual cause in fact of loss, known as the “but for” and “substantial factor” tests. The “but for” test (the generally accepted test at one time) was applied when loss would not have happened “but for” the occurrence of a certain peril or, if that peril was a material and substantial factor in the chain of events. Courts focused on the chain of events to determine which peril was legally responsible or a proximate cause of loss.

Under a property policy, an insurer agrees to indemnify an insured when insured property suffers a covered loss. Whether loss is covered is determined by proximate cause. Courts characterize the types of causes of loss which are eligible for consideration as the proximate cause in many different ways.

“Proximate cause is the real efficient cause.”

“It is the actual or dominant cause.”

“It is the predominant, or the procuring and efficient cause.”

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388 John P. Gorman, 34 INS. COUNSEL J. at 99.
389 John P. Gorman, 34 INS. COUNSEL J. at 99.
390 John P. Gorman, 34 INS. COUNSEL J. at 99.
391 John P. Gorman, 34 INS. COUNSEL J. at 99.
392 John P. Gorman, 34 INS. COUNSEL J. at 99.
394 Michael E. Bragg, 20 FORUM at 386.
“It is the predominating or moving efficient cause of the loss.”

“It is the efficient cause and not a merely incidental cause which may be nearer in time to the result.”

“It is the efficient cause but for which the injury to the insured property would not have happened.”

“It is the direct, violent, and efficient cause.”

“It is the cause which produces the result in a natural and continuous sequence, unbroken by any new and intervening cause.”

“It is the efficient cause. The one that sets others in motion. . . . The cause to which the loss is to be attributed, though other causes may follow it and operate more immediately in producing the loss.”

“It is the active, efficient causes 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.”

“It is the operative cause of the loss.”

“It is a cause from which the loss followed reasonably if no intermediate controlling and self-sufficient cause intervened.”

“IT is the cause from which the result was reasonable and ‘probable.”

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403 Federal Ins. Co. v. Bock, 382 S.W.2d 305 (Tex.Civ.App.--Corpus Christi 1964, writ ref’d n.r.e.).


407 Norwich Union Fire Ins. Soc. v. Board of Commissioners of Port of New Orleans, 141 F.2d 600, 601 (5th Cir. 1944).
“It is a cause from which the loss was a reasonable and proper consequence, directly and naturally resulting.”\textsuperscript{409}

“It is the cause which set the other in motion and clothed it with the power to harm at the time of the disaster.”\textsuperscript{410}

Causation inquiries present two questions: (1) what peril was nearest to loss (proximity/remoteness), and (2) what peril was the efficient proximate cause of loss (dominance analysis)?\textsuperscript{411} To answer to these two questions, courts in most jurisdictions switched from an immediate cause review to a proximity/remoteness analysis, referred to here as “efficient proximate cause.”\textsuperscript{412} An efficient proximate cause of loss is a but-for-cause of loss, but not 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\textsuperscript{413} A court applying efficient proximate cause is concerned with both temporal and spatial relationships between events contributing to loss, as well as the actual loss itself.\textsuperscript{414} When courts apply a dominance analysis, they focus on the “biggest action” that brought about loss, even though that particular peril may have been remote in time or place from the immediate cause of loss.\textsuperscript{415} When the immediate cause of loss is an excluded peril, coverage may still exist if the efficient proximate

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{410} Princess Garment Co. v. Fireman’s Fund Ins. Co. of San Francisco, 115 F.2d 380, 383 (6th Cir. 1940).
\item \textsuperscript{411} Jeffrey W. Stempel, Interpretation of Insurance Contracts - Law and Strategy for Insurers and Policyholders §17.2 (1994).
\item \textsuperscript{412} Jeffrey W. Stempel, §17.2.
\item \textsuperscript{413} Jeffrey W. Stempel, §17.2.
\item \textsuperscript{414} Jeffrey W. Stempel, §17.2.
\item \textsuperscript{415} Jeffrey W. Stempel, §17.2.
\end{itemize}
\end{footnotesize}
cause of loss is a covered peril. This rule reflects the fact that the efficient proximate cause of loss can be concurrent or remote in points of time and/or place.

PTCC and efficient proximate cause are not mutually exclusive, they just apply to distinct factual situations. PTCC applies when multiple acts of negligence are independent in origin, whereas efficient proximate cause applies when perils are dependent. Perils are dependent when a subsequent peril acts upon the initiating peril to cause loss. For example, if the initiating peril of earthquake causes a gas main to break which starts a fire that subsequently burns down a house.

Proximity/Remoteness Analysis

When analyzing loss that may have been caused by at least two perils, it is necessary to consider whether suspected perils have the requisite status of an efficient proximate cause of loss. For example, assume the covered peril of windstorm strikes the insured farm. Five days later, a snowstorm, an excluded peril, also strikes the farm and a barn collapses. Does the covered peril of windstorm qualify as the dominant loss? This question is the problem of proximity/remoteness. If the covered peril of windstorm is not the efficient proximate cause of the collapse of the barn because the occurrence of the covered peril is too remote in time, then the loss would not be covered because the immediate cause of loss is the excluded peril of


417 29A AM.JUR.2d, Insurance, §1134 (1960); Sidney I. Simon, 10 AM.BUS. L.J. at 37. See State Farm Mut. Auto. Ins. Co. v. Partridge, 10 Cal.3d 94, 514 P.2d 123, 109 Cal.Rptr. 811 (1973) (Negligent filing of the trigger on a pistol was an independent act of negligence which occurred prior in time to the insured’s negligent operation of his automobile.).

418 For example, if the initiating excluded peril of earthquake causes a gas main to break which starts a fire that subsequently burns down a house covered by fire insurance. The policy would cover the loss.
snowstorm.\textsuperscript{419} However, if the windstorm is not too remote, the court or jury must decide which of the two perils is the dominant cause of loss. Deciding which of these two perils is the dominant cause of loss is the problem of concurrent causation.

\textit{Bird v. St. Paul Fire & Marine Insurance Co.},\textsuperscript{420} was a case involving the famous “Black Tom Island” disaster of World War I. Judge (later U.S. Supreme Court Justice) Benjamin N. Cardozo contemplated both spatial and temporal remoteness in finding no coverage for the loss. As he pointed out, most people think of relatedness in terms of both time and place.\textsuperscript{421}

St. Paul insured a canal boat.\textsuperscript{422} The insuring agreement of the policy provided that “Touching the Adventures and perils which the same 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.”\textsuperscript{423} There was no express exclusion for loss resulting from the peril of explosion.\textsuperscript{424}

Years after the \textit{Bird} decision, the United States Government would determine that German saboteurs set several small fires in a railroad yard full of wooden freight cars loaded with 1000 tons of TNT, ammunition and dynamite.\textsuperscript{425} These freight cars caught fire.\textsuperscript{426} After a

\textsuperscript{419} Proximity/remoteness concerns the temporal and spatial relationship between a peril and loss. JEFFREY W. STEMPBEL, § 17.2.

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 loss. For example, assume the evidence in the illustration in the text above is that windstorm was of sufficient strength to have weakened the barn but not cause it to collapse, and that the combined actions of the two perils were necessary to cause collapse and, that snowstorm alone would not have caused loss.

\textsuperscript{420} 224 N.Y. 47, 120 N.E. 86 (1918).

\textsuperscript{421} \textit{Bird}, 224 N.Y. at 49, 120 N.E. at 86.

\textsuperscript{422} \textit{Bird}, 224 N.Y. at 49, 120 N.E. at 86.

\textsuperscript{423} \textit{Bird}, 224 N.Y. at 49, 120 N.E. at 86.

\textsuperscript{424} \textit{Bird}, 224 N.Y. at 49, 120 N.E. at 86.

\textsuperscript{425} The ordinance was going to be shipped to Europe for the French and English to use in the war with Germany and Austria.
series of small explosions, a final massive explosion, estimated to be the equivalent of 5.5 on the Richter Scale, caused an air concussion which damaged the insured canal boat that was docked about one thousand feet away.\textsuperscript{427} The canal boat never caught fire, damage was caused solely by the concussion from the explosion.\textsuperscript{428} Judge Cardozo found that damage to the canal boat was not caused by the fires set by the saboteurs, stating:

\begin{quote}
[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 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.\textsuperscript{429}
\end{quote}

The efficient proximate cause is the peril that sets in motion a chain of events, unbroken by any intervening independent peril, that produces loss and without which, loss would not have occurred. Stated another way, the efficient proximate cause is the initiating peril which is acted upon by a subsequent peril. An insurance policy will provide coverage when a covered peril is the efficient proximate cause of loss. However, a policy will not provide coverage if an excluded peril is the efficient proximate cause of loss.\textsuperscript{430} Efficient proximate cause is the opposite of the concept of concurrent causation. Efficient proximate cause applies only when two or more identifiable dependent perils cause loss, with one peril covered and the other dependent peril

\textsuperscript{426} At the time Judge Cardozo heard this case, the United States Government had yet to establish that the explosion was caused by German saboteurs. In the 1930’s, representatives of Germany and the United States agreed that German saboteurs had caused the loss and the German government paid the United States millions of dollars in compensation.

\textsuperscript{427} \textit{Bird}, 224 N.Y. at 50, 120 N.E. at 86.

\textsuperscript{428} \textit{Bird}, 224 N.Y. at 50, 120 N.E. at 86.

\textsuperscript{429} \textit{Bird}, 224 N.Y. at 54-55, 120 N.E. at 88.

excluded, and both the covered peril and excluded peril contribute to loss.\(^{431}\) Perils are considered dependent when a subsequent peril acts upon a condition created by the initiating peril to cause loss.\(^{432}\) When there is a concurrence of different perils, the efficient proximate cause of loss is the peril to which loss is to be attributed, though another peril followed and operated more immediately in producing loss.\(^{433}\) Courts should not designate the initiating peril in a chain of events as the efficient proximate causes of loss when that peril is remote in time or place.\(^{434}\)

**Efficient Proximate Cause Applied**

The California Supreme Court set out its efficient proximate cause test for the first time in 1963 when reviewing *Sabella v. Wisler.*\(^{435}\) 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.’”\(^{436}\) These multiple actions, events, or forces are concurrent in the sense that they must all occur to produce loss; but the *Sabella* test is not limited to claims where perils occur simultaneously or concurrently in time.\(^{437}\)

\(^{431}\) *Kelly,* 281 F.Supp.2d at 1296.


\(^{433}\) The efficient or initiating peril creates a condition which is acted upon by a subsequent or immediate peril. In *Sabella,* for example, the negligence of the contractor, Wisler, in installing the sewer line, a covered peril, emptied waste water in the loose fill, the leaking waste water acted upon the poor foundation soils which led to the excluded peril of foundation settlement. A critical fact in this case was that there was no evidence of subsidence the first four years the Sabellas owned the house. Subsidence became a problem only after the sewer line began leaking. Thus, the efficient proximate cause of loss was the negligent installation of the sewer line, not the defective way Wisler filled the quarry.


\(^{436}\) *Berry v. Commercial Union Ins. Co.,* 87 F.3d 387, 389 (9th Cir. 1996) (manufacturer of aluminum pipe failed to warn consumer of adverse effects of fungicides on that type of pipe).

\(^{437}\) *Berry,* 87 F.3d at 389-90.
The *Sabella* test is appropriate where loss is precipitated by a chain of events occurring in a linear or serial manner.\(^{438}\)

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.” Because the initiating peril is not necessarily the predominating cause, courts tend to favor predominant or dominant cause.\(^{439}\)

Factually, *Sabella* reveals that Luciano and Diane Sabella sued J. W. Wisler after Wisler sold them a poorly constructed home on the former site of a quarry that had been filled.\(^{440}\) National Union insured the Sabellas under an all-risks homeowner’s policy.\(^{441}\) After living in the house for a couple of years, sewer pipes began to leak.\(^{442}\) This leakage, combined with the defective way in which Wisler filled the former quarry, caused soils under the Sabella home to settle, which in turn caused damage to the home. Loss caused by settlement of soils was an excluded peril, and loss caused by negligent construction was a covered peril.\(^{443}\) The efficient proximate cause under California law is the initiating peril which is acted upon by a subsequent peril. The initiating peril is the one to which the loss is to be attributed, although another peril follows and operates more immediately in producing the loss.\(^{444}\) The court rejected National Union’s argument that the Sabellas’ loss would not have occurred “but for” the excluded peril.

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\(^{438}\) *Berry*, 87 F.3d at 390.


\(^{440}\) *Sabella*, 59 Cal.2d at 24, 377 P.2d at 891, 27 Cal.Rptr. at 691.

\(^{441}\) *Sabella*, 59 Cal.2d at 24, 377 P.2d at 891, 27 Cal.Rptr. at 691.

\(^{442}\) *Sabella*, 59 Cal.2d at 24, 377 P.2d at 891, 27 Cal.Rptr. at 691.

\(^{443}\) *Sabella*, 59 Cal.2d at 26, 377 P.2d at 892, 27 Cal.Rptr. at 692.

\(^{444}\) *Sabella*, 59 Cal.2d at 31-32, 377 P.2d at 895, 27 Cal.Rptr. at 695.
and that their damages were excluded from coverage under section 532 of the California Insurance Code.\(^{445}\) 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.\(^{446}\)

The California Supreme Court ruled that policy exclusions are unenforceable if they conflict with section 530 and the efficient proximate cause doctrine. The court ruled that Wisler’s negligent installation of the sewer pipe, rather than the soil settlement, was the efficient proximate cause of loss. The fact there was little or no subsidence damage over the first four years the Sabellases lived in their home satisfied the court that Wisler’s negligence and the subsequent sewer pipe leaking was the predominating cause of loss.\(^{447}\)

\(^{445}\) *Sabella, 59 Cal.2d at 33, 377 P.2d at 896, 27 Cal.Rptr. at 696.*

\(^{446}\) *Sabella, 59 Cal.2d at 33-34, 377 P.2d at 896-97, 27 Cal.Rptr. at 696.*

\(^{447}\) *Sabella, 59 Cal.2d at 31-32, 377 P.2d at 895, 27 Cal.Rptr. at 696.*
In *Garvey v. State Farm Fire & Casualty Co.*, the California Supreme Court addressed an all risks homeowner’s policy that purported to exclude loss contributed to by any earth movement. Thus, there would be no coverage if earth movement was a minor contributing cause of loss. When an addition to the Garveys’ home pulled away from the main structure, State Farm denied coverage based on the earth movement exclusion. The Garveys argued that the efficient proximate cause of loss was contractor negligence, an implicitly covered peril. The court explained that in adopting efficient proximate cause it impliedly recognized that coverage would not exist if the covered peril was a remote cause of loss, or the excluded peril was the efficient proximate cause of loss. The fact that an excluded peril contributed to the loss would not preclude coverage if such an excluded peril was a remote cause of loss. The court clarified that the efficient proximate cause of loss is the “predominant,” or most important cause of loss. The court concluded that by focusing the 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.”

The court remanded the case to the trial court for a determination of whether earth movement was the efficient proximate cause of loss. If so, there would be no coverage. If contractor negligence was the efficient proximate cause of loss, then the Garvey’s claim would be covered. The court rejected State Farm’s attempt to contract around efficient proximate cause, but enforced the exclusion to the extent that an excluded peril was the proximate cause of loss.

449 *Garvey*, 48 Cal.3d at 402-03, 770 P.2d at 707, 257 Cal.Rptr. at 295.
450 *Garvey*, 48 Cal.3d at 403, 770 P.2d at 708, 257 Cal.Rptr. at 296.
451 *Garvey*, 48 Cal.3d at 404, 770 P.2d at 708, 257 Cal.Rptr. at 296.
In *Hahn v. M.F.A. Insurance Co.*452 Hahn sought coverage for damage to a shed and farm machinery therein due to a combination of windstorm and snowstorm that caused the roof of the shed to collapse.453 The policy covered “direct loss” by windstorm and excluded loss caused directly or indirectly by snowstorm.454 M.F.A. claimed its policy provided no coverage because, but for the snowstorm, loss would not have occurred.455

The insured’s expert testified that the roof of the shed collapsed as the result of inadequate wind bracing. The expert also asserted that the roof structure was strong enough to survive the snowstorm without the wind, even though inadequately braced, and that the dominant cause of loss was wind pressure on the roof.456 The jury found that the covered peril of windstorm was the efficient proximate cause of loss.457 The insured could recover under the policy even though another peril contributed to loss, as long as the dominant cause of loss was a covered peril.458 A windstorm policy does not require that wind alone cause loss.459 Although the court of appeals expressed doubt that the evidence in the case supported the jury finding that the covered peril of windstorm was the efficient proximate cause of loss, the court refused to second guess the jury.460 There was sufficient evidence to support the theory that loss was

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452 616 S.W.2d 574 (Mo.App. 1981).
453 *Hahn*, 616 S.W.2d at 574.
454 *Hahn*, 616 S.W.2d at 574.
455 *Hahn*, 616 S.W.2d at 574.
456 *Hahn*, 616 S.W.2d at 575.
457 *Hahn*, 616 S.W.2d at 575.
458 *Hahn*, 616 S.W.2d at 574.
460 *Hahn*, 616 S.W.2d at 575.
caused by the combined perils of windstorm and negligence in failing to adequately brace the roof.\footnote{Hahn, 616 S.W.2d at 575.}

**Contracting Around Efficient Proximate Cause**

Efficient proximate cause is applied in most states to resolve coverage disputes where covered and excluded perils combine to cause loss.\footnote{Mark D. Wuerfel & Mark Koop, “Efficient Proximate Causation” in the Context of Property Insurance Claims, 65 DEF. COUNS. J. 400 (1998).} Insurers attempt to contract around efficient proximate cause by placing anti-concurrent cause provisions in policy exclusions.\footnote{See Chase v. State Farm Fire & Cas. Co., 780 A.2d 1123 (D.C. 2001) (“In other words, if earth movement was a contributing cause of the loss of Chase’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.” Chase, 780 A.2d at 1130. “This is a permissible outcome in the District of Columbia, as there is no statute or public policy requiring otherwise.” Chase, 780 A.2d at 1130.; Bergeron v. State Farm Fire & Cas. Co., 145 N.H. 391, 766 A.2d 256, 260 (2000); Assurance Co. of America, Inc. v. Jay-Mar, Inc., 38 F.Supp.2d 349 (D. N.J. 1999) (“Rules of construction favoring the insured cannot be employed to disregard the clear intent of the policy language.” Jay-Mar, 38 F.Supp.2d at 352. “The Court rejected Jay-Mar’s argument that the part of the insurance policy provision excluding from coverage losses occasioned by simultaneously occurring included and excluded causes violates the State’s public policy.” Jay-Mar, 38 F.Supp.2d at 353. “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.” Jay-Mar, 38 F.Supp.2d at 354. “Therefore, if Jay-Mar’s loss was caused in any part by flood or surface water, it may not recover from Assurance.” Jay-Mar, 38 F.Supp.2d at 354.; Cameron v. USAA Prop. & Cas. Ins. Co., 733 A.2d 965 (D.C. 1999) (“The Camerons’ 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.’” Cameron, 733 A.2d at 971. In Casey v. Gen. Accident Ins. Co., 178 A.D.2d 1001, 578 N.Y.S.2d 337, 338 (N.Y.App.Div.1991), a case in which the plaintiff’s policy contained a similar provision, the court held that “the fact that 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.” Cameron, 773 A.2d at 971. “The same is true here.” Cameron, 773 A.2d at 971. “Notwithstanding our obligation to resolve any genuine ambiguities in the insurance policy in the insurance policy in the Camerons’ favor, we are compelled to conclude that any reasonable reading of the exclusion from coverage of losses attributed to surface water sustains USAA’s denial of the Camerons’ claim.” Cameron, 773 A.2d at 971.; State Farm Fire & Cas. Co. v. Slade, 747 So.2d 293 (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. Hahn, 201 Ala. 376, 78 So. 232 (1917)], does not require us to invalidate the earth-movement exclusion, which indicates State Farm’s efforts to contract for narrower coverage.” Slade, 747 So.2d at 314. “Accordingly, we hold that State Farm 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.” Slade, 747 So.2d at 314; Fla. Residential Prop. & Cas. Joint Underwriting Ass’n v. Kron, 721 So.2d 825 (Fla.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 of event contributing concurrently or any sequence to the loss.’” Kron, 721 So.2d at 826.; Tounayan v. State Farm Gen. Ins. Co., 970 S.W.2d 822 (Mo.App. 1998) (“The parties to an insurance contract can contract out of the efficient proximate cause doctrine by exclusionary language.” Tounayan, 970 S.W.2d at 826. “State Farm’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 proximate cause doctrine.” **Toumayan**, 970 S.W.2d at 826. “In addition, courts in other states have construed the exact exclusionary clause in State Farm’s policy to effectively contact out of the efficient proximate cause doctrine.” **Toumayan**, 970 S.W.2d at 826.; **ABI Asset Corp. v. Twin City Fire Ins. Co.**, 1997 U.S. Dist. LEXIS 18265 (S.D.N.Y. 1997) (“Section 5 also contains what is referred to as an ‘anti-concurrent 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.” **ABI Asset**, 97 U.S. Dist. LEXIS 18265 at 2. “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 Twin City’s Motion for Summary Judgment and deny ABI’s Cross-Motion as moot.” **ABI Asset**, 97 U.S. Dist. LEXIS 18265 at 2-3.; **Bd of Educ. of Maine Twp. High Sch. Dist. 207 v. Int’l Ins. Co.**, 292 Ill.App.3d 14, 684 N.E.2d 978, 225 Ill.Dec. 987 (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.” **Bd. of Educ.**, 292 Ill.App.2d at 16, 684 N.E.2d at 980, 225 Ill.Dec. at 989.); **Pakmark Corp. v. Liberty Mut. Ins. Co.**, 943 S.W.2d 256 (Mo. App. 1997) (“The Liberty Mutual 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 Liberty Mutual 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.” **Pakmark**, 943 S.W.2d at 261. The trial court properly granted Liberty Mutual’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 Pakmark’s loss. We are compelled to construe the policy as written, and therefore, affirm the granting of summary judgment.” **Pakmark**, 943 S.W.2d at 261.); **TNT Speed & Sport Ctr., Inc. v. American States Ins. Co.**, 114 F.3d 731 (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.” **TNT Speed & Sport**, 114 F.3d at 733.); **Cadmus v. Aetna Cas. & Sur. Co.**, 1996 U.S. Dist. LEXIS 29443 (6th Cir. 1996) (“Thus, Tennessee follows the ‘concurrent causation doctrine.’” **Cadmus**, 1996 U.S. Dist. LEXIS 29443 at 2. “Neither side disputes that the rotted condition of the truss contributed to the roof collapse.” **Cadmus**, 1996 U.S. Dist. LEXIS 29443 at 2.); **Prytania Park Hotel v. Gen. Star Indem. Co.**, 896 F.Supp. 618 (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.’” **Prytania Park** Hotel, 896 F.Supp. at 623.); **Ramirez v. American Family Mut. Ins. Co.**, 652 N.E.2d 511 (Ind.App. 1995) (“The exclusion unequivocally states that loss resulting from sump pump failure is not covered ‘regardless of any other cause or event contributing in concurrently or in any sequence to the loss.’” **Ramirez**, 652 N.E.2d at 516. “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 Ramirez’s claim from this exclusion. Their claim falls squarely within the exclusion, and thus, summary judgment of American Family and Collicott’s favor on the coverage issue was proper.” **Ramirez**, 652 N.E.2d at 516.); **Sunshine Motors, Inc. v. N.H. Ins. Co.**, 209 Mich.App. 58, 530 N.W.2d 120 (1995) (“[T]he 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.” **Sunshine Motors**, 209 Mich.App. at 59, 530 N.W.2d at 121. “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... summary disposition was proper.” **Sunshine Motors**, 209 Mich.App. at 60, 530 N.W.2d at 121.); **State Farm Fire & Cas. Co. v. Metro. Dade County, 639 So.2d 63 (Fla.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
An anti-concurrent cause provision might provide that: “We will not pay for “loss” caused directly or indirectly [by any of the following:] Such loss is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.” Another form of an anti-concurrent cause provision might state that: We do not insure for such loss regardless of: the cause of the excluded event; or other causes of loss; or whether other causes acted concurrently or in any sequence with the excluded event to produce loss.

