A Concurrent Mess and a Call for Clarity in First-Party Property Insurance Coverage Analysis

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A CONCURRENT MESS AND A CALL FOR CLARITY IN FIRST-PARTY PROPERTY INSURANCE COVERAGE ANALYSIS

Mark M. Bell

I. INTRODUCTION

In “all-risk” insurance policies, coverage questions are conceptually simple. If a peril is excluded, there is no coverage. If a peril is not excluded, there is coverage. While it is conceptually simple, it becomes complicated in practice when multiple perils combine to cause a loss.

The problems are most acute when non-excluded, covered perils combine or operate in conjunction with excluded, non-covered perils to cause the loss. When covered and non-covered perils combine to cause a loss, it may be unclear from the policy whether the entire loss should be covered, whether the entire loss should be excluded, or whether the loss and resultant damages should be bifurcated to indemnify the insured for losses caused by covered perils while denying indemnity for losses caused by excluded perils.

Multiple covered and excluded perils combining to cause a loss is often referred to as “concurrent causation.” It goes without saying, but nevertheless needs to be said, that the phrase “concurrent causation” presents a definitional problem. While the common definition of concurrent implies a degree of temporal simultaneity, courts and commentators have routinely used the term “concurrent” to refer to sequential chains of events, independent, unrelated events acting in conjunction; and even events that

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1 William Conant Brewer, Jr., Concurrent Causation in Insurance Contracts, 59 Mich. L. Rev. 1141, 1145 (1961). As will be discussed infra, the term concurrent has become imprecise, but it is used here as background. The term “concurrent” can have two distinct meanings. Today, concurrent either describes multi-cause losses operating or occurring at the same time or can refer generically to a web of events having some interrelation among them.


undoubtedly operated in succession.\(^4\)

In addition to these definitional inconsistencies, courts have complicated the issues by developing a patchwork of interpretations of concurrent causation and relevant anti-concurrent causation policy exclusions.\(^5\) This resultant patchwork has operated to deprive policyholders of their reasonable expectations and has prevented insurers from maintaining contract certainty when drafting insurance policies.\(^6\)

The confusion resulting from this patchwork has left one commentator to explain: “Because causation as a theory or doctrine is so elusive, \textit{inconsistent outcomes must be tolerated.}”\(^7\) As stated by this commentator, “[s]ometimes the different outcomes will turn on subtle factual distinctions, but sometimes the different outcomes will be based on utterly irreconcilable view of policy text and principles of interpretation.”\(^8\)

This article provides definitional clarification and develops a framework to minimize the inconsistent outcomes and argues that the inconsistent outcomes need not be tolerated. The article provides both a history of concurrent causation and a history of anti-concurrent policy exclusions. Using that history, the article proffers new definitions to address multi-cause losses, and advocates for a more methodical, categorical analysis for addressing “concurrent causation” questions.\(^9\)

\textbf{II. Background of Concurrent Causation}

When dealing with “concurrent causes,” courts have typically employed one of four approaches:\(^10\) the pro-policyholder approach, the pro-insurer approach, the dominant-cause approach, and the apportionment approach.\(^11\)


\(^8\) Id.

\(^9\) A flow chart setting out the interpretive mechanism is attached as Appendix A.


\(^11\) Conventional scholarship does not typically refer to them by these names, but the names provided herein more adequately and easily describe the relevant categories. For the traditional names, see ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, \textit{Understanding}
A. Pro-Policyholder Approach

Under the pro-policyholder approach, if multiple perils combine to create a loss, the full amount of the loss is covered, so long as part of the loss was caused, even insignificantly, by a covered cause of loss. This approach has also been referred to by courts as the “concurrent causation” doctrine or approach.\(^\text{13}\)

The California Supreme Court in State Farm v. Partridge, was one of the first courts to adopt this approach to liability policies.\(^\text{14}\) The California Court of Appeals attempted to adopt this approach for property policies as well as liability policies in Farmers Insurance Exchange v. Adams.\(^\text{15}\) In Adams, the court held that if third-party negligence (covered loss) contributes in any respect to the loss, the entire loss is covered even if the efficient proximate cause of the loss would be excluded.\(^\text{16}\) While Adams was later overruled by the California Supreme Court, it demonstrates how courts analyze cases under the pro-policyholder approach.

In arguing for the pro-policyholder approach, courts reason that public policy militates in favor of the pro-policyholder approach.\(^\text{17}\) For instance, because all ambiguities in insurance policies are generally interpreted strictly against the insurer and in favor of the insured, courts reason that where a loss is caused by at least some covered peril, the exclusion should be interpreted against the insurer. Accordingly, under the pro-policyholder approach, when non-excluded perils and covered perils act in conjunction to cause the loss, the loss is covered.

B. Pro-Insurer Approach

\(^{12}\) Throughout this article, when the term “post-Partridge” is used, it is in reference to the proliferation of the pro-policyholder approach.

\(^{13}\) See, e.g., Allstate Ins. Co. v. Watts, 811 S.W.2d 883, 886-887 (1991) (“the ‘concurrent causation doctrine’ which provides that coverage under a liability policy is equally available to an insured whenever an insured risk constitutes a concurrent proximate cause of the injury.”).

\(^{14}\) State Farm Mutual Automobile Insurance Co. v. Partridge, 514 P.2d 123 (Cal. 1973). For further discussion, see infra, ___.


\(^{16}\) Id. This case was later expressly rejected by the California Supreme Court in Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 711 (Cal. 1989).

The pro-insurer approach takes the opposite view of the pro-policyholder approach. Under the pro-insurer approach, if one of the causes of loss is excluded, the entire loss is excluded. While no jurisdictions in the United States have entirely adopted this doctrine, Britain applies the pro-insurer approach with some uniformity.\(^\text{18}\)

The British case, Wayne Tank, provides the quintessential example of this approach.\(^\text{19}\) In Wayne Tank, the factory suffered a fire because of two concurrent perils: “Failure to install proper equipment (an excluded case) and employee negligence in leaving the factory unattended (a covered cause).”\(^\text{20}\) The court in Wayne Tank held that even if the employee negligence was the predominant factor in the loss, the loss would still be excluded because the failure to install the proper equipment concurrently acted to cause the loss. Because at least part of the loss was excluded, the entire loss was excluded.

It is unclear exactly why British courts have taken this approach, but perhaps it can be explained, at least in part, because of the history of insurance in the United Kingdom and the remnants of a time when the insurer had less influence and control of the policy process. The roots of modern insurance reach back to the United Kingdom and the shipping industry.\(^\text{21}\) One of the first insurers, Lloyd’s of London, insured ships and their cargo.

In these early transactions, the insurer was at an information disadvantage compared with the shipper. The shipper had a better understanding of his skills, the unique challenges presented by his specific cargo, and had greater control over potential losses. The insurer was often at the mercy of the shipper and had to rely on the shipper providing truthful and accurate information. Because of this information asymmetry in favor of the shipper, Lloyd’s insurance policies were often interpreted strictly against the shipper.\(^\text{22}\) For instance, if the shipper issued a warranty and that warranty was even partially breached, the entire loss was excluded.\(^\text{23}\) Thus, the British courts’ continued harsh treatment of policyholder may be rooted


\(^{19}\) *Id.* at 973 (citing Wayne Tank, [1973] 3 All E.R. 825 (C.A.)).

\(^{20}\) *Id.*

\(^{21}\) ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* (4th ed.) 560-561 (citing Shinrone Inc. v. Insurance Co. of North America, 50 F.2d 715 (8th Cir. 1978)).

\(^{22}\) *Id.*

\(^{23}\) *Id.*
in this specific anachronism.

In the United States today, unlike hundreds of years past in the United Kingdom, insurance policies are pure contracts of adhesion and the justification for strict interpretation of insurance policies against the insured no longer remains a reasonable interpretation. Today, insurers have the negotiating leverage, which is why United States’ jurisdictions read ambiguities broadly against the insurer and read exclusions narrowly. For this reason, American courts have been reluctant to follow the British, pro-policyholder approach.