are present in this provision.” Metro. Dade, 639 So.2d at 66. “The exclusionary clauses are plain and unambiguous on their faces, allowing no room for interpretation.” Metro. Dade, 639 So.2d at 66. “The fact that an insurance policy requires analysis to comprehend its scope does not mean it is ambiguous.” Metro. Dade, 639 So.2d at 66. Thus, the final summary judgment in the County’s favor must be reversed; the case is remanded for entry of judgment for State Farm.” Metro. Dade, 639 So.2d at 66.); Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272 (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.” Alf, 850 P.2d at 1274-75. “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.” Alf, 850 P.2d at 1275. 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 ambiguous, and we cannot do so here.” Alf, 850 P.2d at 1275. This ‘lead-in’ clause, apparently a relatively recent addition by State Farm 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 unambiguous and excluded coverage.” Alf, 850 P.2d at 1276. “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.” Alf, 850 P.2d at 1277. “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 State Farm.” Alf, 850 P.2d at 1278.; Village Inn Apartments v. State Farm Fire & Cas. Co., 790 P.2d 581 (Utah 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.” Village Inn Apartments, 790 P.2d at 583.; Kane v. Royal Ins. Co. of America, 768 P.2d 678, 78 A.L.R. 4th 797 (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.” Kane, 768 P.2d at 679 n.1. “Mere disagreement between the parties about the meaning of a term does not create ambiguity.” Kane, 768 P.2d at 680. “[W]e believe that the efficient moving cause rule must yield to the language of the insurance policy in question.” Kane, 768 P.2d at 684. “The policies cover ‘all-risk of direct physical loss,’ but only’ subject to all the provisions contained herein.” Kane, 768 P.2d at 684. “Those provisions exclude coverage for ‘loss... caused by, resulting from, contributed to, or aggravated by flood.’” Kane, 768 P.2d at 685. “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.’ We would be rewriting the policy if we were to hold that the ‘efficient cause’ . . . is the cause to which loss 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 insured’s loss. Therefore, we decline to apply the ‘efficient moving cause’ rule where it abrogates the language to which the parties agreed.” Kane, 768 P.2d at 685-86.); State Farm Fire & Cas. Co. v. Paulson, 756 P.2d 764 (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.” Paulson, 756 P.2d at 769 n.2.).
Courts in the majority of efficient proximate cause jurisdictions uphold policy provisions which contract out of concurrent causation.\textsuperscript{464} For example, the Sixth Circuit recognized the validity of anti-concurrent cause provisions in \textit{Front Row Theatre, Inc. v. American Manufacturer’s Mutual Insurance Companies}.\textsuperscript{465}

\textit{Front Row} was insured by American under an all risks policy that provided coverage for water damage to the theater but excluded coverage for damage caused by flooding.\textsuperscript{466} On three occasions in the same calendar year, rains caused flood damage to the theater. It was later determined that blockage of a storm sewer caused flooding to the interior of the insured’s theater from storms less severe than the system was rated to handle.\textsuperscript{467} American denied coverage based on the flood exclusion. The insured’s expert reported that loss was caused by a 50\% blockage in one of the drainage pipes prevented the sewer system from functioning properly. When the insured sued, the federal district court granted American’s motion for summary judgment.


\textsuperscript{466} 18 F.3d 1343 (6th Cir. 1994).

\textsuperscript{467} \textit{Front Row}, 18 F.3d at 1345.

\textsuperscript{464} \textit{Front Row}, 18 F.3d at 1345.
On appeal, Front Row argued that the policy provided coverage for two reasons. First, water that caused the damage was not “surface water” within the meaning of the flood exclusion, making the exclusion inapplicable. Second, even if the flood exclusion applied, part of the damages should be covered because some of the water backed up from the sewer, a covered peril. American countered that the entire loss was caused by the excluded peril of surface water flooding.

The appellate court determined that water damage to carpeting in the theater was caused in equal parts by surface water flooding and water that had backed up from the sewer. The court also concluded that “but for” the blockage of the sewer system, the storm drain would have handled the amount of water generated by the three storms.\textsuperscript{468} The policy exclusion for loss caused by surface water flooding was modified by an exception for flooding caused by water backing up from a sewer or drainage system.\textsuperscript{469} The policy also contained anti-concurrent cause provisions stating that American would not pay for loss caused directly or indirectly by any excluded peril and that such loss was excluded even though another peril contributed concurrently to cause loss.\textsuperscript{470} Although the American policy excluded coverage for loss caused by surface water flooding, if loss was caused by water backing up from a sewer or drain, the resulting damages were covered.\textsuperscript{471}

The facts established that loss was caused by a combination of surface water flooding, an excluded peril, and sewer backup, an exception to the flood exclusion. The court ruled that when loss is caused by both covered and excluded perils, coverage may be expressly precluded by

\textsuperscript{468} \textit{Front Row}, 18 F.3d at 1345.
\textsuperscript{469} \textit{Front Row}, 18 F.3d at 1345.
\textsuperscript{470} \textit{Front Row}, 18 F.3d at 1345.
\textsuperscript{471} \textit{Front Row}, 18 F.3d at 1345 n.1.
language in the policy. However, because a portion of the damages to the theater were also caused by surface water flooding, coverage was barred since flooding contributed to cause loss. Thus, American specifically contracted out of coverage.

In *TNT Speed & Sport Center, Inc. v. American States Insurance Co.*, American States insured TNT under a commercial property policy. The anticoncurrent causation provision in the policy excluded coverage for loss caused by flooding, even though a covered peril contributed concurrently, regardless of the sequence of the perils, if at least one peril was excluded.

TNT sold golf carts and operated a go-cart track on its premises. Loss occurred after vandals removed sandbags from a levee protecting the town of West Quincy, Missouri, from rising flood waters of the Mississippi River. The levee subsequently broke, causing the town to flood. Flood waters destroyed the insured’s property. American States argued that the policy’s flood exclusion barred coverage. The insured claimed the policy covered the loss because the efficient proximate cause of loss was the covered peril of vandalism, not flooding. As the Sixth Circuit noted, if the efficient proximate cause doctrine applied, TNT’s loss would be covered because the covered peril of vandalism brought to fruition the potential for damage inherent in the rising flood waters of the Mississippi River. The policy would provide coverage, even though the immediate cause of loss was the excluded peril of flood, because the efficient

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472 *Front Row*, 18 F.3d at 1347.
473 *Front Row*, 18 F.3d at 1349.
474 114 F.3d 731 (8th Cir. 1997).
475 *TNT Speed & Sport*, 114 F.3d at 732.
476 *TNT Speed & Sport*, 114 F.3d at 732.
477 *TNT Speed & Sport*, 114 F.3d at 732.
478 *TNT Speed & Sport*, 114 F.3d at 732.
479 *TNT Speed & Sport*, 114 F.3d at 732.
proximate cause of loss was the initiating covered peril of vandalism.\textsuperscript{480} However, the appellate court held that the insurer clearly intended to exclude any loss caused by flooding.\textsuperscript{481} In explaining its reasoning, the court noted that when a loss is caused by a combination of a covered peril and an excluded peril, coverage is expressly precluded by the terms of the policy.\textsuperscript{482}

In \textit{Shroeder v. State Farm Fire & Casualty Co.},\textsuperscript{483} State Farm insured Quentin and Frances Schroeder under a commercial property policy. An underground city water pipe ruptured due to age and corrosion. Escaping water saturated soil under the insured’s building, causing the soil to settle and the building to shift.\textsuperscript{484} State Farm claimed its policy excluded coverage for loss caused by earth movement, even though another peril may have acted concurrently or in sequence with the excluded peril to cause loss.\textsuperscript{485} The insureds claimed loss was caused by water, a covered peril.\textsuperscript{486} When State Farm denied coverage claiming there would have been no loss but for the soil beneath their building collapsing, the Schroeders sued.\textsuperscript{487}

The State Farm policy language provided that when more than one peril contributes to loss, and at least one peril is excluded from coverage, loss is not covered.\textsuperscript{488} The court ruled that contracting out of efficient proximate cause does not violate public policy of the State of

\begin{thebibliography}{9}
\bibitem{TNT Speed & Sport} TNT Speed & Sport, 114 F.3d at 732.
\bibitem{TNT Speed & Sport} TNT Speed & Sport, 114 F.3d at 733.
\bibitem{Front Row} The court in \textit{Front Row}, also quoted from GEORGE C. COUCH, CYCLOPEDIA OF INSURANCE LAW §44A:2 (2d ed. 1981) for the proposition that “‘Exceptions and exclusions in a policy of public liability insurance must be given effect according to their express terms. . . . [A] court cannot rewrite the contract of the parties.’” \textit{Front Row}, 18 F.3d at 1347.
\bibitem{Schroeder} Schroeder, 770 F.Supp. at 560.
\bibitem{Schroeder} Schroeder, 770 F.Supp. at 560.
\bibitem{Schroeder} Schroeder, 770 F.Supp. at 560.
\bibitem{Schroeder} Schroeder, 770 F.Supp. at 560.
\bibitem{Schroeder} Schroeder, 770 F.Supp. at 561.
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Nevada. The court ruled that while the building suffered water damage, the Schroeders’ building was never directly damaged by water entering the building. Water escaping from the water pipe caused soil subsidence, which in turn caused the building to shift, damaging the building. The excluded peril of soil subsidence, not water damage, caused the building to settle.

In Paulucci v. Liberty Mutual Fire Insurance Co., Jeno Paulucci owned a two-story warehouse constructed in the 1920’s which, at the time of loss, was used as a parking garage and a storage facility. Rains associated with Tropical Storm (formerly Hurricane) Gordon produced a severe rainstorm during which the building, insured by Liberty Mutual, suffered a partial collapse. Liberty Mutual’s policy excluded coverage for loss caused directly or indirectly by wet or dry rot. Paulucci argued that the collapse of the roof was caused by excessive rain which pooled on the roof during the storm.

Liberty Mutual claimed the roof collapsed due to wet or dry rot. Liberty Mutual also asserted that, pursuant to the anti-concurrent cause provision in the policy, when loss results from a covered peril (windstorm), and an excluded peril (rot), there is no coverage. Therefore, any loss caused directly or indirectly by rot was excluded. The insured argued that anti-concurrent cause provisions were illegal under Florida law.

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489 Schroeder, 770 F.Supp. at 561.
490 Schroeder, 770 F.Supp. at 562.
491 Schroeder, 770 F.Supp. at 562.
492 Schroeder, 770 F.Supp. at 562.
493 190 F.Supp.2d 1312 (M.D. Fla. 2002).
494 Paulucci, 190 F.Supp.2d at 1315.
495 Paulucci, 190 F.Supp.2d at 1317.
496 Paulucci, 190 F.Supp.2d at 1317.
497 Paulucci, 190 F.Supp.2d at 1317.
Florida, like Texas, is one of the states that has not adopted efficient proximate cause in property damage cases.\textsuperscript{498} The court ruled that under Florida law, when loss is caused by covered and excluded perils, courts apply the concurrent causation doctrine.\textsuperscript{499} The concurrent causation doctrine mandates that a policy provides coverage when loss would not have occurred but for the combination or “joinder” of independent covered and excluded perils.\textsuperscript{500}

Liberty Mutual claimed that efficient proximate cause applied. The district court noted that concurrent causation and efficient proximate cause are not mutually exclusively because they apply to distinct fact patterns.\textsuperscript{501} Concurrent causation applies when covered and excluded perils are independent. Efficient proximate cause applies when perils are dependent. Perils are independent if they are unrelated. For example, the peril of earthquake would be independent of the peril of lightning, or the peril of windstorm would be independent of the peril of wood rot.\textsuperscript{502} Perils are dependent when a subsequent peril acts upon the initiating peril to cause loss. The court concluded that the perils of windstorm and rot were independent causes of the loss so the concurrent causation doctrine applied.\textsuperscript{503} The court also ruled that the law in Florida allows an insurer to contract around the concurrent causation doctrine.\textsuperscript{504} Because fact issues existed, summary judgment as to coverage was inappropriate. However, if the collapse of the roof on the garage proved to be caused in whole or in part by rot, there would be no coverage.\textsuperscript{505}

\textsuperscript{498} \textit{Paulucci}, 190 F.Supp.2d at 1319.
\textsuperscript{499} \textit{Paulucci}, 190 F.Supp.2d at 1319.
\textsuperscript{500} \textit{Paulucci}, 190 F.Supp.2d at 1318.
\textsuperscript{501} \textit{Paulucci}, 190 F.Supp.2d at 1319.
\textsuperscript{502} \textit{Paulucci}, 190 F.Supp.2d at 1319 (“Causes are dependent when one peril instigates or sets in motion the other, such as an earthquake which breaks a gas main that starts a fire.”).
\textsuperscript{503} \textit{Paulucci}, 190 F.Supp.2d at 1319.
\textsuperscript{504} \textit{Paulucci}, 190 F.Supp.2d at 1320.
\textsuperscript{505} \textit{Paulucci}, 190 F.Supp.2d at 1323.
Dominance Analysis

A court applying the “dominance” prong of causation would define efficient proximate cause as the peril that precedes and is acted upon by a subsequent peril and is the peril to which loss is to be legally attributed, even though other perils may follow and operate more immediately in producing loss. Under a fire insurance policy, a fire may occur that eventually causes an explosion which destroys a building. The efficient proximate cause of loss is the peril that produces loss without any new intervening cause, as long as that peril, alone, would have been sufficient to cause loss. Many courts discuss the dominant cause of loss only when two or more perils are concurrent in time and place. Courts also use a dominance analysis when the immediate cause of loss is an excluded peril. When the immediate cause of loss is a peril excluded from coverage, the loss may still be covered if the efficient proximate cause of loss is a covered peril. The rule is discussed in *Graham v. Public Employees Mutual Insurance Co.*, and *Shinrone, Inc. v. Insurance Company of North America*. Courts in jurisdictions that apply this rule search for a more remote covered cause which they can declare to be the efficient proximate cause of loss. Courts in the better-reasoned cases prefer a dominance analysis over

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509 JEFFREY W. STEMPLE, §17.2, p. 436.
512 570 F.2d 715 (8th Cir. 1978).
513 JEFFREY W. STEMPLE, §17.2, p. 436.
a proximity analysis when loss results from a peril viewed as the most dominant cause of loss, even though a dominant peril is significantly more remote from loss than another peril. 514

In Berg v. New York Life Insurance Co., 515 New York Life sold two life insurance policies which included double indemnity benefits on the life of Abram Berg. 516 Mr. Berg and his wife were confronted by two robbers who broke into their home. 517 The robbers beat Mr. Berg and took the couples’ money and jewelry. 518 Later, at about 3:30 a.m., Mr. Berg started acting confused and erratic. He was taken to hospital where he died at 8:00 a.m. from cerebral arteriosclerosis. 519 Mrs. Berg demanded payment under the double indemnity clause of the policies, which New York Life refused. The Florida Supreme Court considered whether the double indemnity benefits of the two policies covered death resulting directly and independently of all other causes from bodily injury effected solely through external, violent, and accidental means, even though the policies expressly excluded coverage for death resulting directly or indirectly from illness. 520 Medical testimony showed that, at the time Berg was attacked, he suffered from arteriosclerosis and other diseases. The facts established that Berg’s death was caused by a combination of the beating he received during the robbery and his blood vessel

514 JEFFREY W. STEMPEL, §17.2, p. 437.
515 88 So.2d 915 (Fla. 1956).
516 Berg, 88 So.2d at 915-16.
517 Berg, 88 So.2d at 916.
518 Berg, 88 So.2d at 916.
519 Berg, 88 So.2d at 917.
520 Berg, 88 So.2d at 917. The policy benefits were payable “upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause.” The double indemnity provision would not apply if the “death of the Insured resulted directly and independently of all other cause from bodily injury effected solely through external, violent and accidental means.”
disease. However, the court held that the efficient proximate cause of death was disease and, therefore, the double indemnity provisions of the policies did not apply. 521

In *Shinrone, Inc. v. Insurance Company of North America*, 522 INA insured Frances G. Bridge and Shinrone, Inc., an incorporated cattle ranch, under a livestock policy which insured their animals against death directly resulting from windstorm. The policy excluded coverage for loss caused by dampness of atmosphere or extremes of temperature. 523 A severe windstorm and snowstorm struck Shinrone killing 390 animals. 524 The insureds’ expert, a veterinarian, testified that six factors were responsible for the deaths:

- wind
- drop in temperature
- snow
- the size and age of the cattle
- the extremely muddy conditions
- the lack of adequate wind protection 525

Evidence showed that a severe wind and snowstorm struck the State of Iowa. Prior to the snowstorm the weather had been unseasonably warm and wet, causing extremely muddy conditions. Mud in feedlots was two feet deep when the storm began. The expert also stated that calves died because of the snowstorm. In his opinion windstorm alone would not have killed the calves. 526 He also testified that the windstorm was the most significant causal factor in the death of the mature cattle.

521 Berg, 88 So.2d at 917.
522 570 F.2d 715 (8th Cir. 1978).
523 *Shinrone, Inc.*, 570 F.2d at 716.
524 *Shinrone, Inc.*, 570 F.2d at 716.
525 *Shinrone, Inc.*, 570 F.2d at 716.
526 *Shinrone, Inc.*, 570 F.2d at 716.
INA claimed that in order for recovery, the insureds had to establish that there was a windstorm; that the immediate cause of death was the windstorm; and that the excluded perils of dampness of atmosphere or extremes of temperature did not apply.\textsuperscript{527} INA requested the following jury instruction:

You are instructed that a windstorm, in contemplation of law, is a storm characterized by high winds, with little or no precipitation, and an ordinary gust of wind, no matter how prolonged, is not a windstorm. In order to constitute a windstorm, the wind must be of such violence and velocity as to assume the aspect of a storm, that is, an outburst of tumultuous force. A windstorm means a storm of wind of unusual force and violence. A windstorm must be taken to be a wind of sufficient violence to be capable of damaging the insured property by its own unaided action.\textsuperscript{528}

The trial court deleted the phrase “little or no precipitation” and otherwise tailored INA’s requested instruction to read as follows:

You are instructed that a windstorm, in contemplation of law, is a storm characterized by high winds, and an ordinary gust of wind, no matter how prolonged, is not a windstorm. In order to constitute a windstorm, the wind must be of such violence and velocity as to assume the aspect of a storm, that is, an outburst of tumultuous force.\textsuperscript{529}

INA attacked the court’s deletion of the requirements that the windstorm be accompanied with little or no precipitation and that the strength of the windstorm had to be sufficiently violent to be capable of killing the animals by itself.\textsuperscript{530}

INA requested another instruction which stated that if windstorm combined with dampness of atmosphere or extremes in temperature and either of these two perils directly or indirectly caused the death of livestock, then there would be no coverage because a covered peril

\textsuperscript{527} Shinrone, Inc., 570 F.2d at 716.

\textsuperscript{528} Shinrone, Inc., 570 F.2d at 716-17.

\textsuperscript{529} Shinrone, Inc., 570 F.2d at 717.

\textsuperscript{530} R. Dennis Withers, \textit{Proximate Cause and Multiple Causation in First-Party Insurance Cases}, 20 \textit{FORUM} 256, 267 (January 1985).
would have combined with an excluded peril to cause loss. If livestock deaths were caused by a combination of covered and excluded perils, those deaths were not directly or immediately caused by windstorm. INA’s requested jury instruction read:

You are instructed that if the windstorm combined with a hazard expressly excluded from the policy coverage, that is, extremes of temperature or dampness of atmosphere, or both, to produce the death of plaintiffs’ livestock, the death of the livestock is not a direct result of windstorm and the plaintiffs may not recover.

The trial court’s instruction read:

You are instructed that the burden of proof is on the plaintiffs to prove by a preponderance of the evidence in this case that the death of their livestock, for which they seek to recover in this case, was caused directly by windstorm and not the result of some other cause. If you find, from a preponderance of the evidence, that the death of plaintiffs’ livestock was not directly caused by the windstorm, or if you find, from a preponderance of the evidence, that the extremes of temperature and the dampness of the atmosphere were the dominant and proximate cause of the death of the plaintiffs’ livestock, you should return a verdict for the defendant.

INA argued that there was no coverage because the excluded perils of dampness of atmosphere or extremes in temperature contributed to loss of livestock. The instruction defining windstorm allowed coverage if windstorm was the dominant cause of loss. The court of appeals considered INA’s view of coverage too restrictive because it required windstorm to have had “little or no precipitation” and be of “sufficient violence to be capable of damage to the insured property by its own unaided action.” Windstorm was the efficient proximate cause of loss because that peril was acted upon by other perils to cause loss of livestock. INA’s

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531 Shinrone, Inc., 570 F.2d at 717.
532 In some jurisdictions, when a policy insures against “direct loss,” in this case, “direct loss by windstorm,” the insured peril must be the immediate cause of loss.
533 Shinrone, Inc., 570 F.2d at 717.
534 Shinrone, Inc., 570 F.2d at 717-18.
535 Shinrone, Inc., 570 F.2d at 718.
536 Shinrone, Inc., 570 F.2d at 719.
interpretation of the policy would render it “virtually inoperative and practically meaningless because the policy would provide no coverage during winters in Iowa.” The court concluded that the trial court properly submitted the question of efficient proximate cause to the jury.

In *Goodman v. Fireman’s Fund Insurance Co.*, Ronald Goodman, a yacht owner, purchased “hull” insurance from Fireman’s Fund. The policy excluded coverage for loss to Goodman’s yacht caused by “ice and/or freezing.” When Goodman laid up his yacht for the winter, he failed to drain sea water from the cooling system and to close sea valves, permitting sea water to enter the cooling system. Water in the cooling system froze during winter, causing system breaks and allowing sea water to enter the hull. The ship sank as a result.

The federal district court held that loss was caused solely by the excluded peril of frozen water in the cooling system. The court of appeals concluded there were two causes of loss. One cause, the generally negligent manner in which Goodman laid up the yacht, resulted in water in the cooling system freezing. Goodman’s general negligence, coupled with his specific negligence in failing to close the intake valves, caused the yacht to sink. While Goodman’s

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537 *Shinrone, Inc.*, 570 F.2d at 719. When an insurance policy expressly covers direct loss from windstorm, an insured can establish coverage for such loss by proof that windstorm alone was sufficiently violent to bring about a material weakening of the building that it collapsed from the weight of accumulated snow, and that the collapse would not have occurred had the structure not first been weakened by wind. *Anderson v. Conn. Fire Ins. Co.*, 231 Minn. 469, 43 N.W.2d 807 (1950).

538 *Shinrone, Inc.*, 570 F.2d at 719.

539 600 F.2d 1040 (4th Cir. 1979).

540 *Goodman*, 600 F.2d at 1041.

541 *Goodman*, 600 F.2d at 1041.

542 *Goodman*, 600 F.2d at 1041.

543 *Goodman*, 600 F.2d at 1041.

544 *Goodman*, 600 F.2d at 1041.

545 *Goodman*, 600 F.2d at 1042.

546 *Goodman*, 600 F.2d at 1042.

547 *Goodman*, 600 F.2d at 1042.
general negligence was covered under the all risks provision of the policy, frozen water in the cooling system was an excluded cause of loss.\textsuperscript{548} The court of appeals stated that a policy will provide coverage, even though a covered peril combines with an excluded peril to cause loss, if the covered peril is the predominant cause of loss.\textsuperscript{549} The court looked past the freezing water in the cooling system because the predominant cause of loss is not always the last peril in the chain of events.\textsuperscript{550} The initiating peril in a chain of events is generally the predominant cause of loss, even when other foreseeable perils follow. Here, the court found that freezing water in the cooling system was a foreseeable intervening cause of loss which resulted from the generally negligent manner in which Goodman laid up the yacht.\textsuperscript{551} The predominant cause of the yacht’s sinking was Goodman’s negligence. There was no unforeseen intervening peril that came into play that was the result of some new and independent peril.\textsuperscript{552}

**Coverage for Damages Caused By Faulty Design, Construction or Workmanship**

Generally, an all risks policy extends coverage for damages caused by faulty design, construction or workmanship, absent a policy exclusion, as long as such a defect otherwise qualifies as a fortuitous loss.\textsuperscript{553}

In *Davis v. United Services Automobile Association*,\textsuperscript{554} USAA insured the home of Richard and Yvonne Davis under an all risks policy, and had done so for several years.\textsuperscript{555}

\textsuperscript{548} Goodman, 600 F.2d at 1042.

\textsuperscript{549} Goodman, 600 F.2d at 1042.

\textsuperscript{550} Goodman, 600 F.2d at 1042.

\textsuperscript{551} Goodman, 600 F.2d at 1042.

\textsuperscript{552} Goodman, 600 F.2d at 1042.


\textsuperscript{554} 223 Cal.App.3d 1322, 273 Cal.Rptr. 224 (1990). *See Berry v. Commercial Union Ins. Co.*, 87 F.3d 387 (9th Cir. 1996) (The court found that a product manufacturer’s negligent failure to warn the insured of the adverse effects of the fungicides on aluminum pipes was a covered peril and the efficient proximate cause of loss.). *Berry*, 87 F.3d at 391.
Earlier policies issued by USAA had excluded coverage for loss “caused by, resulting from, contributed to or aggravated by any earth movement,” unless an ensuing covered loss occurred, in which case the loss was covered.\textsuperscript{556} Those earlier policies did not expressly exclude coverage for loss due to the negligence of third parties.\textsuperscript{557} Policies issued later by USAA excluded coverage for faulty, inadequate or defective planning, development, design, specifications, materials, or maintenance.\textsuperscript{558} Because contractor negligence was not specifically excluded under the earlier USAA policies, third party negligence was therefore considered a covered peril under California law.\textsuperscript{559} The Davis family claimed they had suffered a property loss caused by the excluded peril of earth movement and the non-excluded peril of contractor negligence in failing to reinforce the foundation slab and failing to properly prepare subgrade soils when the house was originally built.\textsuperscript{560} Relying on a footnote in the California Supreme Court’s decision in \textit{Garvey v. State Farm Fire & Casualty Co.},\textsuperscript{561} USAA argued that the earth movement exclusion applied to the contractor negligence alleged by the insureds.\textsuperscript{562} The \textit{Davis} court noted the California Supreme Court’s discussion of this issue in \textit{Garvey}:

\begin{quote}
A related issue involves whether courts should distinguish between types of negligence when determining whether a loss caused by negligence is covered under a similar policy. For example, if construction is undertaken on the insured premises for the sole purpose of protecting against the operation of a specifically excluded risk under the homeowner’s policy, and that improvement subsequently fails to serve its purpose because it was negligently designed or constructed, the damage to the structure should arguably not be covered. On the other hand,
\end{quote}

\textsuperscript{555} \textit{Davis}, 223 Cal.App.3d at 1324, 273 Cal.Rptr. at 225.
\textsuperscript{556} \textit{Davis}, 223 Cal.App.3d at 1324, 273 Cal.Rptr. at 225.
\textsuperscript{557} \textit{Davis}, 223 Cal.App.3d at 1324, 273 Cal.Rptr. at 225-26.
\textsuperscript{558} \textit{Davis}, 223 Cal.App.3d at 1324, 273 Cal.Rptr. at 225-26.
\textsuperscript{559} \textit{Davis}, 223 Cal.App.3d at 1328, 273 Cal.Rptr. at 228.
\textsuperscript{560} \textit{Davis}, 223 Cal.App.3d at 1328, 273 Cal.Rptr. at 227-28.
\textsuperscript{561} 48 Cal.3d 395, 408-09 n.7, 770 P.2d 704, 712 n.7, 257 Cal.Rptr. 292, 300 n. 7 (1989).
\textsuperscript{562} \textit{Davis}, 223 Cal.App.3d at 1329, 273 Cal.Rptr. at 228.
ordinary negligence that contributes to property loss, but does not involve acts undertaken to protect against an excluded risk, may give rise to coverage under an all-risk policy. In other words, at some point, courts may want to distinguish between types of negligence when analyzing coverage in a first party property insurance context. The issue, however, was not raised in the present case, and we do not address it here.\(^{563}\)

The court concluded because the early policies issued by USAA did not exclude loss due to faulty workmanship, contractor negligence was a covered peril.\(^{564}\)

USAA claimed that evidence presented at trial did not support a finding that third party negligence was the efficient proximate cause of loss.\(^{565}\) The undisputed evidence established that earth movement was the immediate cause of loss.\(^{566}\) The insureds’ expert testified that damage to the house was set in motion by the contractor’s negligent preparation of the subgrade soil and the foundation.\(^{567}\) He testified that “but for” the contractor’s negligence in preparing the soils and foundation, earth movement would not have caused loss.\(^{568}\)

USAA’s expert asserted that earth movement was the only peril among the stipulated causes which could have resulted in the type of damages suffered by the insureds.\(^{569}\) This expert also testified that while he could not identify the event which triggered loss, he challenged the opinion of the insureds’ expert that soil preparation set other events in motion because soil preparation was a condition, not a triggering mechanism.\(^{570}\) In other words, soil could be

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\(^{564}\) Davis, 223 Cal.App.3d at 1330, 273 Cal.Rptr. at 229.

\(^{565}\) Davis, 223 Cal.App.3d at 1330-31, 273 Cal.Rptr. at 229.

\(^{566}\) Davis, 223 Cal.App.3d at 1331, 273 Cal.Rptr. at 229.

\(^{567}\) Davis, 223 Cal.App.3d at 1331, 273 Cal.Rptr. at 229.

\(^{568}\) Davis, 223 Cal.App.3d at 1331, 273 Cal.Rptr. at 230.

\(^{569}\) Davis, 223 Cal.App.3d at 1331, 273 Cal.Rptr. at 229-30.

\(^{570}\) Davis, 223 Cal.App.3d at 1331, 273 Cal.Rptr. at 230.
compacted so as not to cause earth movement.\textsuperscript{571} Under the theory of USAA’s expert, “but for” earth movement, there would not have been loss.\textsuperscript{572} Because there was conflicting evidence on the cause of loss, the trial court resolved the conflict by concluding that the efficient proximate cause of loss was the contractor’s negligence in failing to adequately prepare the soil and foundation.\textsuperscript{573}

Insurers have taken the position that all risks policies do not cover faulty workmanship or negligent construction because those forms of negligence do not constitute a “risk of physical loss or damage” required by insuring agreements.\textsuperscript{574} As noted by one court, the term “loss,” as it relates to insurance, is defined as a:

[D]ecrease in value of resources or increase in liabilities; depletion or depreciation or destruction or shrinkage of value; injury, damage, etc. to property or persons injured; injury or damage sustained by insured in consequence of happening of one or more of the accidents or misfortunes against which insurer has undertaken to indemnify the insured; pecuniary injury resulting from the occurrence of the contingency insured against; word “loss” implies that property is no longer in existence.\textsuperscript{575}

In \textit{Trinity Industries, Inc. v. Insurance Company of North America},\textsuperscript{576} Halter Marine negligently constructed a ship.\textsuperscript{577} The ship’s owner, Leam Transportation, filed for arbitration, seeking damages of $2.3 million.\textsuperscript{578} Halter Marine paid an arbitration award of $200,000 for its negligent construction of the ship, then sued INA, its builders risk insurer. INA’s policy

\textsuperscript{571} \textit{Davis}, 223 Cal.App.3d at 1331, 273 Cal.Rptr. at 230.
\textsuperscript{572} \textit{Davis}, 223 Cal.App.3d at 1331, 273 Cal.Rptr. at 230.
\textsuperscript{573} \textit{Davis}, 223 Cal.App.3d at 1332, 273 Cal.Rptr. at 230.
\textsuperscript{576} 916 F.2d 267 (5th Cir. 1990) (Louisiana law).
\textsuperscript{577} \textit{Trinity Industries}, 916 F.2d at 268.
\textsuperscript{578} \textit{Trinity Industries}, 916 F.2d at 268.
provided cover against “all risks of physical loss of or damage to the subject matter.” The court held that the policy did not cover Halter Marine’s costs to correct and repair its own faulty workmanship. The court based its holding on the idea that, while an all risks policy would cover a loss caused by the negligence of the insured, that type of policy should not be read to cover costs incurred to replace or repair ordinary faulty workmanship.

The phrase “physical loss or damage” strongly implies that the subject matter of loss must result from an initial satisfactory state following construction that has changed by some external event into an unsatisfactory state. The phrase “physical loss or damage” does not encompass faulty initial construction. The court distinguished between cases where loss is caused by defective workmanship or design, and cases where the insured seeks compensation for costs to redesign, replace or rebuild a structure so as to eliminate a defect due to workmanship or design. The court stated:

While the distinction [between damage caused by an accident and faulty initial construction] is perhaps difficult to see as an abstract concept, it appears relatively clear as a practical matter. Many construction accidents can be traced, at least in part, to some negligence on behalf of the insured. Defective workmanship can lead to the collapse of a cement dome or a brick wall. If an all risk policy did not cover accidents resulting from such negligence, then perhaps it would become a no risk policy, as one plaintiff has suggested.

That [an all risks policy] should cover accidents caused by the negligence of the insured does not justify reading such a policy to cover the costs of replacing or repairing crooked window frames or crooked door frames, even though the

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579 Trinity Industries, 916 F.2d at 269.
580 Trinity Industries, 916 F.2d at 269.
581 Trinity Industries, 916 F.2d at 269.
582 Trinity Industries, 916 F.2d at 270-71.
583 Trinity Industries, 916 F.2d at 270-71.
584 Trinity Industries, 916 F.2d at 270.
585 Trinity Industries, 916 F.2d at 270.
crookedness of the frame was undoubtedly the result of the insured’s negligence.\(^{586}\)

The language “physical loss or damage” strongly implies there was an initial satisfactory state that was changed by some external event into an unsatisfactory state – for example, the car was undamaged before the collision dented the bumper. It would not ordinarily be thought to encompass faulty initial construction.\(^{587}\)

Thus, when an insured has made claims for the collapse of the insured subject matter because of faulty design, district courts have awarded as damages the cost to rebuild the structure in its defective state. They have not awarded as damages the cost to redesign or rebuild the structure so as to eliminate the defect. This reflects an interpretation of the all risks policy to cover accidents resulting from defective design or workmanship, but not the cost of repairing the defect itself.\(^{588}\)

The important point made by the court was not who was at fault (the insured or some third party), but whether loss resulting from an accident was fortuitous and covered under the all risks policy. Loss due to faulty initial construction would not be covered.\(^{589}\)

*City of Burlington v. Indemnity Insurance Company of North America,*\(^{590}\) involved the City of Burlington’s 1982 contract with Zurn Industries to design, engineer and construct a wood-fired steam electric energy generator.\(^{591}\) This equipment, installed in a new generating station, included an “economizer” consisting of metal tubes welded together. Zurn welded the economizer components at its manufacturing facility and then delivered and installed the completed sections of the economizer for service that began in 1984.

During 1987 and 1988, the City requested maintenance on the boiler after city employees discovered two isolated leaks in the lower section of the economizer. The City found no other

\(^{586}\) *Trinity Industries*, 916 F.2d at 270.

\(^{587}\) *Trinity Industries*, 916 F.2d at 270-71.

\(^{588}\) *Trinity Industries*, 916 F.2d at 271.

\(^{589}\) *Trinity Industries*, 916 F.2d at 269 n.11, 270-71.

\(^{590}\) 332 F.3d 38, 45 (2d Cir. 2003).

\(^{591}\) 332 F.3d at 41.
defective welds until April, 1995, and before August, 1999, more than thirty leaks were discovered and repaired. When the number of failures increased during the winter of 1998, the City hired an expert who studied the economizer and determined that the original welds made by Zurn were substandard.\(^{592}\) The City removed and replaced all existing weldments on the economizer, including those which showed no signs of leaking.

Indemnity Insurance covered the electricity generator under an “all risks” policy.\(^{593}\) Most of the leaks occurred during the time when Indemnity Insurance was on the risk. That policy excluded loss caused directly or indirectly by “inherent vice” or “latent defect.”\(^{594}\) Also excluded was coverage for any error, omission or deficiency in design, plans, specification engineering or surveying or faulty or defective workmanship, materials and supplies.\(^{595}\) However, the faulty workmanship exclusion did not apply to any electrical machine used for the generation of electrical power which had been installed, fully tested and accepted by the City and operated as part of the City’s normal production process in the capacity for which it was designed.\(^{596}\) Indemnity Insurance denied coverage of the City’s loss, citing the inherent vice and latent defect exclusions. After the City sued Indemnity Insurance and both parties moved for summary judgment, the district court concluded that the inherent vice and latent defect exclusions precluded coverage.\(^{597}\)

The Second Circuit chose not to focus on the two exclusions, considering instead the more fundamental question of whether loss fell within the insuring agreements, asking whether

\(^{592}\) City of Burlington, 332 F.3d at 41.
\(^{593}\) City of Burlington, 332 F.3d at 41.
\(^{594}\) City of Burlington, 332 F.3d at 41.
\(^{595}\) City of Burlington, 332 F.3d at 41.
\(^{596}\) City of Burlington, 332 F.3d at 41-42.
\(^{597}\) City of Burlington, 332 F.3d at 42.
defective and failed weldments qualified as “direct physical loss or damage to the property insured.”598 The court of appeals began by noting that some courts have held that the phrase “physical loss or damage” implies that there was a time when the insured object was in an “initial satisfactory state that was [later] changed … into an unsatisfactory state.”599 Using this definition, the court of appeals stated that “while a failure of a defective part qualifies as direct physical loss or damage, the defect itself, assuming the item has not yet failed, does not.”600 The court concluded that the Indemnity Insurance policy covered the thirty-three leaks. However, the lone defective weld which had not yet caused a leak did not qualify as direct physical loss or damage, and the policy therefore did not cover costs to repair that unfailed weldment.601

In Julian v. Hartford Underwriters Insurance Co.,602 Frank and Carol Julian’s home was insured by Hartford under an all risks homeowner’s policy.603 The policy excluded coverage for loss caused by earth movement, weather conditions, errors or omissions in design or construction and collapse due to flood.604 The Julians claimed partial destruction of their home due to a ground slope failure above and behind their property.605 Hartford’s engineers determined the cause of loss was the excluded peril of landslide triggered by heavy rainfall, concluding that substandard work by the building contractor contributed to the loss.606 Hartford denied

598 City of Burlington, 332 F.3d at 43-44.
599 City of Burlington, 332 F.3d at 44.
600 City of Burlington, 332 F.3d at 44.
601 City of Burlington, 332 F.3d at 44.
603 Julian, 100 Cal.App.4th at 815, 123 Cal.Rptr.2d at 770.
604 Julian, 100 Cal.App.4th at 816, 123 Cal.Rptr.2d at 770.
605 Julian, 100 Cal.App.4th at 816, 123 Cal.Rptr.2d at 770.
606 Julian, 100 Cal.App.4th at 816, 123 Cal.Rptr.2d at 771.
The Julians argued that the efficient proximate cause of loss was third party negligence by neighbors occupying the house above and behind theirs and by contractors who worked on the neighbors’ property; weather conditions alone; or collapse not due to flood. When Hartford moved for summary judgment on the grounds that the Julians’ policy excluded each of the perils Hartford identified as a possible efficient proximate cause, the trial court found that the efficient proximate cause of loss was landslide triggered by heavy rainfall. Both landslide and weather conditions were excluded perils.

The court of appeals affirmed, ruling that there was no reason to determine whether third-party negligence was the efficient proximate cause of the Julians’ loss because the policy excluded third-party negligence. The Julians replied that when third-party negligence combines with the peril that is the efficient proximate cause of loss, and that peril is not excluded from cover, indemnity is owed, regardless of a third-party negligence exclusion. The court of appeals held that Hartford did not breach the insurance contract by denying benefits to the Julians under the third-party negligence exclusion.

The California Supreme Court then granted review to resolve a dispute over the validity of the weather conditions clause. The higher court considered whether California Insurance Code section 530 and, the efficient proximate cause doctrine, require an insurer providing cover for some loss caused by weather conditions to cover loss caused by all weather conditions. The

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607 Julian, 100 Cal.App.4th at 816, 123 Cal.Rptr.2d at 771.
608 Julian, 100 Cal.App.4th at 816, 123 Cal.Rptr.2d at 771.
609 Julian, 100 Cal.App.4th at 824, 123 Cal.Rptr.2d at 776 n.7.
610 Julian, 100 Cal.App.4th at 824, 123 Cal.Rptr.2d at n.7.
611 Julian, 100 Cal.App.4th at 823 n.7, 123 Cal.Rptr.2d at 776 n.7.
court said no, an insurer can draft a policy that provides “coverage for some, but not all, manifestations of a particular peril.”\textsuperscript{614} The court offered the example of excluding loss caused by freezing of water in a plumbing system, but covering other types of loss caused by freezing.\textsuperscript{615} The court addressed only the application of the weather conditions clause to loss resulting from a rain-induced landslide. The landslide in this case, according to Hartford’s engineers, could only be caused by water.\textsuperscript{616} Landslide was not an independent causal agent.\textsuperscript{617} The policy excluded loss caused by landslides or earth movement resulting in any way by weather conditions or rain.