C. Dominant-Cause Approach

The dominant-cause approach attempts to strike a middle ground between the pro-policyholder and pro-insurer approaches. This approach relies on equitable principles of fairness and reasonable expectations. Under the dominant-cause approach, the court attempts to ascertain which cause, among the concurrent causes of loss—or which link in the chain of events—was the most important, substantial, or responsible factor in the loss. This approach is also often referred to as the efficient proximate cause approach.

Shinrone Inc. v. Insurance Co. of North America demonstrates how courts apply the dominant-cause approach. Shinrone involved an insurance coverage dispute concerning cattle killed during a storm, which produced high winds, damp snow, muddy land, and extremely cold temperatures. The policy in question provided that death by windstorm was covered, but death caused by “dampness of the atmosphere or extremes of temperature” was not covered. The testimony in the case was conflicting and experts concluded that the cattle died due to a combination of factors including wind, cold temperatures, snow, the size and age of the cattle, conditions of the land, and the lack of adequate wind protection. Analyzing these factors, the jury determined that the “efficient proximate cause” of the loss was windstorm.

28 Id.
29 Id.
constituted the efficient proximate cause of the loss because without the wind, the cattle may have survived the extreme cold.\textsuperscript{30}

The dominant cause approach is the most prevalent approach because it is instinctively fair and determines whether coverage should be afforded dependent on which cause operated most significantly on the loss.

**D. The Apportionment Approach**

No courts have yet adopted the apportionment approach, but the analysis follows traditional tort apportionment doctrines.\textsuperscript{31} Like comparative negligence, there are two potential sub-approaches to the apportionment approach: pure apportionment and modified comparative apportionment.

Under a pure apportionment approach, the policyholder would receive the apportioned percentage of the damages caused by the covered losses. For instance, if 30% of the loss was caused by a covered peril, then the insured would receive 30% of the total amount of the loss—or 30% of the policy limit depending on how a court were to implement the apportionment method.\textsuperscript{32}

Under a modified apportionment approach, the policyholder would receive the percentage of the loss so long as the efficient proximate cause was a covered peril.\textsuperscript{33}

This approach would inevitably lead to greater litigation would provide an incredibly complex system of analysis. Rarely, is it clear what precise percent of the loss a particular peril caused. For this reason, and others, no courts have adopted this approach.

**III. DEVELOPMENT OF THE APPROACHES IN THE UNITED STATES**

In many ways, California is the grandfather of concurrent causation jurisprudence.\textsuperscript{34} A trilogy of California Supreme Court cases has spawned

\textsuperscript{30} Id. at 561.
\textsuperscript{33} Id.
\textsuperscript{34} California has certainly tried—and justifiably so—to distance itself as the genesis of concurrent causation. Joseph Lavitt, *The Doctrine of Efficient Proximate Cause, the Katrina Disaster, Prosser’s Folly, and the Third Restatement of Torts: Cracking the*
and inspired the jurisprudence throughout the country. *Sabella v. Wisler*, *State Farm v. Partridge*, and *Garvey v. State Farm Fire & Casualty* form the California trilogy. While California would certainly like to disclaim paternity status, the fact remains that other jurisdictions have followed California’s lead on many concurrent causation issues.35

**A. Sabella v. Wisler**

In much the same way that California is the grandfather of concurrent causation analysis, *Sabella v. Wisler* is the grandfather of property insurance analysis.36 In *Sabella*, a home was damaged by extensive settling, and the settling was caused by a leak in a sewer pipe. The leaking pipe saturated the fill material surrounding the foundation. The leak was caused by contractor negligence, and more specifically, caused by the contractor inadequately compacting fill material and improperly sealing of the sewer pipe joints.37 Under the policy, settling was excluded but contractor negligence was covered, and the court was faced with the classic “concurrent causation” question.38 The court held that the leaking pipe was the efficient proximate cause of the loss because it set the other events in motion.39 Because the efficient proximate cause of the loss was covered, the entire loss was covered.