In \textit{Whitaker v. Nationwide Mutual Fire Insurance Co.},\textsuperscript{618} Mark and Ingrid Whitaker contracted with Robinson to construct a home for them. Nationwide insured the Whitakers under an all risks homeowner’s policy.\textsuperscript{619} Nationwide also insured Robinson, the contractor, under a contractor’s insurance policy.\textsuperscript{620} The Whitakers became dissatisfied with the quality of Robinson’s work and filed a claim under Robinson’s contractor’s policy and also sued Robinson. Robinson filed for bankruptcy protection.\textsuperscript{621} Almost two years after the Whitakers made their claim under Robinson’s policy, Nationwide had yet to admit or deny coverage under that policy. The Whitakers sued Nationwide for coverage under their homeowner’s policy, claiming costs to repair the defective workmanship itself, as well as other damages to the premises resulting from defective workmanship.\textsuperscript{622}

\textsuperscript{614} Julian, 35 Cal.4th at 759, 110 P.3d at 910, 27 Cal.Rptr.3d at 657.
\textsuperscript{615} Julian, 35 Cal.4th at 759, 110 P.3d at 911, 27 Cal.Rptr.3d at 657.
\textsuperscript{616} Julian, 35 Cal.4th at 760, 110 P.3d at 911, 27 Cal.Rptr.3d at 658.
\textsuperscript{617} Julian, 35 Cal.4th at 760, 110 P.3d at 911, 27 Cal.Rptr.3d at 658.
\textsuperscript{618} 115 F.Supp.2d 612, 617 (E.D.Va. 1999).
\textsuperscript{619} Whitaker, 115 F.Supp.2d at 614-15.
\textsuperscript{620} Whitaker, 115 F.Supp.2d at 614.
\textsuperscript{621} Whitaker, 115 F.Supp.2d at 615.
\textsuperscript{622} Whitaker, 115 F.Supp.2d at 614.
All parties moved for summary judgment. Nationwide argued that repair of poor or defective workmanship was not covered under the policy because such repairs qualified as an economic loss, not direct physical loss. The court pointed out that the bulk of the insureds’ damages were incurred in repairing or replacing Robinson’s defective work. Citing *Trinity Industries, Inc. v. Insurance Company of North America*, the court ruled that there was no coverage under Nationwide’s policy for costs incurred to repair or replace construction defects.

In *Bethesda Place Ltd. Partnership v. Reliance Insurance Co.*, Bethesda Place was a partnership that developed and managed commercial and residential property. During construction, Bethesda Place was insured under an all risks policy issued by Reliance. As a result of bargaining between insurer and insured, Reliance deleted a design error exclusion.

During construction, Bethesda Place discovered design errors by the architects and engineers that resulted in cost overruns to correct. When Bethesda Place made a claim for the cost overruns, Reliance denied the claim because the insured property never suffered “physical loss” and was never damaged by an external cause. Bethesda Place sued Reliance.

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623 *Whitaker*, 115 F.Supp.2d at 616. Nationwide admitted that damage caused by faulty workmanship would be covered.

624 916 F.2d 267 (5th Cir. 1990).

625 *Whitaker*, 115 F.Supp.2d at 616.


Both parties moved for summary judgment. Reliance asserted that no loss resulted from “direct physical loss or damage” to covered property. Bethesda Place responded to Reliance’s no “direct physical loss” argument, with their contention that courts have recognized design defects as covered perils under all risk insurance policies. The district court rejected Bethesda Place’s argument because their cited cases dealt with damages caused by defective workmanship. Bethesda Place was seeking reimbursement of sums it paid to repair and replace defective workmanship. The court held that design defects alone are not physical injury or damage to property from external causes.

In Wolstein v. Yorkshire Insurance Company, Ltd., Bertram Wolstein contracted with Burger Boat Company (“Burger”) to build a 105 foot yacht at a cost of $4.5 Million. During the contract negotiations, Tacoma Boatbuilding Company (“Tacoma”) bought Burger. Burger purchased marine builder’s risk insurance from Yorkshire, as required under the Wolstein/Burger contract. Wolstein was named as an additional insured under the policy. About a year after work began on Wolstein’s yacht, Burger/Tacoma abandoned the project after Tacoma’s directors improperly diverted Wolstein’s progress payments. Burger shut its doors, locked out its employees, abandoned the boat yard, and filed for bankruptcy. Wolstein hired

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633 Bethesda Place, 1992 WL 97342 at p.3.
634 Bethesda Place, 1992 WL 97342 at p.3.
635 Bethesda Place, 1992 WL 97342 at p.3.
637 Wolstein, 97 Wash.App. at 203, 985 P.2d at 403.
638 Wolstein, 97 Wash.App. at 203, 985 P.2d at 403.
639 Wolstein, 97 Wash.App. at 203, 985 P.2d at 403.
640 Wolstein, 97 Wash.App. at 204, 985 P.2d at 403.
security personnel to safeguard his vessel and took over completion of his yacht, which ended up costing almost $7 Million.\textsuperscript{641}

Wolstein filed a claim with Yorkshire under the builder’s risk policy, suing after Yorkshire denied coverage for losses resulting from Burger’s failure to complete the yacht.\textsuperscript{642} The trial court dismissed Wolstein’s lawsuit on grounds that no covered loss occurred during the policy period.\textsuperscript{643} Wolstein argued there was coverage because all work done to complete the yacht resulted directly from Burger’s bankruptcy.\textsuperscript{644} The court of appeals held that the all risks provisions of the policy did not provide coverage for Wolstein’s increased costs to complete his yacht due to Burger’s bankruptcy, nor for costs to repair Burger’s faulty workmanship.\textsuperscript{645}

In \textit{North American Shipbuilding, Inc. v. Southern Marine & Aviation Underwriting, Inc.},\textsuperscript{646} North American contracted to build a ship hull, designated NASB Hull No. 137. North American purchased builder’s risk insurance through Southern Marine from Lloyd’s of London.\textsuperscript{647} The policy insured against “all risks of physical loss of or damage to the vessel.”\textsuperscript{648} North American tested welds on the hull and found them defective.\textsuperscript{649} The cause of the defective welds was the use of improperly mixed welding gas supplied by Swisco, Inc.\textsuperscript{650} North American repaired the defective welds and demanded recovery from Lloyd’s.\textsuperscript{651} When Lloyd’s

\textsuperscript{641} Wolstein, 97 Wash.App. at 203, 985 P.2d at 404.
\textsuperscript{642} Wolstein, 97 Wash.App. at 204, 985 P.2d at 403.
\textsuperscript{643} Wolstein, 97 Wash.App. at 208, 985 P.2d at 405.
\textsuperscript{644} Wolstein, 97 Wash.App. at 208, 985 P.2d at 405.
\textsuperscript{645} Wolstein, 97 Wash.App. at 213, 985 P.2d at 408.
\textsuperscript{646} 930 S.W.2d 829 (Tex.App. -- Houston [1st Dist.] 1996, writ ref’d).
\textsuperscript{647} \textit{N. American}, 930 S.W.2d at 831.
\textsuperscript{648} \textit{N. American}, 930 S.W.2d at 831.
\textsuperscript{649} \textit{N. American}, 930 S.W.2d at 831.
\textsuperscript{650} \textit{N. American}, 930 S.W.2d at 831.
\textsuperscript{651} \textit{N. American}, 930 S.W.2d at 831.
refused, North American sued. Lloyd’s moved for summary judgment arguing in part that a claim for faulty initial construction was not “physical loss of or damage to” the hull. The trial court granted Lloyd’s motion without explanation.

On appeal, Houston’s First Court of Appeals affirmed the decision of the court below, stating that an all risks policy need not contain an express exclusion for loss due to faulty initial construction. The court in Trinity Industries, Inc. v. Insurance Company of North America, made it clear that such a cause of loss did not constitute “physical loss of or damage to” property under a builder’s risk policy. The welds in question were never in an initial satisfactory state that was changed by some external event into an unsatisfactory state. The court held that the phrase “physical loss of or damage to” does not include costs incurred to repair faulty initial construction.

Causation - Arising Out of Ownership, Maintenance or Use of an Automobile

Construing the phrase “arising out of the ownership, maintenance or use of an automobile,” found in an automobile policy or in an automobile exclusion in homeowner’s or CGL policies has proven troublesome for courts over the years. When addressing coverage under an automobile policy, an insured must prove that there is a causal connection between bodily injury or property damage and use of an automobile as such. Use of an automobile

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652 Lloyd’s cited Trinity Industries, Inc. v. Ins. Co. of N. America, 916 F.2d 267 (5th Cir. 1990). N. American Shipbuilding, 930 S.W.2d at 831.
653 916 F.2d 267 (5th Cir. 1990).
654 N. American, 930 S.W.2d at 834.
655 N. American, 930 S.W.2d at 834.
656 The first element of the . . . test requires a causal connection to exist between the vehicle and the injury. “In this context, causal connection means: (a) the vehicle was an ‘active accessory’ to the assault; and (b) something less than proximate cause but more than mere site of the injury; and (c) that the ‘injury must be foreseeably identifiable with the normal use of [the vehicle].’” “The required causal connection does not exist when the only connection between an injury and the insured vehicle’s use is that fact that the injured person was an occupant of the vehicle when the [injury] occurred.” “No distinction is made as to whether the injury resulted from a negligent, reckless, or
need not be a proximate cause of bodily injury or property damage, but the involvement of an automobile and injury or damage must be something more than the location where the loss occurred. Bodily injury or property damage does not arise out of the use of an automobile when an accident is directly caused by some independent or intervening cause which is wholly disassociated from the use of an automobile.

The requisite causal connection has been expressed in different ways. Generally, causation can be established by evidence of the following:

- all events which result in injury or damage are dependent automobile related causes of loss;
- injury or damage results from an independent automobile related cause and a concurrent independent non-automobile related cause of loss;
- injury or damage results from a non-automobile related intervening cause of loss;
- injury or damage results from covered and non-covered concurrent causes and the efficient proximate cause of loss is an automobile related cause of loss;
- a covered event, use of an automobile, is too remote from the non-automobile cause of loss;
- use of an automobile is not too remote in time from the event causing loss.


Webb, 256 Cal.App.2d at 145, 63 Cal.Rptr. at 794.


Dependent Automobile Related Causes

In the case of Capitol Indemnity Corp. v. Braxton, Capitol Indemnity insured Vivian and Otis Braxton and their day care center under a CGL policy. National Indemnity Company provided automobile liability coverage to the Braxtons. An employee of the day care center, Preston Young, was in charge of transporting children to and from the center. On the day of the accident, Young picked up children from their homes, including Brandon Mann, and delivered them to the day care center. However, Brandon never left the van. He remained there all day and died of hyperthermia. Brandon’s parents sued the Braxtons and Young for wrongful death, alleging negligent failure to take student roll calls, to take student head counts, to inspect the van after a trip, or to make inquiries to learn whether all students had been removed from the van. National Indemnity did not dispute coverage. Capitol Indemnity denied coverage because Brandon’s death arose from the use of an automobile. The trial court found the automobile exclusion did not apply.

On review, the Sixth Circuit began its coverage analysis by discussing Allstate Insurance Co. v. Watts, where the issue was whether coverage under a homeowner’s policy was negated

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by an automobile exclusion. By Bobby Watts helped the insured, Dewey Crafton, in removing lug nuts from a truck. Watts decided to facilitate matters by using his welding torch. However, before igniting his welding torch, Watts asked Crafton if there were any flammable materials in the area. After Crafton stated there were none, sparks from the welding torch ignited an unseen pan of flammable liquid under the truck. Crafton tried to remove the flaming pan by picking it up. He quickly dropped the pan due to the heat and then accidentally kicked the pan which caused flaming liquid to splash onto Watts. When Watts sued Crafton, Allstate argued that Watts was injured while both men were in the act of maintaining the truck. Therefore, any negligent acts committed by Crafton fell within the automobile exclusion of Allstate’s homeowner’s policy issued to Crafton.

As stated previously, the first step in establishing whether a claim for bodily injury or property damage arises out of ownership, maintenance or use of an automobile requires proof that the injury or damage occurred while the insured was in fact maintaining or using the insured automobile. The second step is to prove a causal connection between that maintenance or use and injury or damage. The Watts court cited State Farm Mutual Automobile Insurance Co. v. Partridge, where the court discussed the fact that maintenance or use of an automobile need

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not be the proximate cause of injury or damage. According to Partridge and its progeny, the requisite causal connection between injury or damage and use of an automobile is slight, not substantial. Coverage under the causal phrase of the insuring agreements of an automobile policy, “arising out of the use of an automobile,” is to be interpreted broadly in favor of coverage.

An automobile exclusion in a homeowner’s or CGL policy, on the other hand, is interpreted narrowly against the insurer so that the exclusion applies only when injury or damage is the proximate result of ownership, maintenance or use of an automobile. However, not just any causal connection between an automobile and injury or damage is sufficient to establish the required causal connection. The court stated that if it were to adopt Allstate’s interpretation of the phrase “arising out of” to include any causal connection, coverage would be unreasonably withheld because the exclusion could apply to most situations where injury occurs and automobile maintenance had taken place within some reasonable time frame. According to Allstate’s broad construction of the exclusion, coverage would be excluded if Watts had fallen down a flight of stairs after going into Dewey Crafton’s home to retrieve a tool to remove the lug nuts. Under these same facts, one could argue that Watts’ maintenance of the vehicle set in motion the chain of events resulting in his injury. In other words, but-for the difficulty Watts

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684 Partridge, 10 Cal.3d at 100 n.7, 514 P.2d at 127 n.7, 109 Cal.Rptr. at 815 n.7.


encountered in removing the lugnuts, Watts would not have been inside Crafton’s home when Watts fell down the stairs as he looked for the tool.\textsuperscript{690} Allstate’s homeowner’s policy covered Crafton even though maintenance of the automobile served as a background for the events leading to Watts’ injury. The court found that the various covered acts of negligence, placing flammable substance on the garage floor, failing to warn that a flammable substance was on the floor, and then dropping and kicking the burning pan, were the efficient proximate causes of Watts’ injury.\textsuperscript{691} The court held that the truck was merely the location where all these acts of negligence played out. The fact that the area around the truck served as the place where Watts was injured was not a sufficient reason to preclude coverage under the Allstate homeowner’s policy.\textsuperscript{692}

The Federal District Court in \textit{Capitol Indemnity}, also held that the Braxton’s van was not being “used” at the time of the accident because it was not being “operated” at the time of Brandon’s death. The van was parked and the engine turned off.\textsuperscript{693} The district court’s interpretation of the term “use” was so narrow it would destroy the purpose of the exclusion.\textsuperscript{694} On the day Brandon died, he was transported in the van, he remained in the van, he died in the van.\textsuperscript{695} The court of appeals ruled that Brandon’s death arose out of the use of the van.\textsuperscript{696} All of the alleged non-automobile related acts of negligence arose of from the use of the van; \textit{i.e.}, Young’s failure to take a roll call, count heads, or ascertain whether all children had been

\begin{footnotesize}
\textsuperscript{690} Watts, 811 S.W.2d at 887. \textit{Capitol Indem.}, 24 Fed.Appx. at 440.
\textsuperscript{691} Watts, 811 S.W.2d at 888. \textit{Capitol Indem.}, 24 Fed.Appx. at 441.
\textsuperscript{692} Watts, 811 S.W.2d at 888.
\textsuperscript{693} \textit{Capitol Indem.}, 24 Fed.Appx. at 442.
\textsuperscript{694} \textit{Capitol Indem.}, 24 Fed.Appx. at 442.
\textsuperscript{695} \textit{Capitol Indem.}, 24 Fed.Appx. at 442.
\textsuperscript{696} \textit{Capitol Indem.}, 24 Fed.Appx. at 442.
\end{footnotesize}
removed from the van, all related to his failure to remove Brandon from the instrumentality of his death.\textsuperscript{697} None of the non-automobile related acts of negligence were an efficient proximate cause of Brandon’s death because none of the non-automobile related acts of negligence would have caused Brandon’s death without the use of the van being an integral factor.\textsuperscript{698}

In \textit{Travelers Insurance Co. v. Aetna Casualty & Surety Co.},\textsuperscript{699} Travelers issued homeowner's coverage to Ray and Ann Muehlman which excluded coverage for injury or damage arising out of “ownership, maintenance or use” of an automobile.\textsuperscript{700} Aetna issued an automobile policy to the Muehlmans.\textsuperscript{701} Their son, Raymond, accidentally shot his friend, Robert Rapai, on a hunting trip when Raymond placed his shotgun into the automobile through a rear window.\textsuperscript{702} Travelers agreed to defend under the homeowner's policy and then sued Aetna, the automobile insurer.\textsuperscript{703}

The trial court held that Aetna’s automobile policy provided coverage and that Travelers’ homeowner’s policy excluded coverage.\textsuperscript{704} Aetna argued that Rapai’s injury did not result from the use of the automobile as a means of transportation.\textsuperscript{705} The appellate court found that the requisite causal connection between use of the automobile and injury because the automobile was “being used as a receptacle for the gun” and the injury flowed from that use of the

\textsuperscript{697} \textit{Capitol Indem.}, 24 Fed.Appx. at 442.

\textsuperscript{698} \textit{Tomlinson v. Bituminous Cas. Corp.}, 117 F.3d 1421 (6th Cir. 1997).

\textsuperscript{699} 491 S.W.2d 363 (Tenn. 1973).

\textsuperscript{700} \textit{Travelers}, 491 S.W.2d at 364.

\textsuperscript{701} \textit{Travelers}, 491 S.W.2d at 364.

\textsuperscript{702} \textit{Travelers}, 491 S.W.2d at 364.

\textsuperscript{703} \textit{Travelers}, 491 S.W.2d at 364.

\textsuperscript{704} \textit{Travelers}, 491 S.W.2d at 364.

\textsuperscript{705} \textit{Travelers}, 491 S.W.2d at 364.
automobile as a place to store the weapon. The court noted that a “mere connection” with the
loading of the vehicle was not sufficient to destroy coverage. The court also ruled that
Travelers’ homeowner’s policy provided coverage because the efficient proximate cause of the
loss was a defect in the shotgun which caused it to accidentally discharge.

Non-Automobile Related Intervening Cause

In *Truck Insurance Exchange v. Webb*, Reliable Foods leased two commercial
buildings from Earl and Valah Webb. Robert Smith, a Reliable Foods employee, was
instructed to dispose of some used cardboard boxes. Smith, driving a pick-up truck owned by
Reliable Foods, exited the work site but remained close to the leased buildings. Smith unloaded
the boxes from the truck and placed them on the ground, set them on fire, and drove back to
work. The burning boxes set fire to the leased buildings, destroying them. Truck’s CGL
policy issued to Reliable Foods contained an automobile endorsement which extended coverage
to include damage arising out of the ownership, maintenance or use of any automobile.

The Webbs sued Reliable Foods to recover damages for the destruction of their buildings
leased to Reliable Foods. Northwestern Mutual Insurance Company, the Webbs’ property
insurer, also sued Reliable Foods and Smith on a subrogated claim. Truck sued the Webbs
and Northwestern to determine the extent, if any, Truck was obligated to pay damages under its

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706 *Travelers*, 491 S.W.2d at 366.
707 *Travelers*, 491 S.W.2d at 367-68.
709 *Webb*, 256 Cal.App.2d at 142, 63 Cal.Rptr. at 792.
710 *Webb*, 256 Cal.App.2d at 142, 63 Cal.Rptr. at 792.
711 *Webb*, 256 Cal.App.2d at 142, 63 Cal.Rptr. at 792.
712 *Webb*, 256 Cal.App.2d at 142, 63 Cal.Rptr. at 792.
713 *Webb*, 256 Cal.App.2d at 142, 63 Cal.Rptr. at 792.
714 *Webb*, 256 Cal.App.2d at 142, 63 Cal.Rptr. at 792.
The issue in Webb was whether a policy which covers damage arising out of the use of an automobile would apply to the destruction of buildings by a fire that originated from cardboard boxes that were ignited after being unloaded from an insured vehicle. Acknowledging that use of an automobile includes loading and unloading of a vehicle, the trial court ruled that Truck’s CGL policy did not cover destruction of the buildings because damage to property occupied or rented by the insured (Reliable Foods) was excluded.

The Webbs challenged this ruling. However, the Webbs did not appeal the trial court’s determination that the “occupied property” exclusion applied, they argued instead that Smith was an additional insured under Truck’s policy and the insurer could not invoke the property damage exclusion for occupied or leased premises because Smith was neither a lessee nor an occupier of the buildings. Stipulated facts established as a matter of law that Smith’s liability for damage to the Webb’s buildings fell within the scope of coverage for property damage “arising out of the use of any automobile.” In order to trigger coverage, all the Webbs had to prove was a causal connection between use of the Reliable Foods truck and damage to the Webbs’ property. The court of appeals reasoned that:

The automobile is so much a part of American life that there are few activities in which the “use of an automobile” does not play a part somewhere in the chain of events. Clearly the parties to an automobile liability policy do not contemplate a general liability insurance contract. The test for determining the existence of the requisite causal connection has been expressed in varying language. It has been stated that the resulting injury must be a “natural and reasonable incident or consequence of the use of the [automobile] for the purposes shown by the declarations, though not foreseen or expected. . . .” and that the injury cannot be

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715 Webb, 256 Cal.App.2d at 142, 63 Cal.Rptr. at 792.
716 Webb, 256 Cal.App.2d at 142, 63 Cal.Rptr. at 792.
717 Webb, 256 Cal.App.2d at 142, 63 Cal.Rptr. at 793.
718 Webb, 256 Cal.App.2d at 143, 63 Cal.Rptr. at 793.
719 Webb, 256 Cal.App.2d at 143, 63 Cal.Rptr. at 793.
720 Webb, 256 Cal.App.2d at 145, 63 Cal.Rptr. at 793.
said to arise out of the use of an automobile “if it was directly caused by some independent act, or intervening cause wholly disassociated from, independent of and remote from the use of the [automobile].”

The so-called “Illinois test” for determining the existence of causal a relationship requires ownership, maintenance or use of an automobile to be the efficient and predominating cause of loss of bodily injury or property damage. The Illinois rule is similar to the test created to determine cause in fact in tort cases, namely, whether the alleged tortfeasor’s conduct was a “material element and a substantial factor” in bringing about a loss. Although use of an automobile played a part in the chain of events, that use was not the efficient proximate cause of loss in this case. Smith’s use of the truck to transport the boxes to the place where he burned them was unrelated to his actual setting the boxes on fire and leaving them to burn, independent acts that were the efficient proximate cause of loss.

Independent Concurrent Causes

In Sabella v. Wisler, the California Supreme Court addressed how to determine coverage under a property insurance policy when an excluded peril has combined with a covered peril to cause loss. The court ruled that the focus in such cases should be on the peril which sets in motion other perils which create the chain of events that cause a loss. If that moving or

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723 Webb, 256 Cal.App.2d at 145-46, 63 Cal.Rptr. at 794.
724 Webb, 256 Cal.App.2d at 148, 63 Cal.Rptr. at 796.
725 Webb, 256 Cal.App.2d at 148, 63 Cal.Rptr. at 796.
727 In Sabella, a homebuilder’s negligent installation of a sewer line, a covered risk, caused water to flow into the ground under the insured’s home. The leaking water caused the earth to settle, an excluded peril, which caused foundation cracks.
“efficient proximate” cause is a covered peril, the loss is covered, even though an excluded peril combines to cause the loss.

*Sabella* did not address how courts should decide coverage issues when a loss is caused by two independent causes. However, that issue was confronted by the court in *State Farm Mutual Automobile Insurance Co. v. Partridge*, involving coverage under two liability insurance policies, a homeowner’s policy and an automobile policy. Factually, *Partridge* did not lend itself to the court’s earlier *Sabella* analysis because no single event was the efficient proximate cause of loss.

Following *Partridge*, concern arose over the use of concurrent causation to decide coverage under property insurance as an alternative to using the rules of efficient proximate cause. The problem was this: if negligent design, construction, or maintenance are covered perils under an all risk policy, as the *Sabella* court held, and this third-party negligence operates concurrently with an excluded peril, under *Sabella/Partridge*, a loss clearly excluded would be covered. In order to avoid policy exclusions under property insurance, an insured would need only assert that third-party negligence combined to cause the loss.

Sixteen years passed before the California Supreme Court judicially recognized that analyzing causation under a first-party policy is different from analyzing causation under a liability insurance policy. A first-party policy is a contract in which the insurer agrees to

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indemnify an insured when insured property suffers a covered loss.\textsuperscript{733} Coverage under a first-party policy is commonly provided by reference to causation, \textit{i.e.}, a “loss caused by” certain enumerated perils.\textsuperscript{734} A peril is a fortuitous, active, physical force, such as lightning, wind, and explosion, which brings about loss.\textsuperscript{735} Coverage determinations under a first-party policy initially focus on whether loss was caused by an included or excluded fortuitous peril.\textsuperscript{736} The differences between first-party and liability insurance are critical to resolving questions of concurrent causation. A property loss is more likely to involve the inter-play of more than one peril than liability insurance claims.\textsuperscript{737} So long as one peril falls within the insuring agreements of a first-party policy, either because the peril is specifically insured, as in a “named perils” policy, or not specifically excluded, as in an “all risks” policy, disputes over coverage can arise.\textsuperscript{738} In many jurisdictions where two or more perils contribute to cause a loss, first-party coverage determinations depend on which peril was the prime, moving or efficient proximate cause of loss.\textsuperscript{739} 

Coverage determinations under a liability insurance policy, on the other hand, draw on traditional tort concepts of duty, fault, and proximate cause.\textsuperscript{740} A liability analysis is therefore substantially different from an analysis of a coverage issue under a first-party policy.\textsuperscript{741} A first-party policy draws on the relationship between perils that are either covered or excluded by

\textsuperscript{734} Michael E. Bragg, 20 \textit{FORUM} at 386-87.
\textsuperscript{735} Michael E. Bragg, 20 \textit{FORUM} at 386-87.
\textsuperscript{736} \textit{Chu}, 224 Cal.App.3d at 94, 274 Cal.Rptr. at 25.
\textsuperscript{737} Michael E. Bragg, 20 \textit{FORUM} at 386-87.
\textsuperscript{738} Michael E. Bragg, 20 \textit{FORUM} at 386-87.
\textsuperscript{739} Michael E. Bragg, 20 \textit{FORUM} at 386-87.
\textsuperscript{741} Michael E. Bragg, 20 \textit{FORUM} at 386-87.
A first-party insurer is generally not concerned with establishing negligence or otherwise assessing tort liability. On the other hand, by insuring for personal liability and agreeing to indemnify an insured for his or her own negligence, a liability insurer agrees to cover a broader spectrum of risks.

In *Partridge*, Vanida Neilson sued Wayne Partridge after he accidentally shot Neilson while she was riding in his automobile. Neilson was paralyzed as a result of her injury. State Farm Mutual Automobile Insurance Company insured Partridge’s Ford Bronco. State Farm Fire and Casualty Company insured Partridge under a homeowner’s policy. State Farm Mutual conceded that Neilson’s bodily injury was covered under the automobile policy. State Farm Fire, however, disputed coverage under the homeowner’s policy because that policy, on its face, excluded coverage for injury arising out of the use of a motor vehicle. Efficient proximate cause, as adopted by the California Supreme Court in *Sabella v. Wisler*, did not apply here because Partridge’s separate acts of negligence were independent of each other.

State Farm Fire argued that because Partridge’s use of an automobile played a role in the accident that occurred, Neilson’s injuries arose out of the use of an automobile within the meaning of the automobile exclusion in the homeowner’s policy, and therefore only the automobile policy applied. Partridge claimed that he committed two independent acts of negligence, (1) filing the trigger mechanism of his handgun to allow the gun to fire with less

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742 Michael E. Bragg, 20 FORUM at 386-87.
746 *Partridge*, 10 Cal.3d at 99, 514 P.2d at 126, 109 Cal.Rptr. at 814.
trigger pressure, and (2) his negligent offroad driving, which were concurrent proximate causes of Neilson’s paralysis for which both policies provided coverage.\textsuperscript{747}

Coverage was not based on the fact that Partridge owed and operated his automobile or that he was the named insured under two different liability insurance policies.\textsuperscript{748} The determinative factor in deciding there was coverage under both policies was Partridge’s commission of two separate and independent acts of negligence, and that neither negligent act produce any effect on the other. Partridge’s prior negligence in modifying the trigger mechanism on his pistol was entirely disconnected from his more immediate act of negligence to the injury, the manner in which he operated his automobile.\textsuperscript{749}

State Farm Fire claimed the automobile exclusion in its homeowner’s policy precluded coverage because the court had previously determined that the accident “arose out of the use” of Partridge’s automobile for the purpose of determining coverage under the automobile policy.\textsuperscript{750} State Farm Fire, emphasized the fact that the automobile exclusion in the homeowner’s policy was nearly identical to the language of the insuring agreements of the automobile policy and that coverage under the two policies were intended to be mutually exclusive, arguing there could be no overlapping of coverage under the two policies.\textsuperscript{751} The California Supreme Court pointed out that the prior determination that Neilson’s bodily injury arose out of Partridge’s use of an automobile was solely for the purpose of satisfying the insuring agreements of the automobile policy and had no bearing on whether her claim fell within the automobile exclusion of the

\textsuperscript{747} Partridge, 10 Cal.3d at 99, 514 P.2d at 126, 109 Cal.Rptr. at 814.

\textsuperscript{748} Partridge, 10 Cal.3d at 100, 514 P.2d at 127, 109 Cal.Rptr. at 815.

\textsuperscript{749} Partridge, 10 Cal.3d at 100, 514 P.2d at 127, 109 Cal.Rptr. at 815.

\textsuperscript{750} Partridge, 10 Cal.3d at 101, 514 P.2d at 128, 109 Cal.Rptr. at 816.

\textsuperscript{751} The point State Farm was making is known in the insurance industry as dovetailing. Partridge, 10 Cal.3d at 101, 514 P.2d at 128, 109 Cal. at 816.
homeowner’s policy. While the meaning of the phrase “use of an automobile” depends on the circumstances, the overriding goal of the courts is to interpret the phrase to give, but never take away, coverage for use of an automobile. Courts must not shy away from a proper construction of this phrase just because that interpretation may result in overlap coverages under both an automobile policy and a homeowner’s or CGL policy.

Use of Partridge’s automobile was not the sole cause of Neilson’s injury. It was just one of two joint causes of the accident. The court offered this hypothetical to explain further its conclusion that when separate and independent acts of negligence constitute a concurrent proximate cause, the insurer is liable so long as one act of negligence is covered by the policy:

If, after negligently modifying the gun, Partridge had lent it to a friend who had then driven his own insured car negligently, resulting in the firing of the gun and injuring of a passenger, both Partridge and his friend under traditional joint tortfeasor principles would be liable for the injury. In such circumstances, Partridge’s personal liability would surely be covered by his homeowner’s policy, and his friend’s liability would be covered by automobile insurance. When viewed from this perspective, it can be seen that State Farm is presently attempting to escape liability under the homeowner’s policy simply because, in the instant case, both negligent acts happened to have been committed by a single tortfeasor. In our view, this coincidence cannot defeat the insurer’s obligation to indemnify the insured for liability arising from non-automobile risks.

Whenever a question arises as to whether either of two acts of negligence can be properly characterized as the prime, moving or efficient proximate cause of loss, coverage under an automobile policy and a homeowner’s policy are equally available to an insured so long as the

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752 Partridge, 10 Cal.3d at 101, 514 P.2d at 128, 109 Cal.Rptr. at 816.
753 Partridge, 10 Cal.3d at 102, 514 P.2d at 129, 109 Cal.Rptr. at 817.
754 Partridge, 10 Cal.3d at 102, 514 P.2d at 128-29, 109 Cal.Rptr. at 816-17. The court cited to a law review article authored by Asher Marcus. Asher Marcus, Overlapping Liability Insurance, 16 DEF. L.J. 549, 556 (1967).
755 Partridge, 10 Cal.3d at 102, 514 P.2d at 129, 109 Cal.Rptr. at 817.
756 Partridge, 10 Cal.3d at 103, 514 P.2d at 129, 109 Cal.Rptr. at 817.
covered acts of negligence constitute a concurrent proximate cause of injury or damage.\textsuperscript{757} By purchasing two separate insurance policies, Partridge clearly expressed his intent to fully cover himself for different types of liability arising from a variety of conduct.\textsuperscript{758} State Farm Fire agreed to protect Partridge against liability arising generally from non-automobile-related acts of negligence and to indemnify him for injury or damage arising out of covered automobile-related events.\textsuperscript{759} Neilson’s injury, and Partridge’s liability for that injury, resulted from both automobile-related and non-automobile-related acts of negligence.\textsuperscript{760} The court properly concluded that coverage was available under both the automobile policy and the homeowner’s policy.\textsuperscript{761}

**Non-Automobile Related Cause of Loss - Too Remote**

In *Farmers Insurance Exchange v. Reed*,\textsuperscript{762} the Reeds were husband and wife.\textsuperscript{763} Mrs. Reed was an episodic alcoholic.\textsuperscript{764} One day after Mr. Reed had arrived home from work he learned that his wife had driven one of their automobiles to a local bar and had become intoxicated.\textsuperscript{765} Mr. Reed went to the bar and, after confronting his wife, took the car keys away from her and left her at the bar. Later, Mrs. Reed chose to walk home.\textsuperscript{766} While walking home, she was struck by an automobile driven by Charles Schultz.\textsuperscript{767}

\textsuperscript{757} *Partridge*, 10 Cal.3d at 104-05, 514 P.2d at 130, 109 Cal.Rptr. at 818.
\textsuperscript{758} *Partridge*, 10 Cal.3d at 106, 514 P.2d at 131, 109 Cal.Rptr. at 819.
\textsuperscript{759} *Partridge*, 10 Cal.3d at 106, 514 P.2d at 131, 109 Cal.Rptr. at 819.
\textsuperscript{760} *Partridge*, 10 Cal.3d at 106, 514 P.2d at 131, 109 Cal.Rptr. at 819.
\textsuperscript{761} *Partridge*, 10 Cal.3d at 106, 514 P.2d at 131, 109 Cal.Rptr. at 819.
\textsuperscript{762} 200 Cal.App.3d 1230, 248 Cal.Rptr. 11 (1988).
\textsuperscript{763} *Reed*, 200 Cal.App.3d at 1232, 248 Cal.Rptr. at 12.
\textsuperscript{764} *Reed*, 200 Cal.App.3d at 1232, 248 Cal.Rptr. at 12.
\textsuperscript{765} *Reed*, 200 Cal.App.3d at 1232, 248 Cal.Rptr. at 12.
\textsuperscript{766} *Reed*, 200 Cal.App.3d at 1232, 248 Cal.Rptr. at 12.
\textsuperscript{767} *Reed*, 200 Cal.App.3d at 1232, 248 Cal.Rptr. at 12.
Mrs. Reed sued Schultz, the bar where she had become intoxicated, and her husband, claiming he negligently failed to provide her with transportation home from the bar and that his negligence was a concurrent proximate cause of her injuries. When Mr. Reed asked Farmers to defend and indemnify him, Farmers filed this action for declaratory relief. The trial court ruled Mrs. Reed’s injuries did not arise out of ownership, maintenance or use of the Reeds’ automobile, and Farmers neither owed Mr. Reed a defense nor any obligation to indemnify him.

The court of appeals considered the word “use” in its most comprehensive sense, as requiring a causal connection between use of the Reeds’ automobile and Mrs. Reed’s injury beyond any “but for” causal link. Use of the insured automobile had to be the predominant cause of the injuries suffered by Mrs. Reed. Injury that results from an act which is independent of and remote from the use of an insured automobile, does not satisfy the requisite causal connection. When Mr. Reed took the car keys away from his wife, he created one link in a chain of events which culminated in her subsequent injury. However, that single act fell well short of creating the required causal connection between her injury and use of a covered automobile. The decision to walk home, in connection with the independent act of negligence the driver who struck her, broke any causal connection between her husband’s use of an automobile.

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768 Reed, 200 Cal.App.3d at 1232, 248 Cal.Rptr. at 12.
769 Reed, 200 Cal.App.3d at 1232, 248 Cal.Rptr. at 12.
770 Reed, 200 Cal.App.3d at 1232, 248 Cal.Rptr. at 12.
771 Reed, 200 Cal.App.3d at 1232, 248 Cal.Rptr. at 12.
772 Reed, 200 Cal.App.3d at 1233, 248 Cal.Rptr. at 13.
774 Reed, 200 Cal.App.3d at 1233, 248 Cal.Rptr. at 13.
775 Reed, 200 Cal.App.3d at 1233, 248 Cal.Rptr. at 13.
automobile and the injury. 776 Certainly, Mrs. Reed could sue her husband for failing to arrange for her safe transportation home but that negligent failure did not involve use of an insured automobile. 777

In Perry v. Chipouras, 778 George Chipouras bought and sold used cardboard boxes. 779 After a day of collecting boxes, Chipouras parked his truck in front of his place of business in order to unload. 780 Some boxes contained short loops of rope. 781 Chipouras removed the boxes from the truck and placed them in stacks on the sidewalk, then carried the stacks of boxes into his cellar. 782 In the process of unloading boxes from his truck and carrying them to his cellar, some of the loops of rope dropped onto the sidewalk. 783 Esther Perry was injured when she tripped on one of those loops of rope. 784

The Supreme Judicial Court of Massachusetts ruled that the presence of rope on the sidewalk, even though Chipouras dropped that rope while unloading his truck, was too remote from operation and use of his truck. 785 Because coverage depended on the causal connection between the injury and the insured’s loading and unloading activities, the court had to decide whether Chipouras’s unloading of the boxes and loops of rope from his truck, was too remote in

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776 Reed, 200 Cal.App.3d at 1233, 248 Cal.Rptr. at 13.
777 Reed, 200 Cal.App.3d at 1232, 248 Cal.Rptr. at 12.
779 Chipouras, 319 Mass. at 474, 66 N.E.2d at 361.
780 Chipouras, 319 Mass. at 474, 66 N.E.2d at 361.
781 Chipouras, 319 Mass. at 474, 66 N.E.2d at 361.
783 Chipouras, 319 Mass. at 474, 66 N.E.2d at 362.
784 Chipouras, 319 Mass. at 474, 66 N.E.2d at 362.
785 Chipouras, 319 Mass. at 474, 66 N.E.2d at 362.
time or place to be a legal cause of her injury.\footnote{Chipouras, 319 Mass. at 474, 66 N.E.2d at 362.} The court drew the line at the point in time when the particular loop of rope that Perry tripped on came to rest on the sidewalk.\footnote{Chipouras, 319 Mass. at 474, 66 N.E.2d at 362.}

**Causation Issues In Automobile Usage**

Two causation issues are related to the causal phrase “arising out of the ownership, maintenance or use of an automobile,” depending on whether the phrase is in the insuring agreements or in a policy exclusion. The first issue addresses the relationship between injury or damage, on one hand, and ownership, maintenance or use of an automobile on the other. The applicable causal standard depends on whether the insured seeks coverage under an automobile policy or an insurer denies coverage based on an automobile exclusion. When the causal phrase “arising out of the use of an automobile” is in the insuring agreements of an automobile policy, a court should interpret this phrase broadly to provide the insured the greatest possible protection. Thus, the causal phrase affords coverage for injury or damage bearing almost any causal relationship to use of an automobile.\footnote{Shawn McCammon, *Just What Does “Arising out of the Operation, Use or Maintenance” Actually Mean in Automobile Insurance Agreements?*, 28 W. St. U.L. Rev. 177, 182 (2001).  See Eichelberger v. Warner, 290 Pa.Super. 269, 272-73, 434 A.2d 747, 749 (1981).} Bodily injury or property damage arises out of use of an automobile when some physical part of the automobile contributes to the loss or when the loss occurs because of an act connected with the operation of an automobile.\footnote{Schmidt v. Utilities Ins. Co., 353 Mo. 213, 182 S.W.2d 181, 183, 154 A.L.R. 1088 (Mo. 1944).} The relationship between use of an automobile and injury or damage need not approach the equivalent of proximate cause, however, because the causal phrase “arising out of” does not mean proximate cause in any strict legal sense. “Arising out of” does not mean that an insured automobile exerted physical force on an instrumentality which was the immediate cause of loss. Almost any
causal connection or relationship will suffice. Although bodily injury or property damage need not be the proximate result of the use of an automobile, causation cannot be extended to some event which is distinctly remote. The question to be answered is whether bodily injury or property damage “originated from,” “had its origin in,” “grew out of,” or “flowed from” the use of the automobile. When bodily injury or property damage results entirely from an act of negligence which is in no way related to the use of an automobile, the fact that the automobile is the place where the bodily injury or property damage occurred may be sufficient to establish coverage.

For purposes of the second causation issue, pertinent to an automobile exclusion, the causal phrase “arising out of” the use of an automobile, is interpreted narrowly against the insurer, and excludes coverage for bodily injury or property damage proximately caused by automobile-related conduct.

Texas law on the first causation issue is in a state of confusion. A federal court stated in *Nutmeg Insurance Co. v. Clear Lake City Water Authority*, that the phrase “arising out of,” when used in an automobile exclusion, must be broadly construed, a claim needing only to have an incidental relationship to described conduct in order for the exclusion to apply. This

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statement of the law is the standard most courts apply to determine a causal relationship between bodily injury or property damage and ownership, maintenance or use of an automobile under an automobile policy. Some jurisdictions hold the causal phrase “arising out of” as a general and comprehensive term effecting broad coverage, however, when construing the insuring agreements of an automobile policy.796 The court in Nutmeg, appears to have mistakenly cited Red Ball Motor Freight v. Employers Mutual Liability Insurance Co.,797 wherein the phrase under consideration was part of the insuring agreements of an automobile policy. The court in Nutmeg, construed an exclusion which precluded coverage for “Advertising Injury” arising out of a [b]reach of contract.”798 However, when the phrase “arising out of” is used in an automobile exclusion a court reads the exclusion strictly against the insurer and will find bodily injury or property damage excluded from coverage if injury or damage is proximately caused by use of an automobile.799 The causal connection required to trigger coverage under an automobile policy is not the same as the connection required to trigger an automobile exclusion.800

**Proximate Cause**

In Eichelberger v. Warner,801 Federal Kemper insured Dava Rice under an automobile policy, and Valley Mutual insured Rice under a homeowner’s policy.802 Rice and her sister,
Linda Junk, were traveling in Pennsylvania when Rice’s vehicle ran out of gas. Rice parked the car as far on the right side of the road as possible, but the berm was not wide enough and part of the vehicle remained on the highway. Rice and Junk walked to a gas station for a can of gas, and two men stopped to help. While the men poured gasoline into the car, Rice stood slightly on the highway behind her automobile with her back to traffic. An automobile driven by Vivian Warner approached Rice’s car, and when Warner was a few feet away from Rice’s automobile, Rice suddenly stepped backwards in front of Warner’s automobile. Rice was killed and the two men fueling the Rice automobile were badly injured.

One of the injured men sued Warner, and Warner joined Rice as a defendant. The jury found Warner and Rice were both negligent. Warner paid the judgment and then sued Rice’s insurers, Federal Kemper and Valley Mutual. When Warner moved for summary judgment, the court granted judgment against Federal Kemper, the automobile insurer, but denied her motion against Valley Mutual, the homeowner’s insurer.