**B. State Farm Mutual Insurance v. Partridge**

The second case in the trilogy is not a property-insurance case, but a liability case.40 While it is plainly not a property case, it is included in this discussion because of the confusion the case has caused. In *Partridge*, the insured was covered by both an automobile and homeowner’s insurance policy. The homeowner’s policy provided for a much larger amount of

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37 Id.

38 Id.

39 It is important to note the proximate causation issue here and how tort and insurance proximate causation apply. Under tort theories, the loss was proximately caused by the contractor’s negligence. However, insurance disputes try to determine the proximate cause of the loss; rather than which culpable party proximately caused the injury.

coverage but excluded losses “arising out of the use of an automobile.” The facts in Partridge were unique: The insured had filed a hair-trigger on a rifle allowing the rifle to be discharged at the slightest touch of the trigger. The insured and some friends were off-roading hunting jackrabbits when the insured hit a bump; causing the hair-trigger rifle to fire. The shot hit one of the passengers and caused significant injuries. The trial court found that the insured had committed two negligent acts: negligently filing the hair trigger and negligently off-roading.

The homeowner’s policy covered general negligence but excluded damages arising out of the use of the automobile. Thus, the California Supreme Court was again faced with a classic concurrent causation question. The court elected not to follow the precedent in Sabella because “the ‘efficient cause’ language is not very helpful, for here both causes were independent of each other: the filing of the trigger did not ‘cause’ the careless driving, nor vice versa.” Accordingly, the court developed a new standard and held that the fact that “coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries.” Thus, under Partridge, so long as a covered peril substantially contributed to the loss, coverage would be afforded.

While the plain language of Partridge clearly limits the case to third-party liability claims, courts began to apply the “concurrent causation” doctrine to property policies. For instance, in Safeco v. Guyton, the Ninth Circuit analyzed concurrent causation questions after Hurricane Kathleen. The court held that there were two concurrent causes of loss: (a) third-party negligence (a covered loss) in maintaining flood control plans and (b) flood (excluded). The court held that because third-party negligence contributed to the loss, the entire loss was covered, even though the loss was

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41 Id.
42 Id.
43 514 P.2d 130-31 at n. 10.
44 Id. (emphasis added).
46 692 F.2d 551 (9th Cir. 1982)
47 Id. For a reincarnation of the Guyton case post-Hurricane Katrina, see In re Katrina Canal Breaches Consolidated Litigation, 2007 WL 496856, at *2 (E.D. La. 2007) (holding that losses post-Katrina were not flood losses within the meaning of the water exclusion but rather losses resulting from negligence and the breach of the levies).
unequivocally caused by flood.\textsuperscript{48}

\textbf{C. Garvey v. State Farm Fire & Casualty}

Sixteen years, and a mountain of confusion, later, the California Supreme Court eventually revisited the concurrent causation doctrine developed in \textit{Partridge} and rebuked the lower courts for misapplying \textit{Partridge}.\textsuperscript{49}

\textit{Garvey} involved facts eerily similar to \textit{Sabella}. In the late 1970s the Garveys noticed that an addition to their house was beginning to separate from the main property. The Garveys argued that the contractor’s negligence was the proximate cause of the loss and that the loss should be covered. State Farm argued that settling was the efficient proximate cause of the loss and that any negligence by the contractor was negligible and should not impact coverage.\textsuperscript{50} Relying on \textit{Partridge}—rather than \textit{Sabella}—the trial court held that the contractor’s negligence was a contributing cause, and even though settling may be the dominant cause, because the policy covers negligence, the entire loss was covered.

The California Court rejected the trial court’s application of \textit{Partridge} to property insurance questions.\textsuperscript{51} The court held that for property policies, a loss is not necessarily covered just because a covered cause of loss contributes to the loss. Rather, first-party coverage questions require the reviewing court to look at the facts of the case and determine which among the contributing perils is the “efficient proximate cause” of the loss. The efficient proximate cause has been referred to as “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.”\textsuperscript{52} Under the efficient proximate cause analysis, if the predominant factor in the loss is covered, the loss is covered even if excluded perils also contribute to the loss. Similarly, if the predominant factor in the loss is excluded, the loss is excluded even if covered perils contribute to the loss.