The court rejected Federal Kemper’s contention that its automobile policy did not cover any negligent conduct on the part of Rice because the accident was caused by bodily movement

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803 Warner, 290 Pa.Super. at 271, 434 A.2d at 748.
804 Warner, 290 Pa.Super. at 272, 434 A.2d at 749.
806 Warner, 290 Pa.Super. at 272, 434 A.2d at 749.
807 Warner, 290 Pa.Super. at 272, 434 A.2d at 749.
808 Warner, 290 Pa.Super. at 272, 434 A.2d at 749.
809 Warner, 290 Pa.Super. at 271, 434 A.2d at 748-49.
810 Warner, 290 Pa.Super. at 271, 434 A.2d at 748.
811 Warner, 290 Pa.Super. at 271, 434 A.2d at 748.
812 Warner, 290 Pa.Super. at 271, 434 A.2d at 748.
unrelated to ownership, maintenance or use of her automobile.813 Pennsylvania law provides that
the phrase “arising out of,” as used in automobile policy insuring agreements, means “causally
connected with” and not “proximately caused by.”814 On this point, the Pennsylvania Supreme
Court stated in Manufacturers Casualty Insurance Co. v. Goodville Mutual Casualty Co.,815 that:

When the provisions of an insurance policy are vague or ambiguous, they must be
construed strictly against the insurer and liberally in favor of the insured. Had the
insurer desired to limit its liability to accidents with such a close causal
connection to the ownership, maintenance or use [of the motor vehicle] . . . as to
be encompassed within the scope of proximate causation, it could have and
should have so stated in its policy. Construed strictly against the insurer, ‘arising
out of’ means causally connected with, not proximately caused by. ‘But for’
causation, i.e., a cause and result relationship, is enough to satisfy this provision
of the policy.816

The Pennsylvania Supreme Court held that the term “maintenance,” as used in the context of the
insuring agreements of an automobile policy, includes all acts falling within the ordinary scope
and meaning of that word.817 Federal Kemper argued that there was no causal connection
between Rice’s negligence in stepping into the path of an oncoming automobile and maintenance
of her automobile.818 The court rejected this contention on grounds that a cause and result
relationship satisfies the “arising out of” provision of the insuring agreements of an automobile
policy.819 Had Rice’s automobile not ran out of fuel, Rice would not have been standing on the
highway waiting while others handled the refueling.820 Rice’s negligence in stepping in front of

818 Warner, 290 Pa.Super. at 273, 434 A.2d at 750.
819 Warner, 290 Pa.Super. at 273, 434 A.2d at 750.
820 Warner, 290 Pa.Super. at 273, 434 A.2d at 750.
an oncoming automobile was not so unrelated from the maintenance/refueling as to be causally remote.\textsuperscript{821}

The Valley Mutual homeowner’s policy excluded coverage for bodily injury arising out of the ownership, maintenance, operation, use of any motor vehicle owned or operated by any insured.\textsuperscript{822} Valley Mutual claimed the automobile exclusion applied. Warner asserted that this exclusion, when construed strictly against Valley Mutual, did not apply to Rice’s act of negligently stepping into the path of Warner’s vehicle.\textsuperscript{823} The court agreed, noting that coverage under a homeowner’s policy and an automobile policy are not mutually exclusive.\textsuperscript{824} The court explained that some courts confuse the relationship between automobile coverage and an automobile exclusion in a homeowner’s policy. These courts have focused on the automobile exclusion rather than on the insuring agreements of an automobile policy and a homeowner’s policy. The insuring agreements of these policies are not the same. An automobile insurer agrees to pay all damages arising out of use of an automobile, whereas a homeowner’s insurer agrees to pay all damages arising out of an occurrence. The automobile exclusion in a homeowner’s policy suggests that if bodily injury or property damage arises out of the use of an automobile away from the insured premises, coverage is excluded. However, such a view ignores the fact that the insuring agreements of a homeowner’s policy focuses on an “occurrence” and the insuring agreements of an automobile policy focuses on the automobile. When use of an automobile is incidental to the events resulting in bodily injury or property damage, coverage should not be excluded under a homeowner’s policy. A court must give a

\textsuperscript{821} Warner, 290 Pa.Super. at 273, 434 A.2d at 750.
\textsuperscript{822} Warner, 290 Pa.Super. at 275, 434 A.2d at 750.
\textsuperscript{823} Warner, 290 Pa.Super. at 273, 434 A.2d at 750.
\textsuperscript{824} Warner, 290 Pa.Super. at 273, 434 A.2d at 750.
broad construction to the insuring agreements of an automobile policy, but strictly construe an automobile exclusion in a homeowner’s policy. Thus, coverage may exist under a homeowner’s policy, even though there is no causal connection between use of the vehicle and bodily injury or property damage. Coverage under a homeowner’s policy and an automobile policy are not mutually exclusive and coverage may be found under both policies. Warner claimed that even though Rice’s negligence was casually connected to maintenance of her automobile for purposes of the insuring agreements of her automobile policy, for purposes of the automobile exclusion in her homeowner’s policy, the proximate cause of the accident was her non-automobile related negligence as a pedestrian.

The Warner court, cited State Farm Mutual Automobile Insurance Co. v. Partridge, and that court’s conclusion that:

In view of the [different canons of construction] the fact that an accident has been found to ‘arise out of the use’ of a vehicle for purposes of an automobile policy is not necessarily determinative of the question of whether the same accident falls within the similarly worked exclusionary clause of a homeowner’s policy.

The Warner court held that:

[F]or purposes of an exclusionary clause, when the words ‘arising out of’ the use of an automobile are read strictly against the insurer, then it must be concluded that this clause acts to exclude only those injuries which are proximately caused by the automobile. This interpretation is consistent with the general rule that

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826 Warner, 290 Pa.Super. at 273, 434 A.2d at 751.

827 10 Cal.3d 94, 102, 514 P.2d 123, 128, 109 Cal.Rptr. 811, 816 (1973). Warner, 290 Pa.Super. at 276, 434 A.2d at 751. In Partridge, State Farm Mutual conceded that if the insured and the tort plaintiff had been jogging together on a street and his pistol accidentally discharged, the homeowner’s policy would have provided coverage. The same logic applied in Warner. Had Dava been walking on the side of the road and negligently stepped in front of an oncoming automobile, the homeowner’s policy would apply.

828 Partridge, 10 Cal.3d at 102, 514 P.2d at 128, 109 Cal.Rptr. at 816. Warner, 290 Pa.Super. at 277, 434 A.2d at 751.
insurance policies are read to effect the policy's dominant purpose of indemnity or payment to the insured. 829

Efficient Proximate Cause and Loading/Unloading Motor Vehicles

An insurer under an automobile policy agrees to pay “all sums” an insured must legally pay as damages because of bodily injury or property damage caused by an accident and resulting from ownership, maintenance or use of a covered automobile. 830 “Use” of a covered automobile includes loading and unloading. 831 Courts apply two tests to determine the precise line at which loading begins or unloading ends so as to delimit with understandable certainty the nature of the liability which is imposed on insureds. These tests are referred to as the “coming to rest test” (referred to as the “narrow” construction test), and the “complete operation test” (referred to as the “broader” construction test). 832 Under the coming to rest test, bodily injury or property damage must occur during the actual removal or lifting of cargo from the vehicle or the placement of cargo on the vehicle. 833 Courts that apply the complete operation test, find coverage for bodily injury or property damage which occur while goods are being transported between the vehicle and the place from or to which they are being delivered. 834 Once a court determines that bodily injury or property damage occurred during loading or unloading of an automobile, the court then considers the sufficiency of the causal relationship between actions

829 Warner, 290 Pa.Super. at 278, 434 A.2d at 752.
830 “[T]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death therefrom, hereinafter called ‘bodily injury’; sustained by any person; arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile...”
833 Cont’l Cas., 403 F.2d at 318.
taken to load or unload a motor vehicle and the resulting bodily injury or property damage. In jurisdictions that apply the coming to rest test, loading or unloading must be the efficient proximate cause of loss. In jurisdictions which apply the complete operations test, only the most minimal “but for” causal relationship is required. Because most jurisdictions now apply the complete operations test, contemporary cases rarely if ever discuss efficient proximate cause when construing the loading/unloading clause.

The 1929 case of Panhandle Steel Products Co. v. Fidelity Union Casualty Co., shows how the court applied the efficient proximate cause test to determine that use of a truck was excluded under a CGL policy. Panhandle Steel operated an iron works and sold structural iron and steel to be used in building construction. Panhandle sold and delivered some channel iron to Taylor Brothers. While offloading an 18-foot long iron beam from Panhandle’s truck, Ida Godley was struck by the beam. Godley sued Panhandle and the company paid $1,500 to her to settle her claim.

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837 7 AM.JUR.2d, Automobile Insurance §301 (1997). The topic of causation was addressed in an annotation in 1945. K. A. Drechsler, Annot., Risks Within “Loading and Unloading” Clause of Automobile Liability Insurance Policy, 160 A.L.R. 1251 (1945). This annotation was supplemented at 95 A.L.R.2d 1122 in 1964. This supplementation continued to address the topic of causation. A second supplementation occurred in 1981. 6 A.L.R.4th 686. The topic of causation was deleted for reasons not specified.


840 Panhandle Steel, 23 S.W.2d at 799.

841 Panhandle Steel, 23 S.W.2d at 800.

842 Panhandle Steel, 23 S.W.2d at 800.

843 Panhandle Steel, 23 S.W.2d at 800.
Fidelity Union insured Panhandle under an automobile policy.\textsuperscript{844} Federal Surety Company insured Panhandle under an early form of general liability insurance. Federal Surety’s policy excluded coverage for bodily injury caused by any motor vehicle “owned, hired, maintained or used” by the insured.\textsuperscript{845} Fidelity Union claimed that its automobile policy did not cover Godley’s bodily injury claim because “use” of the Panhandle truck was not the proximate cause of the accident.\textsuperscript{846} Fidelity Union asserted that the “immediate” cause of Godley’s bodily injury was the negligence of employees of Taylor Brothers who unloaded the truck. Such negligence, while not excluded, was not covered under the insuring agreements of the automobile policy.\textsuperscript{847} In rejecting Fidelity Union’s argument, the court stated that unloading the truck was not an act that was separate and independent from use of the truck.\textsuperscript{848} In fact, unloading the truck was an incidental and necessary step in delivering the iron beam, which followed in natural sequence the use of the truck.\textsuperscript{849} The court concluded that use of the truck was the efficient proximate cause of Godley’s bodily injury, even though unloading the truck was not the proximate cause of her injuries.\textsuperscript{850}

The insuring agreements of Federal Surety’s general liability policy restricted coverage to bodily injury occurring at locations described in the policy, none of which included the building owned by Taylor Brothers.\textsuperscript{851} The liability policy excluded coverage for bodily injury caused by

\textsuperscript{844} Panhandle Steel, 23 S.W.2d at 800.
\textsuperscript{845} Panhandle Steel, 23 S.W.2d at 802.
\textsuperscript{846} Panhandle Steel, 23 S.W.2d at 801.
\textsuperscript{847} Panhandle Steel, 23 S.W.2d at 801. (Legal liability had to be imposed upon an insured under the policy.).
\textsuperscript{848} Panhandle Steel, 23 S.W.2d at 802.
\textsuperscript{849} Panhandle Steel, 23 S.W.2d at 802.
\textsuperscript{850} Panhandle Steel, 23 S.W.2d at 802.
\textsuperscript{851} Panhandle Steel, 23 S.W.2d at 802.
any vehicle owned, maintained or used by the insured. The court concluded that because unloading the beam, the last link in the chain of events leading to Godley’s injury, was dependent on Panhandle’s prior use of the truck to deliver the beam to Taylor Brothers, the automobile exclusion applied.

The 2006 case of *EMCASCO Insurance Co. v. American International Specialty Line Insurance Co.*,\(^{854}\) shows the modern trend. Jaime Langston drove down a paved country road with her son one day when she skidded on a patch of slick mud, clay, and/or sand.\(^{855}\) Her car swerved off the road and struck a tree, injuring her and killing her son.\(^{856}\)

Wilson-Riley, Inc. operated a sand pit immediately adjacent to the accident site on property owned by SLS Management Corporation.\(^{857}\) EMCASCO insured Wilson-Riley and SLS Management Corporation under a commercial automobile policy.\(^{858}\) American International insured Wilson-Riley and SLS under a CGL policy containing an automobile exclusion.\(^{859}\)

Plaintiffs’ original petition alleged that heavy rains before the accident caused Wilson-Riley’s trucks to track mud onto the roadway, and that this slick mud on the road was the producing cause of the accident.\(^{860}\) The third amended petition alleged that the accident was caused by Wilson-Riley’s ownership, maintenance and use of trucks hauling materials from the

\(^{852}\) *Panhandle Steel*, 23 S.W.2d at 802.

\(^{853}\) *Panhandle Steel*, 23 S.W.2d at 803.

\(^{854}\) 438 F.3d 519 (5th Cir. 2006).

\(^{855}\) *EMCASCO*, 438 F.3d at 521.

\(^{856}\) *EMCASCO*, 438 F.3d at 521.

\(^{857}\) *EMCASCO*, 438 F.3d at 521.

\(^{858}\) *EMCASCO*, 438 F.3d at 521.

\(^{859}\) American International settled the Langstons’ claims against SLS for $200,000.

\(^{860}\) *EMCASCO*, 438 F.3d at 521.
sand pit. The Fourth Amended petition added the claim that Wilson-Riley obstructed the road adjacent to its worksite in violation of Section 42.03 of the Texas Penal Code, and was therefore negligence per se.

EMCASCO settled claims against Wilson-Riley, paying the Langstons $350,000, then sued American International to recover all or part of the settlement money. When the two insurers filed cross-motions for summary judgment, the district court granted American International’s motion, finding that the Langstons’ damages were covered by the automobile policy and that coverage was explicitly excluded by the automobile exclusion in the CGL policy. On appeal, EMCASCO claimed the district court erred in interpreting the automobile exclusion in American International’s policy, arguing that settlement money did not arise out of the use of a motor vehicle, and that the automobile exclusion was ambiguous.

Generally, tort plaintiffs must show a causal relationship between injury or damage and use of an automobile. The Langstons alleged in their third amended petition that the accident resulted from the use of Wilson-Riley’s trucks to haul materials from the sand pit. The court of appeals concluded that these allegations created the requisite minimal causal connection between use of a motor vehicle and the Langstons’ damages. Therefore, EMCASCO was not

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861 *EMCASCO*, 438 F.3d at 524.
862 *EMCASCO*, 438 F.3d at 522.
863 *EMCASCO*, 438 F.3d at 523.
864 *EMCASCO*, 438 F.3d at 523.
865 *EMCASCO*, 438 F.3d at 523.
866 *EMCASCO*, 438 F.3d at 524.
867 *EMCASCO*, 438 F.3d at 524.
entitled to a determination that there was no coverage based on the pleadings alone, and that EMCASCO had a duty to pay defense costs. 868

When Texas courts decide whether an insurer has a duty to indemnify, courts apply the “complete operation” test, under which “the provision for use coverage extends to foreseeable consequences of what was done in connection with the use of the car, ... so long as the act or thing done by the insured’s employee which causes the accident arises out of the use of the insured’s car.” 869 The complete operation test has a two part question: was the insured’s conduct incident to, and connected with the use of a motor vehicle, and did use of a motor vehicle proximately cause bodily injury and/or property damage? 870 With respect to the first question, under an automobile policy, coverage includes negligent acts associated with the loading and unloading of a motor vehicle, and coverage applies to negligent acts which occur during the course of making commercial deliveries. 871 Coverage extends to “the entire process involved in the movement of the articles from the place where insured’s employees find the articles which are to be moved by truck, and continue to the place where the insured’s employees turn the articles over to the party to whom they make delivery.” 872

The court of appeals found that debris tracked by truck tires (and debris falling from truck cargo) are incidental to the use of the vehicle. 873 The court of appeals found that it was

868 EMCASCO, 438 F.3d at 524.
869 EMCASCO, 438 F.3d at 524.
870 EMCASCO, 438 F.3d at 525.
871 EMCASCO, 438 F.3d at 525.
872 EMCASCO, 438 F.3d at 525.
873 EMCASCO, 438 F.3d at 526.
inherent in the transportation of cargo that the cargo may spill or fall unto the road, and tracking debris by tires is incident to the operation of a vehicle on unpaved roads.874

The Langstons’ injuries need not have been caused by the negligent operation of the motor vehicle, but instead by an act incident to its use.875 The accident need not occur at the time of or immediately after trucks tracked mud onto the highway.876 Driving a vehicle need not be the only proximate cause of bodily injury or property damage.

The summary judgment evidence failed to address whether the accident would not have occurred without the tracking of the debris. However, the amount of mud accumulated from the rain alone was sufficient to cause the accident, even if mud had not been tracked by trucks. Rain washing mud onto the paved roadway could have been a separate cause of the accident and was not dependent on trucks tracking mud. Rain washing mud onto the paved road was independent of trucks tracking mud onto the road. The court of appeals concluded that the CGL policy potentially covered the allegations with respect to rain causing mud to accumulate at the accident site. These allegations did not relate to use of trucks, and covered the claims of negligence per se. The CGL policy and the automobile policy were mutually exclusive only with respect to which policy covered mud tracked by truck tires, the only theory of liability at issue with respect to use of motor vehicles.

The non-excluded event of rain washing mud onto the paved roadway, however, was covered by the CGL policy, because that independent act could have caused the injury.877 Under Texas law, when two separate and independent events cause an accident, one excluded by a CGL

874 EMCASCO, 438 F.3d at 526.
875 EMCASCO, 438 F.3d at 526.
876 EMCASCO, 438 F.3d at 526.
877 EMCASCO, 438 F.3d at 528.
policy and one covered by that same policy, coverage is provided despite an automobile exclusion.\textsuperscript{878} The court of appeals ruled that the jury had to decide whether the amount of mud washed by rain was enough by itself to cause an accident.\textsuperscript{879} This genuine issue of material fact caused summary judgment to be improperly granted to the CGL insurer, American International.\textsuperscript{880}

**Automobile Related Cause of Loss - Not Too Remote**

In *Merchants Co. v. Hartford Accident & Indemnity Co.*\textsuperscript{881} Merchants Company was in the business of making truck deliveries to retail customers.\textsuperscript{882} After a Merchants truck slid into a roadside ditch while on a delivery, Merchants’ driver used several large poles to free the truck from the ditch.\textsuperscript{883} When the truck was able to travel again, the truck driver left without removing the poles from the road.\textsuperscript{884} That night, an automobile struck the poles and a passenger, Grubbs, was severely injured.\textsuperscript{885} Grubbs sued Merchants and eventually recovered a judgment.\textsuperscript{886}

Merchants was insured under a CGL policy issued by Hartford, and an automobile policy issued by St. Paul.\textsuperscript{887} The court began its analysis by stating that although coverage under an automobile policy is not limited to negligent acts which occur while a motor vehicle is actually being used or operated, neither does coverage under an automobile policy extend to bodily injury or property damage caused by a negligent act distinctly remote from use of the automobile,

\textsuperscript{878} *EMCASCO*, 438 F.3d at 528.
\textsuperscript{879} *EMCASCO*, 438 F.3d at 528.
\textsuperscript{880} *EMCASCO*, 438 F.3d at 528.
\textsuperscript{881} 187 Miss. 301, 188 So. 571 (1939).
\textsuperscript{882} *Merchants Co.*, 187 Miss. at 306, 188 So. at 571.
\textsuperscript{883} *Merchants Co.*, 187 Miss. at 306, 188 So. at 571.
\textsuperscript{884} *Merchants Co.*, 187 Miss. at 306, 188 So. at 571.
\textsuperscript{885} *Merchants Co.*, 187 Miss. at 306, 188 So. at 571.
\textsuperscript{886} *Merchants Co.*, 187 Miss. at 306, 188 So. at 571.
\textsuperscript{887} *Merchants Co.*, 187 Miss. at 306, 188 So. at 571.
although such a negligent act may fall within the line of causation. When an insured creates a dangerous situation resulting in injury or damage, and the events leading to those damages arose out of or had their origin in use or operation of an automobile, the causal chain has the requisite articulation with use or operation of the motor vehicle.

The use of poles to extricate the Merchants truck from the roadside ditch was clearly part of operating the truck. There were no intervening non-automobile related acts of negligence which directly or substantially broke the causal connection between use of the truck and Grubbs’ bodily injury. When the Merchants driver left the area with the poles still in the road, the driver created a direct and substantial causal connection between use of the truck and the bodily injury later suffered by Grubbs.

In Dougherty v. State Farm Mutual Automobile Insurance Co., Sheryl Dougherty had a number of drinks at a local bar. While driving home in the early morning hours, her car became stuck in a snowdrift. Upon exiting her car, she accidentally hit the automatic door locks and was locked out of her car without her hat and mittens. The wind-chill was approximately forty-five degrees below zero. Because she lived less than a block away, she decided to walk home. She later testified that while walking, she felt frozen and exhausted from the cold. When she entered the parking lot of her apartment complex she discovered it was blocked by

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888 Merchants Co., 187 Miss. at 308, 180 So. at 572.
889 Merchants Co., 187 Miss. at 308, 180 So. at 572.
890 Merchants Co., 187 Miss. at 308, 180 So. at 572.
891 Merchants Co., 187 Miss. at 308, 180 So. at 572.
892 Merchants Co., 187 Miss. at 308, 180 So. at 572.
893 683 N.W.2d 855 (Minn.App. 2004).
894 Dougherty, 683 N.W.2d at 857.
895 Dougherty, 683 N.W.2d at 857.
896 Dougherty, 683 N.W.2d at 857.
snow.  

She crawled behind a garage out of the wind to rest, and she either fell asleep or passed out.  

She awoke some 30-40 minutes later, and was finally able to get to her home. Her daughter called an ambulance and she received hospital treatment for frostbite, with several of her fingers later being amputated. Blood tests taken at the emergency room showed she was legally intoxicated.