\textbf{D. Spawn of the Trilogy and Ramifications}

Before \textit{Garvey} could clarify concurrent causation principles, the insurance industry became terrified of the onslaught of additional claims

\textsuperscript{48} These cases were compiled in Doug G. Houser and Christopher H. Kent, \textit{supra note} 45 at 577-78.

\textsuperscript{49} 770 P.2d 704 (Cal. 1989).

\textsuperscript{50} \textit{Id}.

\textsuperscript{51} \textit{Id}.

that could be brought. As discussed above, under some jurisdictions’ reading of the policies, if 99.9% of the loss was excluded but 0.01% of the loss was covered, the entire loss could be covered.\(^{53}\)

As a result of the insurance industry’s fears, the insurance industry modified its standard contracts in the mid-1980s.\(^{54}\) The industry offered revamped standard commercial general liability\(^{55}\) and commercial property policies, at least in part, to address the concurrent causation decisions spawned by courts applying *Partridge* to property policies. In order to avoid future *Partridge*-like decisions, the insurance industry included a new exclusion in its standard form contracts.\(^{56}\) The policies were revised to exclude “loss or damage caused directly or indirectly by any of the following [exclusions]. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.”\(^{57}\) This language has generally been referred to as the “anti-concurrent” policy exclusion.\(^{58}\)

### IV. COURTS INTERPRETATION OF ANTI-CONCURRENT POLICY EXCLUSIONS

The development of anti-concurrent causation policies has proved a powerful combatant to the *Partridge*-expansive-precedent developed throughout United States jurisdictions.\(^{59}\) In dealing with anti-concurrent causation contracts, courts have typically followed one of three approaches: (1) the “freedom of contract” approach, (2) the substantial factor approach, or (3) the Rossmiller/Blue-Pencil approach.\(^{60}\)

#### A. Freedom of Contract Approach

\(^{53}\) See supra ___.


\(^{55}\) Previously referred to before the significant revisions as comprehensive general liability policies.

\(^{56}\) *Id.*


\(^{58}\) Again, there is a definitional problem here. The clauses are colloquially referred to as anti-concurrent causation clauses, but refer to both simultaneous and subsequent causes of loss. See infra ____ for further discussion.

\(^{59}\) Cases expanding on *Partridge* and applying *Partridge* to property insurance questions are colloquially referred to herein as post-*Partridge* decisions.

\(^{60}\) None of the courts have actually referred to their approaches by any of these names. However, for clarification and categorization purposes, these names accurately reflect the various approaches taken by U.S. jurisdictions.
The freedom of contract approach is probably the most prevalent of the approaches to anti-concurrent causation clauses. Although many of courts have followed this approach, one of the earliest adopters, and one of the clearest analyses on point is found in *Alf v. State Farm Fire and Cas. Co.*

*Alf* presented the classic chain-of-events concurrent causation question. The Alfs had an all-risk homeowners policy from State Farm. The parties agreed that the loss was caused because a pipe on the Alfs property ruptured due to unusually low temperatures. Water then escaped from the ruptured pipe and caused extensive flooding and soil erosion.

If *Alf* were decided prior to the 1980-insurance policy revisions, the policy would have clearly provided coverage. Utah follows the dominant approach to concurrent causation issues, which seeks to find the efficient proximate cause of the loss. Here, the parties agreed that the efficient proximate cause of the loss was the ruptured pipe—just as in the case of *Sabella.* Under the Dominant Cause analysis, the policy would clearly provide coverage.

*Alf,* however, was not decided under the pre-1980s insurance policies, and the Utah Supreme Court was faced with the question of whether an insurer can contractually avoid the efficient proximate cause rule. The court held that the efficient proximate cause rule is not an immutable rule of insurance in Utah, but rather, operates as a default rule “only when the parties have not chosen freely to contract out of it.”