State Farm denied Dougherty’s claims for no-fault benefits under her automobile policy. However, the district court concluded that Dougherty was entitled to those benefits for her injuries. A no-fault analysis focuses on the “actual use of the vehicle,” not on whether the driver of the vehicle behaved properly, and any negligent or unreasonable decisions made by Dougherty after her vehicle became stranded was not part of a proper coverage decision. Dougherty’s frostbite injuries were natural and reasonable consequences of her use of her automobile because, once her vehicle became stuck in the snow, it was reasonably foreseeable she would attempt to walk home. Because Dougherty established the required causal connection, the court had to determine whether any independent intervening acts of significance occurred to break any causal links between her use of her vehicle and her injuries. If there

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897 Dougherty, 683 N.W.2d at 857.
898 Dougherty, 683 N.W.2d at 857.
899 Dougherty, 683 N.W.2d at 857.
900 Dougherty, 683 N.W.2d at 857.
901 Dougherty, 683 N.W.2d at 857.
902 Dougherty, 683 N.W.2d at 857.
903 Dougherty, 683 N.W.2d at 857.
904 Dougherty, 683 N.W.2d at 857.
905 Dougherty, 683 N.W.2d at 858.
were no independent intervening acts, no-fault coverage would apply, so long as the automobile was used for transportation purposes.\textsuperscript{906} 

State Farm argued that Dougherty’s injury had no causal connection to maintenance or use of her vehicle.\textsuperscript{907} According to the test established in \textit{Continental Western Insurance Co. v. Klug},\textsuperscript{908} Dougherty had to prove a causal connection between her bodily injury and her automobile which was less than tort proximate cause, but more than the vehicle being the place where her injury occurred.\textsuperscript{909} A causal connection exists if bodily injury flows naturally and reasonably from use of an automobile.\textsuperscript{910} 

As the court pointed out, because winter perils are a fundamental part of driving in Minnesota, it was foreseeable that once Dougherty’s automobile was disabled by snow, she would have to face the prospect of exposure to the elements if she remained in place and attempt to move to a safe location.\textsuperscript{911} Dougherty’s injuries were sustained after her vehicle was stuck in the snow, which was a natural consequence of her use of her motor vehicle.\textsuperscript{912} Dougherty was not required to show that she was using her vehicle for the purpose of transportation when she was injured, but only to show that her injuries resulted from her operation or use of her vehicle.

\textsuperscript{906} Dougherty, 683 N.W.2d at 858.  
\textsuperscript{907} Dougherty, 683 N.W.2d at 859.  
\textsuperscript{908} 415 N.W.2d 876, 877 (Minn. 1987).  
\textsuperscript{911} Dougherty, 683 N.W.2d at 860.  
\textsuperscript{912} See Baker v. American Family Mut. Ins. Co., 460 N.W.2d 86, 87 (Minn.App. 1990) (parties stipulated that Baker’s death caused by exposure to subzero temperatures and hypothermia after walking away from vehicle stuck in a ditch - arose out of maintenance or use of vehicle). Dougherty, 683 N.W.2d at 860.
The fact she abandoned her vehicle after it became stuck in the snow made no difference as to whether she was entitled to coverage under her policy.914

**Automobile Related Cause of Loss - Too Remote**

In *Westfield Insurance Co. v. Herbert,*915 Westfield provided homeowner’s insurance to Lucy Brumley and her sixteen year-old son, Donald, who owned an automobile which was not operable and was not insured.916

One morning Donald began repairing his automobile. He first removed the engine’s valve cover in order to fix an oil leak and install a new cover.917 Later that night, he put the old valve cover in a pan filled with gasoline so he could clean it for resale.918 When he tried to remove the gasket from the valve cover, it would not come off.919 Donald decided to burn off the gasket, setting it on fire, which in turn caused his right hand to catch fire. While he was trying to extinguish the fire, the pan of gasoline exploded.920 The explosion and fire severely burned a young girl playing in the Brumley’s backyard.921

Westfield filed this action for declaratory relief, contending that an automobile exclusion in the homeowner’s policy applied.922 Tort plaintiffs, insureds and insurer all agreed that, on the morning of the accident, Donald was performing automobile maintenance by removing the

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913 *Klug*, 415 N.W.2d at 878. (no-fault “coverage should exist only for injuries resulting from use of an automobile for transportation purposes”). *Dougherty*, 683 N.W.2d at 861.

914 *Dougherty*, 683 N.W.2d at 861.

915 110 F.3d 24 (7th Cir. 1997).

916 *Herbert*, 110 F.3d at 25.

917 *Herbert*, 110 F.3d at 26.

918 *Herbert*, 110 F.3d at 26.

919 *Herbert*, 110 F.3d at 26.

920 *Herbert*, 110 F.3d at 26.

921 *Herbert*, 110 F.3d at 26.

922 *Herbert*, 110 F.3d at 26.
engine’s valve cover. However, there was a question about whether the events that occurred later that night were part of Donald’s maintenance of his automobile.

According to Westfield’s characterization of the chain of events, had Donald not decided to fix the oil leak he would not have removed the engine’s valve cover. If he had not removed the engine’s valve cover, he would not have tried to clean it. If he had not decided to clean it, he would not have bought the gasoline. If Donald had not bought the gasoline, there would have been no explosion. The court concluded that the automobile exclusion in the homeowner’s policy did not apply because automobile maintenance was not the efficient and predominating cause of loss. Donald’s acts in maintaining the automobile were too remote in time from the events that caused the young girl’s injuries: Donald’s cleaning an automobile part so he could sell it. A question to consider is whether the holding in this case would have been different if Donald had intended to place the cleaned valve cover back on the engine of his car.

Automobile Policy Exclusions and Negligent Entrustment or Supervision

Courts apply three theories to determine whether automobile exclusions apply to negligent entrustment or negligent supervision claims. One theory, referred to as “derivative liability,” holds that a negligent entrustment claim is derived from ownership, maintenance or use of an automobile, and that an entruster cannot be held liable under that theory unless the

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923 Herbert, 110 F.3d at 26.
924 Herbert, 110 F.3d at 26.
925 Herbert, 110 F.3d at 27.
926 Herbert, 110 F.3d at 27.
927 Herbert, 110 F.3d at 27.
person to whom the vehicle is entrusted operates or uses the vehicle in a negligent manner.\textsuperscript{929} The second theory, called the “dovetail” or “complimentary” theory, is based on the notion that the insurance industry has purposely designed different types of liability insurance policies to dovetail or fit together in a coordinated and unified whole so as to eliminate coverage voids or duplications.\textsuperscript{930} The final theory is that automobile exclusions are unambiguous and homeowner’s and/or CGL policies unequivocally exclude coverage for automobile related bodily injury or property damage.\textsuperscript{931}

\textbf{Derivative Liability Theory}

In \textit{Cooter v. State Farm Fire \& Casualty Co.},\textsuperscript{932} Bruce Knight was injured in an automobile accident while a passenger in an automobile owned by Billy Kleinklaus and driven by Kleinklaus’ son, James.\textsuperscript{933} State Farm insured the Kleinklaus family under a homeowner’s policy.\textsuperscript{934} The insuring agreements of the homeowner’s policy provided as follows:

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  \item \textsuperscript{929} \textit{Cooter v. State Farm Fire \& Casualty Co.}, 344 So.2d 496 (Ala. 1977); \textit{Safeco Ins. Co. v. Gilstrap}, 141 Cal.App.3d 524, 530-31, 190 Cal.Rptr. 425, 429-30 (1983); \textit{N. Ins. Co. of N.Y. v. Ekstrom}, 784 P.2d 320 (Colo. 1989). Another form of derivative liability theory serves as a device to determine the existence of a potential for coverage. Derivative liability theory relieves the insurer of any duty to defend if the tort plaintiff’s suit would not exist “but for” conduct explicitly excluded from coverage. Derivative liability theory, also referred to as the \textit{same nucleus of facts test}, distinguishes between theories of liability alleged in a suit and the actual events giving rise to the tort plaintiff’s suit. \textit{See Northbrook Indem. Ins. Co. v. Water Dist. Mgmt. Co., Inc.}, 892 F.Supp. 170, 175 (S.D. Tex. 1995). A theory of liability can change, or the tort plaintiff can manipulate the pleadings to seemingly avoid a policy exclusion, but the actual events, which caused the tort plaintiff’s damages do not change. \textit{W. Heritage Ins. Co. v. River Entm’t}, 998 F.2d 311 (5th Cir. 1993).
  \item \textsuperscript{932} 344 So.2d 496 (Ala. 1977). \textit{See David B. Harrison, Annot., Construction and Effect of Provision Excluding Liability for Automobile-Related Injuries or Damage from Coverage of Homeowner’s or Personal Liability Policy}. 6 A.L.R. 4th 548 (1981).
  \item \textsuperscript{933} \textit{Cooter}, 344 So.2d at 496.
  \item \textsuperscript{934} \textit{Cooter}, 344 So.2d at 496.
\end{itemize}
This Company agrees to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence. This Company shall have the right and duty, at its own expense, to defend any suit against the Insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, but may make such investigation and settlement of any claim or suit as it deems expedient. This Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of this Company’s liability has been exhausted by payment of judgments or settlements.935

The policy excluded coverage for “bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any motor vehicle owned or operated by, or rented or loaned to any insured.”936

Wanza Cooter, Bruce Knight’s guardian, sued son James for negligently operating an automobile, and sued parent Billy for negligent entrustment of that automobile.937 State Farm brought this action seeking a declaration that it was not obligated to defend or indemnify the insureds.938

State Farm presented two arguments. First, the automobile policy covered a claim for negligent entrustment of an automobile because the tort plaintiff’s bodily injury arose out of use of a motor vehicle.939 Second, Bruce Knight’s bodily injury arose out of Billy’s ownership of the vehicle, as well as from its use by James.940 In connection with the first argument, State Farm claimed that under the “dovetail” theory, the insurance industry has drafted the insuring agreements of automobile insurance to match the wording of the automobile exclusion in a homeowner’s policy so that homeowner’s insurance does not cover claims for negligent

935 Cooter, 344 So.2d at 496-97.
936 Cooter, 344 So.2d at 497.
937 Cooter, 344 So.2d at 497.
938 Cooter, 344 So.2d at 497.
939 Cooter, 344 So.2d at 497.
940 Cooter, 344 So.2d at 497.
entrustment because that theory of liability arises out of the ownership of a motor vehicle. 941

The court rejected the dovetail argument because there was no evidence that the insureds were covered under automobile insurance and homeowner’s insurance. Therefore, coverage under the homeowner’s policy had to stand or fall on its own merits. 942

State Farm claimed that Knight’s injuries arose out of Billy’s ownership of the automobile, as well as James’ use of the vehicle. Negligent entrustment of an automobile, according to the insurer, is derived from the insured’s ownership of the automobile. The court concluded that the homeowner’s policy excluded coverage for bodily injury arising out of the ownership and use of an automobile owned or operated by the insured. 943 The very elements spelled out in the automobile exclusion were the same elements Cooter had to prove to fix liability against the insured under a negligent entrustment theory. 944 Once the essential elements of the tort of negligent entrustment are proven, an automobile exclusion bars coverage. 945

**Dovetailing**

In *Northern Insurance Co. v. Ekstrom*, 946 Anne Ekstrom was injured when her automobile was struck by a truck driven by Kenneth Hobbie, an employee of Mallow Plating Works. 947 Northern insured Mallow under a CGL policy containing a special multi-peril endorsement with a policy limit of $500,000. 948 Mallow was also insured by Maryland Casualty

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941 *Cooter*, 344 So.2d at 497-98.
942 *Cooter*, 344 So.2d at 498.
943 *Cooter*, 344 So.2d at 499.
944 *Cooter*, 344 So.2d at 499.
946 784 P.2d 320 (Colo. 1989).
947 *Ekstrom*, 784 P.2d at 321.
948 *Ekstrom*, 784 P.2d at 321.
Company under a commercial automobile policy with a $500,000 limit per occurrence. The insuring agreements of Northern’s CGL policy provided that:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of Coverage A bodily injury or Coverage B property damage to which this insurance applies caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage.

The insuring agreements of the special multi-peril endorsement extended coverage to bodily injury or property damage “arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental to the business of the named insured conducted at or from the insured premises.” Both the CGL policy and the special multi-peril endorsement excluded coverage for “bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any automobile . . . owned or operated by or rented or loaned to any insured, or any other automobile . . . operated by any person in the course of his employment by any insured.”

Ekstrom sued Mallow and Hobbie, claiming that Mallow was liable for Hobbies’ negligence under the doctrine of respondeat superior. Ekstrom also alleged, and the jury later found, that Mallow was independently negligent for entrusting the vehicle to Hobbie, and that Mallow negligently hired, retained and supervised Hobbie. When the jury awarded Ekstrom $1,982,000, Maryland Casualty deposited its $500,000 policy limit into the registry of the court,

949 Eckstrom, 784 P.2d at 321.
950 Eckstrom, 784 P.2d at 321.
951 Eckstrom, 784 P.2d at 321.
952 Eckstrom, 784 P.2d at 321.
953 Eckstrom, 784 P.2d at 322.
954 Eckstrom, 784 P.2d at 322.
plus approximately $301,000 in interest on the entire judgment. Northern responded to Ekstrom’s writ of garnishment by denying that it held any personal property belonging to Mallow, stating that the policy did not cover negligent entrustment of an automobile. The trial court found in favor of Ekstrom, and entered judgment against Northern for $500,000.

A required element of negligent entrustment under Colorado law is negligent use of the entrusted automobile by the driver. Negligent entrustment of an automobile is derived from or related to the insured’s ownership, maintenance or use of an automobile. The Colorado Supreme Court concluded that the phrase “arising out of” was not ambiguous in the context of a claim for negligent entrustment and that such a claim was “related to,” “flowed from,” and would not exist “but for” the acts of the entrusted driver. Thus, a claim of negligent entrustment arises out of ownership, operation or use of an automobile. Ekstrom also argued that her injuries were caused by two independent acts of negligence, negligent operation of the truck by Hobbie and negligent entrustment of the truck by Mallow. Ekstrom claimed that when a tort plaintiff alleges multiple causes of bodily injury or property damage, coverage is not barred by an automobile exclusion if the damages arise from non-automobile related conduct which is independent of ownership, maintenance or use of an automobile.

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955 *Ekstrom*, 784 P.2d at 322.
956 *Ekstrom*, 784 P.2d at 322.
957 *Ekstrom*, 784 P.2d at 322.
958 *Ekstrom*, 784 P.2d at 323.
959 *Ekstrom*, 784 P.2d at 323.
960 *Ekstrom*, 784 P.2d at 323.
961 *Ekstrom*, 784 P.2d at 323.
962 *Ekstrom*, 784 P.2d at 323.
The Colorado Supreme Court noted that insurance policies are “dovetailed” to fit together into a coordinated and unified whole.\(^{963}\) This practice of excluding coverage for injury or damage arising out of ownership, maintenance or use of an automobile under a CGL policy and issuing a separate automobile policy was relevant to the issue of whether the automobile exclusion was ambiguous.\(^{964}\) The court found that coverage under the automobile policy was “dovetailed” into the automobile exclusion under the CGL policy so that coverage under both policies would not be duplicative.\(^{965}\) The insuring agreements of an automobile policy and an automobile exclusion in a CGL policy should therefore be construed the same.\(^{966}\) The automobile exclusion in Northern’s policy, together with the automobile policy issued by Maryland Casualty, unambiguously excluded claims for negligent entrustment of an automobile under the CGL policy.\(^{967}\)

\textbf{Exclusion Unambiguous}

In \textit{Safeco Insurance Co. v. Gilstrap},\(^{968}\) Travis and Dorothy Gilstrap’s son, Donald, owned a motorcycle. Donald stored his motorcycle in his parents’ garage while Donald served in the U.S. Navy.\(^{969}\) Michael, the Gilstrap’s youngest son, was a 14 year old unlicensed driver.\(^{970}\) On the day of the accident, Michael removed the motorcycle from the garage and took Patricia

\begin{footnotes}
\footnote{\textit{Eckstrom}, 784 P.2d at 324.}
\footnote{\textit{Eckstrom}, 784 P.2d at 324.}
\footnote{\textit{Eckstrom}, 784 P.2d at 324.}
\footnote{141 Cal.App.3d 524, 190 Cal.Rptr. 425 (1983).}
\footnote{\textit{Gilstrap}, 141 Cal.App.3d at 526, 190 Cal.Rptr. at 426.}
\footnote{\textit{Gilstrap}, 141 Cal.App.3d at 526, 190 Cal.Rptr. at 426.}
\end{footnotes}
Leverton for a ride. Leverton for a ride.971 Michael and Patricia collided with a motorcycle operated by Frank Brown. The Levertons sued the entire Gilstrap family.972

Safeco insured the Gilstraps under a homeowner’s policy, but the motorcycle was not insured.973 Safeco filed for declaratory relief, asking the court to determine whether Safeco owed a duty to defend or indemnify the Gilstraps under their homeowner’s policy which excluded coverage for injuries arising out of the ownership and use of a motor vehicle.974 The Levertons tried to avoid this exclusion by including a cause of action against Mr. and Mrs. Gilstrap for negligent entrustment of the motorcycle to Michael, also alleging in the complaint that Michael was negligent in operating the motorcycle.975 The trial court determined Safeco had no duty to defend Michael, but the court ruled that Safeco owed a duty to defend Michael’s parents for negligent entrustment and to pay any judgment rendered against them on that cause of action.976

The insuring agreements of Safeco’s policy provided that the insurer would “pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence.”977 The policy defined the term “occurrence” to mean “an accident . . . which results . . . in bodily injury or property damage.”978 The policy excluded coverage for bodily

971 Gilstrap, 141 Cal.App.3d at 526, 190 Cal.Rptr. at 426.
972 Gilstrap, 141 Cal.App.3d at 526, 190 Cal.Rptr. at 426.
973 Gilstrap, 141 Cal.App.3d at 527 n.3, 190 Cal.Rptr. at 427 n.3.
974 Gilstrap, 141 Cal.App.3d at 526, 190 Cal.Rptr. at 426.
975 Gilstrap, 141 Cal.App.3d at 526, 190 Cal.Rptr. at 426.
976 Gilstrap, 141 Cal.App.3d at 526, 190 Cal.Rptr. at 426.
977 Gilstrap, 141 Cal.App.3d at 526, 190 Cal.Rptr. at 426.
978 Gilstrap, 141 Cal.App.3d at 526, 190 Cal.Rptr. at 426.
injury or property damage “arising out of the ownership, maintenance, operation, use, loading or unloading of . . . any motor vehicle owned or operated by, or rented or loaned to any insured.”

From the court of appeals’ point of view, the issue was whether the insureds’ potential liability was exclusively related to use of the motorcycle. The court asked as to the parents, in light of the automobile exclusion, whether “their liability arose out of some conduct unrelated to the operation or use of a motorcycle loaned to any insured?” The court of appeals concluded that the answer was “no.”

The court explained its position through a discussion of State Farm Mutual Automobile Insurance Co. v. Partridge. State Farm Fire & Casualty Company insured Partridge under a homeowner’s policy. State Farm Fire, in denying coverage argued that the dovetail concept applied because the automobile exclusion in the homeowner’s policy was nearly identical to the language of the insuring agreements in State Farm Mutual’s automobile policy. According to the dovetail concept, insurers draft automobile insurance and a homeowner’s insurance to prevent coverage under the two policies from overlapping. The California Supreme Court rejected this dovetail argument, noting that just because a claim fell within the insuring agreements of an automobile policy did not mean that a claim automatically fell within the automobile exclusion contained in a homeowner’s policy. This is so because the phrase “use of an automobile” has different meanings under different circumstances and courts must apply an interpretation which

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979 Gilstrap, 141 Cal.App.3d at 526, 190 Cal.Rptr. at 426.
980 Gilstrap, 141 Cal.App.3d at 527, 190 Cal.Rptr. at 426.
981 Gilstrap, 141 Cal.App.3d at 527, 190 Cal.Rptr. at 426.
983 Partridge, 10 Cal.3d at 101, 514 P.2d at 128, 109 Cal.Rptr. at 816.
984 Partridge, 10 Cal.3d at 101, 514 P.2d at 128, 109 Cal.Rptr. at 816.
gives, but never takes away, coverage for “use” of an automobile, thereby causing coverage under an automobile policy and a non-automobile liability policy to overlap, notwithstanding the exclusion of coverage for bodily injury arising out of the use of an automobile in most non-automobile liability insurance policies. 985

Partridge’s use of his automobile was not the sole cause of the injury to his passenger. 986 Use of the automobile was just one of two joint causes of the accident, one cause involving a hair-trigger pistol. 987 The court concluded that when two separate acts of negligence constitute a concurrent proximate cause of an accident, insurers are liable so long as one cause is covered by the policy. 988 The court offered this hypothetical to explain further its conclusion in this regard:

If, after negligently modifying the gun, Partridge had lent it to a friend who had then driven his own insured car negligently, resulting in the firing of the gun and injuring of a passenger, both Partridge and his friend under traditional joint tortfeasor principles would be liable for the injury. In such circumstances, Partridge’s personal liability would surely be covered by his homeowner’s policy, and his friend’s liability would be covered by automobile insurance. When viewed from this perspective, it can be seen that State Farm is presently attempting to escape liability under the homeowner’s policy simply because, in the instant case, both negligent acts happened to have been committed by a single tortfeasor. In our view, this coincidence cannot defeat the insurer’s obligation to indemnify the insured for liability arising from non-automobile risks. 989

The court concluded that whenever there is a question whether either of two independent acts of negligence can be properly characterized as the “prime,” “moving” or “efficient” causes of loss, coverage under an automobile policy and a homeowner’s policy are equally available to

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985 Partridge, 10 Cal.3d at 102, 514 P.2d at 128-29, 109 Cal.Rptr. at 816-17. The court cited to a law review article authored by Asher Marcus. See Asher Marcus, Overlapping Liability Insurance, 16 DEF. L.J. 549, 556 (1967).

986 Partridge, 10 Cal.3d at 102, 514 P.2d at 129, 109 Cal.Rptr. at 817.

987 Partridge, 10 Cal.3d at 102, 514 P.2d at 129, 109 Cal.Rptr. at 817.

988 Partridge, 10 Cal.3d at 102, 514 P.2d at 129, 109 Cal.Rptr. at 817.

989 Partridge, 10 Cal.3d at 103, 514 P.2d at 129, 109 Cal.Rptr. at 817.
By purchasing two separate insurance policies, Partridge clearly expressed his desire to be fully covered for different types of liability arising from different sources. State Farm Fire contracted to protect Partridge against liability arising generally from non-automobile-related risks. State Farm Mutual agreed to indemnify Partridge for injury or damage arising from covered automobile-related events. Partridge’s liability for his passenger’s damages resulted from both automobile-related and non-automobile-related acts of negligence. The court properly concluded that coverage was available under both the automobile policy and the homeowner’s policy.

The court in *Gilstrap*, contrasted the obligation of Partridge, to the obligation of the Gilstraps, and concluded that the duties of Michael’s parents did not arise from an act that was separate and independent from Michael’s use of the motorcycle. The parents alleged negligence in entrusting the motorcycle to their minor son was a separate act only because that act preceded the collision. The actions of Mr. and Mrs. Gilstrap could not be disassociated from Michael’s use of the motorcycle. Conduct which is dependent upon and related to use of a motor vehicle is not an independent act of a homeowner under a homeowner’s policy. Liability of the Gilstraps for their automobile-related conduct (entrustment of the motorcycle) was not independent from their son’s use of the motorcycle. Had Michael not negligently used the

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90 *Partridge*, 10 Cal.3d at 104-05, 514 P.2d at 130, 109 Cal.Rptr. at 818.
91 *Partridge*, 10 Cal.3d at 106, 514 P.2d at 131, 109 Cal.Rptr. at 819.
92 *Partridge*, 10 Cal.3d at 106, 514 P.2d at 131, 109 Cal.Rptr. at 819.
93 *Partridge*, 10 Cal.3d at 106, 514 P.2d at 131, 109 Cal.Rptr. at 819.
94 *Partridge*, 10 Cal.3d at 106, 514 P.2d at 131, 109 Cal.Rptr. at 819.
95 *Gilstrap*, 141 Cal.App.3d at 527-28, 109 Cal.Rptr. at 426.
97 *Gilstrap*, 141 Cal.App.3d at 530, 190 Cal.Rptr. at 426.
motorcycle and caused injury, his parents would not have been liable. While the theory of negligent entrustment imposes liability on an owner or entruster because that person is independently negligent, the tort plaintiff still must prove that injury or property was proximately caused by the driver’s negligence. In jurisdictions holding that a motor vehicle exclusion does not preclude coverage for negligent entrustment, courts generally note that negligent entrustment is based on the primary negligence of the entruster in supplying a motor vehicle to an incompetent driver. Entrustment is unrelated to ownership, maintenance or use of a motor vehicle and coverage is therefore not excluded.

Another line of cases holds that a motor vehicle exclusion precludes coverage for negligent entrustment. Gilstrap, 141 Cal.App.3d at 530, 190 Cal.Rptr. at 426. The Gilstrap court noted that an essential element of recovery for negligent entrustment is negligent operation of the motor vehicle. Gilstrap, 141 Cal.App.3d at 530, 190 Cal.Rptr. at 426. The court cited Cooter v. State Farm Fire & Cas. Co., 344 So.2d 496, 498 (Ala. 1977). Although liability for negligent entrustment is not conditioned on the entruster’s ownership, maintenance or use of the motor vehicle, the concurrence of negligent entrustment by an owner and negligent use by an entrustee is essential to recovery. The concurrence of these dual elements is missing from those cases upholding coverage. Gilstrap, 141 Cal.App.3d at 531, 190 Cal.Rptr. at 427. The rationale that negligent entrustment of a motor vehicle, and not its use, is the basis of the liability of an insured, a tort plaintiff would be allowed to recover absent any showing that the vehicle operator negligently caused injury or damage. Gilstrap, 141 Cal.App.3d at 531-32, 190 Cal.Rptr. at 430.

998 Gilstrap, 141 Cal.App.3d at 530, 190 Cal.Rptr. at 426.
999 Gilstrap, 141 Cal.App.3d at 530, 190 Cal.Rptr. at 426.
1000 Gilstrap, 141 Cal.App.3d at 530, 190 Cal.Rptr. at 426.
1001 Gilstrap, 141 Cal.App.3d at 530, 190 Cal.Rptr. at 426.
In *Aetna Casualty & Surety v. American Manufacturers Mutual Insurance Co.*, Delores Cunningham sued James Waggener for negligently entrusting a mini bike to a minor. The child operated the bike on a neighborhood sidewalk away from the insured premises and injured Cunningham’s minor child.

American Manufacturers insured Waggener under a homeowner’s policy. Aetna insured Waggener under an excess indemnity policy. American Manufacturers refused to defend Waggener, citing the automobile exclusion in the homeowner’s policy.

Aetna brought a declaratory judgment action asking the court to rule that the primary insurer owed Waggener a defense and a duty to indemnify him. The court below held that American Manufacturers’ policy excluded coverage for negligent entrustment. The insuring agreements of the homeowner’s policy provided as follows:

This company agrees to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence.

The policy defined an “occurrence” as an accident resulting in bodily injury or property.

According to the automobile exclusion, there was no coverage for injury or damage occurring off the insured premises and arising out of the ownership, maintenance, operation, use,
loading or unloading of any recreational motor vehicle owned by any insured.\textsuperscript{1012} The Arkansas Supreme Court affirmed the trial court’s finding that American Manufacturers was not required to defend Waggener.\textsuperscript{1013} The court found that the wording of the exclusion was clearly stated. The accident occurred off the insured premises and was caused by use of the minibike.\textsuperscript{1014} The court rejected Aetna’s argument that negligent entrustment, rather than negligent “use” of the mini bike, was the act that caused bodily injury. The court concluded that this accident was best covered by automobile insurance.\textsuperscript{1015}

Courts in most jurisdictions specify what events constitute “use,” “maintenance,” and “operation” of automobiles, and what connection is necessary between injury or damage and use of an automobile to satisfy the causal phrase “arising out of.”\textsuperscript{1016} All courts agree on the need for a causal connection between injury or damage and ownership, maintenance or use of an automobile in order for the injury or damage to fall within the causal phrase.\textsuperscript{1017} When the requisite causal connector is absent, there is no coverage.\textsuperscript{1018}

Although courts agree on the need for causal connectors to exist, they do not agree on which test to apply. The tests most often discussed are the \textit{Partridge} “minimal causal connection” test\textsuperscript{1019} and “efficient proximate cause.”\textsuperscript{1020}

\textsuperscript{1012} \textit{American Manufacturers}, 261 Ark. at 327, 547 S.W.2d at 758.
\textsuperscript{1013} \textit{American Manufacturers}, 261 Ark. at 327-28, 547 S.W.2d at 758.
\textsuperscript{1014} \textit{American Manufacturers}, 261 Ark. at 328, 547 S.W.2d at 758.
\textsuperscript{1015} \textit{American Manufacturers}, 261 Ark. at 328, 547 S.W.2d at 758.
\textsuperscript{1017} Larry D. Schaefer, Annot., 15 A.L.R.4th at 17.
\textsuperscript{1018} Larry D. Schaefer, Annot., 15 A.L.R.4th at 17.
\textsuperscript{1020} \textit{Panhandle Steel Products Co. v. Fid. Union Cas. Co.}, 23 S.W.2d 799, 802 (Tex.Civ.App.--Fort Worth 1929, no writ).
In Gurrola v. Great Southwest Insurance Co., Wilcox owned a welding business which was insured under a CGL policy written by Great Southwest. Wilcox’s hobby was rebuilding cars. One of his rebuilt cars was a 1934 Bantam Coupe. To rebuild the car, Wilcox had to weld the chassis to the frame of the vehicle. Wilcox and Hayes, a passenger in the Bantam, were traveling at speeds exceeding 90 miles per hour when their vehicle crossed the center line of the road and struck a vehicle operated by Gurrola, who was seriously injured. Both Wilcox and Hayes died as a result of their injuries, and Hayes’ survivors and Gurrola sued the Wilcox estate. The Great Southwest policy excluded coverage for injury or damage arising out of the ownership, maintenance, operation or use of any automobile owned or operated by any insured.

In trying to establish coverage under the CGL policy, tort plaintiffs argued that while the immediate cause of the accident was Wilcox’s negligent operation of his automobile the vehicle, his prior act of negligently welding the chassis to the frame did not fall within the automobile exclusion and was, therefore, covered. The court ruled this theory had no merit.

The Gurrola court discussed State Farm Fire & Casualty Co. v. Camara, and the Camara court’s review of State Farm Mutual Automobile Insurance Co. v. Partridge. In

1022 Gurrola, 17 Cal.App.4th at 67, 21 Cal.Rptr.2d at 749.
1023 Gurrola, 17 Cal.App.4th at 67, 21 Cal.Rptr.2d at 749.
1024 Gurrola, 17 Cal.App.4th at 67, 21 Cal.Rptr.2d at 749.
1025 Gurrola, 17 Cal.App.4th at 67, 21 Cal.Rptr.2d at 749.
1026 Gurrola, 17 Cal.App.4th at 67, 21 Cal.Rptr.2d at 749.
1027 Gurrola, 17 Cal.App.4th at 67, 21 Cal.Rptr.2d at 750.
1028 Gurrola, 17 Cal.App.4th at 67, 21 Cal.Rptr.2d at 750.
1029 Gurrola, 17 Cal.App.4th at 67, 21 Cal.Rptr.2d at 750.
Camara, Frank Camara, purchased a homeowner’s insurance policy from State Farm Fire which contained an automobile exclusion.\textsuperscript{1032} Camara owned a 1970 Volkswagen which he designed and assembled into a dune buggy. Camara’s sister-in-law, Cheryl DeBoer, was a passenger in Camara’s dune buggy when he drove off a fire protection road onto a very steep hillside and the dune buggy overturned.\textsuperscript{1033} DeBoer sued Camara alleging he negligently designed, constructed and assembled the dune buggy so as to “proximately cause the vehicle to overturn.”\textsuperscript{1034}

The question in Camara was whether Camara’s conversion of the Volkswagen into a dune buggy was an activity arising out of ownership, maintenance or use of a motor vehicle. The court found there was no coverage for Camara under the homeowner’s policy. Although Camara allegedly committed two independent negligent acts, negligent construction and negligent operation, unlike Partridge, where the independent acts of negligence were automobile and non-automobile related, negligent acts in Camara were both automobile related. Negligent construction of the dune buggy became a causal factor in DeBoer’s injuries upon Camara’s negligent operation of the vehicle. Under Partridge, the non-vehicle-related cause of loss must be independent of the vehicle-related cause in order for the insured’s liability to be covered by the homeowner’s policy. The court concluded there was no coverage under Camara’s homeowner’s policy.\textsuperscript{1035} Where an owner’s modification of a vehicle causes it to overturn on steep terrain, the resulting bodily injury necessarily arises from ownership, maintenance, or use of the vehicle. The Camara court pointed out that “the only way in which plaintiff could have

\textsuperscript{1032} Camara, 63 Cal.App.3d at 50, 133 Cal.Rptr. at 601.
\textsuperscript{1033} Camara, 63 Cal.App.3d at 50, 133 Cal.Rptr. at 601.
\textsuperscript{1034} Camara, 63 Cal.App.3d at 50, 133 Cal.Rptr. at 601.
\textsuperscript{1035} Camara, 63 Cal.App.3d at 54-55, 133 Cal.Rptr. at 603-04.
been exposed to the claimed design risk was through the operation or use of the motor vehicle.\textsuperscript{1036}

The Gurrola court, applying Camara, held that the only way for Gurrola to have been exposed to Wilcox’s non-automobile related act of negligent welding was through the insured’s negligent operation of his automobile. A homeowner’s policy or CGL policy therefore provides no coverage for automobile-related accidents unless there are two negligent acts of the insured, and one of them is independent of the excluded negligent use of the automobile.

**Suggested Test For Applicability of Automobile Exclusion**

One commentator has proposed a four-part test to supplant the efficient proximate cause test.\textsuperscript{1037} The first step is to determine if there are any non-automobile independent or intervening causes that break the chain of causation.\textsuperscript{1038} Bodily injury does not arise out of use of an automobile if a non-automobile independent or intervening cause is present.\textsuperscript{1039} With respect to the effort of an insured to prove that a loss falls within the insuring agreements of an automobile policy, if an event causing injury or damage is a non-automobile related independent or intervening cause, a court should end its analysis with a finding of no coverage.\textsuperscript{1040} When an insurer is trying to establish that an automobile exclusion applies, the insurer must prove that an automobile related independent or intervening event caused injury or damage. The second part of the test employs the “active accessory” doctrine, which requires that an automobile be an

\textsuperscript{1036} Camara, 63 Cal.App.3d at 54, 133 Cal.Rptr. at 603.


\textsuperscript{1038} Shawn McCammon, 28 W. St. L. Rev. at 200-01. Examples of non-automobile related intervening cause cases are *Track Ins. Exch. v. Webb*, 256 Cal.App.2d 140, 63 Cal.Rptr. 791 (1967), discussed herein at p. 94-96, and *Westfield Ins. Co. v. Herbert*, 110 F.3d 24 (7th Cir. 1997), also discussed herein at p. 119-120.

\textsuperscript{1039} Shawn McCammon, 28 W. St. L. Rev. at 200-01.

\textsuperscript{1040} Shawn McCammon, 28 W. St. L. Rev. at 200-01.
active accessory to injury or damage. Courts have applied a “but for” analysis to determine if an automobile was an active accessory. The third part of the test asks whether the automobile was being used for transportation purposes when the accident occurred, or stated another way, was the automobile merely the situs of the accident. The final part of the test asks whether bodily injury or property damage occurred during ingress or egress from an automobile. Injuries caused during ingress and egress are generally covered.

Conclusion

The purpose of this review is to examine a variety of issues related to liability insurance. Only a very small portion of this review concerning insurance causation, is applicable to liability insurance of the type we call “Partridge-Type Concurrent Causation” (“PTCC”), and those issues related to causation and the phrase “arising out of the ownership, maintenance or use of automobiles.” As stated above, PTCC applies when two independent acts of negligence are simultaneously joined together to cause bodily injury or property damage.

With respect to property insurance, determining whether a particular peril in a chain of perils is the efficient proximate cause of loss is a two step process. The first step requires recognition of the actual cause in fact. The second step is identifying the chain of events and

1041 Shawn McCammon, 28 W. St. L. Rev. at 201-02.  
1042 Shawn McCammon, 28 W. St. L. Rev. at 201-02.  
1043 Shawn McCammon, 28 W. St. L. Rev. at 202-03.  
1045 Shawn McCammon, 28 W. St. L. Rev. at 203-04.  
1046 See Wallis v. United Services Auto. Ass’n, 2 S.W.3d 300 (Tex.App. -- San Antonio 1999, pet. denied). In Wallis, the San Antonio Court of Appeals refers to “the doctrine of concurrent causes,” but is in fact discussing what we have named the “Multiple Concurrent Causes - First-Party Texas Rule,” not the PTCC.  
1049 John P. Gorman, 34 INS. COUNSEL J. at 99.
the legal or responsible cause of loss.\textsuperscript{1050} In insurance causation parlance, the term “proximate causation” refers to a fact pattern of causation. Proximate cause (referred to here as the “efficient proximate” cause) refers to the initiating peril that is acted upon by a subsequent peril or perils in a chain of events that is unbroken by any independent intervening peril that produces a loss and without which such loss would not have occurred.\textsuperscript{1051} A cause in fact or the efficient proximate cause encompasses the entire series of events, whether active or passive, which directly cause loss. Whether a peril is a cause in fact of loss is determined by a “substantial factor test.” If a peril is a substantial factor in causing a loss, that peril is part of the chain of causation in fact.\textsuperscript{1052} To establish a fact pattern of proximate causation, event A must cause event B, which in turn must cause event C (and perhaps also D, E, and so on), which directly caused the loss. For example, negligence of an unknown third party causes a door to be left open on the roof of a hotel, allowing rain from a passing storm to enter, resulting in water infiltrating a bus duct in an electrical room, which causes an electrical disturbance, which activates a sprinkler system, causing water damage to the interior of the hotel.\textsuperscript{1053}

Most important, in proximate causation so described, is dependence of events both in origin and operation. Events are dependent in origin if the initial event, the direct, efficient, dominant cause, acts upon existing forces and conditions to cause all subsequent events in the chain of causation. Events are dependent in operation because they all must operate together to produce loss, without the intervention of any active, independent events. More formally, all

\textsuperscript{1050} John P. Gorman, 34 INS. COUNSEL J. at 99.
\textsuperscript{1052} John P. Gorman, 34 INS. COUNSEL J. at 99.
events are jointly necessary and sufficient conditions of loss; none of the events alone are sufficient conditions to cause loss.

If the peril that directly causes loss is a covered (or nonexcluded) peril, the policy will provide coverage, even though a subsequent, dependent, excluded or noncovered peril causally contributes to the loss.\footnote{\textit{Fawcett House, Inc. v. Great Cent. Ins. Co.}, 280 Minn. 325, 159 N.W.2d 268 (1968); \textit{Shinrone, Inc. v. Ins. Co. of N. America}, 570 F.2d 715 (8th Cir. 1978) (Iowa law); \textit{Rust Tractor Co. v. Consol. Constructors, Inc.}, 86 N.M. 658, 526 P.2d 800 (N.M.App. 1974); \textit{Raybestos-Manhattan, Inc. v. Indus. Risk Insurers}, 289 Pa.Super. 479, 433 A.2d 906 (1981) (finding coverage under all risks policy when an employee negligently (a covered peril) deposited No. 2 fuel oil into an underground storage tank containing heptane, which caused the heptane to be contaminated (a peril excluded by a contamination exclusion); the contaminated mixture was then used in a production process, causing damage to work in progress); \textit{Trexler Lumber Co. v. Allemannia Fire Ins. Co. of Pittsburgh}, 289 Pa. 13, 136 A. 856 (1927).}

If a noncovered or excluded peril directly causes loss, the policy will not provide coverage, even though a subsequent dependent covered peril contributes to the loss.\footnote{\textit{Lorio v. Aetna Ins. Co.}, 255 La. 721, 232 So.2d 490 (1970) (finding no coverage under windstorm policy for death of a horse); \textit{Hardin Bag & Burlap Co. v. Fid. & Guar. Fire Corp.}, 14 So.2d 634 (La. 1943) (finding no coverage for damage by sprinkler leakage caused by a windstorm, an excluded peril); \textit{Franklin v. Farmers Mut. Ins. Co.}, 627 S.W.2d 110, 113 (Mo.App. 1982) (no coverage under a named-peril property policy if policyholder did not establish that a covered peril caused the loss).}

The following are rules of property insurance causation:

- The efficient proximate cause of loss is not always the peril nearest in time or place to the loss.\footnote{Sidney I. Simon, \textit{Proximate Cause in Insurance}, 10 AM. BUS. L.J. 33, 36 (1972-73). \textit{Pa. Fire Ins. Co. v. Sikes}, 197 Okla. 137, 168 P.2d 1016 (1946) (Windstorm blows house and truck into a body of water. Flood water was excluded and windstorm damage was covered. The court found that the damages caused by flood waters were expected).}

- The efficient proximate cause of loss may be a peril which occurred prior to a peril which is nearer in time or place to the loss.\footnote{Sidney I. Simon, \textit{Proximate Cause in Insurance}, 10 AM. BUS. L.J. 33, 36. \textit{Dixie Pine Products Co. v. Md. Cas. Co.}, 133 F.2d 583, 585 (5th Cir. 1943).}

\footnote{Sidney I. Simon, \textit{Proximate Cause in Insurance}, 10 AM. BUS. L.J. at 36. (Proximate cause in the construction of an insurance policy is synonymous with “direct cause,” and “efficient cause” as used in the previous sentence means “predominant” cause).}

\footnote{Sidney I. Simon, \textit{Proximate Cause in Insurance}, 10 AM. BUS. L.J. at 36.}

\footnote{Sidney I. Simon, \textit{Proximate Cause in Insurance}, 10 AM. BUS. L.J. at 36.}
The efficient proximate cause of loss is the peril that is acted upon by a subsequent peril or perils in a chain of events and that is free of any intervening perils which originate from new and independent sources.1060

When different perils combine to cause a loss, a court must examine the chain of events to locate the efficient proximate cause of loss. In order for a peril to qualify as the efficient proximate cause of loss, that peril must be a natural and probable consequence of that chain of events.

The efficient proximate cause of a loss is the peril which is acted upon by a subsequent peril or perils, even though these are a subsequent peril or perils may be nearer in time and place to the loss and may operate more immediately in producing the loss.1061

The nearest or immediate peril to the loss may be a mere instrument and only incidental to the peril which is the efficient proximate cause of loss.1062 The efficient proximate cause of loss is the peril most essentially connected with the loss.1063

If the nearest or immediate peril to the loss is an excluded or non-insured peril, the loss may still be covered when the efficient proximate cause is a covered peril.1064

The initiating peril is not the efficient proximate cause of loss when a subsequent peril which was not stimulated immediately by the initiating peril intervenes to cause the loss.1065

When perils are independent of each other, the nearest or immediate peril is the efficient proximate cause of loss.1066

An intervening cause of loss is independent if that peril breaks the natural sequence of events.1067

When the initiating peril is naturally acted upon by a subsequent peril or perils, the initiating peril is the efficient proximate cause of loss, irrespective of whether the subsequent peril is a covered peril or an excluded peril.1068

1060 Sidney I. Simon, 10 AM. BUS. L.J. at 36.
1061 Sidney I. Simon, 10 AM. BUS. L.J. at 37.
1062 Sidney I. Simon, 10 AM. BUS. L.J. at 37.
1063 Sidney I. Simon, 10 AM. BUS. L.J. at 37.
1064 Sidney I. Simon, 10 AM. BUS. L.J. at 37.
1065 Sidney I. Simon, 10 AM. BUS. L.J. at 37.
1066 Sidney I. Simon, 10 AM. BUS. L.J. at 38.
1067 Sidney I. Simon, 10 AM. BUS. L.J. at 38.
1068 Sidney I. Simon, 10 AM. BUS. L.J. at 38.
Mr. Simon cited *United States Cas. Co. v. Mathews*, 35 Ga. 526, 133 S.E. 875 (1926). Worker dislocated his ankle and tore ligaments. Worker had a stroke and died. One expert testified the ankle injury led to the stroke.