The court held that the parties had chosen to contract around the efficient proximate cause rule and that the parties were entitled to do so. The court argued that the anti-concurrent causation language in the policy did not upset norms of reasonable expectations of insureds, and held that the contractual modification was permissible.

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62 850 P.2d 1272 (Utah 1993); see also, Kane v. Royal Insurance Co. of America, 768 P.2d 678 (Colo. 1989).
63 Id.
64 See supra __.
65 See supra __.
66 850 P.2d at 1277.
67 Id.
It is interesting to note that under this interpretation, insurers have basically done to insureds what courts were doing to the insurers in post-Partridge cases applying liability insurance rules to property insurance. Of course, insureds do not possess the lobbying powers or the contractual capacity or influence to cause ubiquitous changes across all policy lines of insurance, which is why the policies remain as they are today. After Partridge, courts held that coverage was available whenever the insured could point to some loss in the chain-of-events that was covered. Many insureds were able to point to negligence, which is covered, and argue that because negligence contributed, at least partially, to the loss, the loss should be covered.

Today, if the insurer can point to some event in the chain of events that was excluded, the insurer can deny coverage in freedom-of-contract-approach jurisdictions like Utah. As currently applied, if the insured could argue that 99% of the loss was caused by covered losses, but 1% of the losses was excluded, then the entire loss will be excluded. Additionally, the possibility exists that insurers can modify policies and begin excluding negligence, as an example, in all-risk policies, and thereby effectively prevent coverage for all losses where the loss can be at least partially attributed to someone’s negligence.

B. Substantial Factor Approach

Recognizing the various problems associated with the freedom-of-contract approach, some courts have held that in order anti-concurrent exclusions to apply, the excluded loss must be a substantial factor or the efficient proximate cause of the loss. There are four states that have followed this approach and expressly rejected the freedom of contract approach. California and North Dakota have done so by code and

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69 Id.
73 CAL. INS. CODE §§ 530, 532 (“An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remove cause of the loss; but he is not liable for a loss of which the peril
Washington and West Virginia have done so by case law.\textsuperscript{75}

The first case to reject the freedom-of-contract approach without relying on insurance code regulations was \textit{Safeco Insurance Co. v. Hirschmann}.\textsuperscript{76} In \textit{Hirschmann}, severe winds were followed by heavy rains and landslides. The Hirschmann’s home was pushed from its foundation and completely destroyed because of strong winds and water saturation of the soil. According to one expert, the primary cause of the hillside’s collapse was the heavy rainfall.\textsuperscript{77}

Safeco denied coverage and conceded during the proceedings that had the policy been interpreted before the 1980 revisions, then the loss would have been covered in Washington because Washington follows the dominant-cause approach.\textsuperscript{78} Safeco argued that the post-1980s policy changes change the dominant-cause approach, and should allow Safeco to be able to exclude coverage since at least part of the loss was excluded.\textsuperscript{79}

The court in \textit{Hirschmann} held that the efficient proximate cause rule was an immutable principle of Washington insurance law, and that the parties cannot contract around the efficient proximate cause rule.\textsuperscript{80} The court held that because the primary cause of the loss was the covered perils of wind and rain, coverage should be afforded.

\textit{Murray v. State Farm Fire & Cas. Co.} provides West Virginia’s analysis of the efficient proximate cause rule and also offers a thorough

\begin{itemize}
  \item \textsuperscript{74} N.D. CENT. CODE § 26.1-32-01 (“An insurer is liable for a loss proximately caused by a peril insured against even though a peril not contemplated by the insurance contract may have been a remote cause of the loss. An insurer is not liable for a loss of which the peril insured against was only a remote cause. The efficient proximate cause doctrine applies only if separate, distinct, and totally unrelated causes contribute to the loss.”).
  \item \textsuperscript{75} At the time of this writing, the Colorado Supreme Court has granted certiorari to determine whether a loss is covered where 90% of the loss was covered and 10% was excluded. Colorado intergovernmental Risk Sharing Agency v. Northfield Ins. Co., 207 P.3d 839 (Colo. App. 2008), cert. granted 2009 WL 145804 (Colo. 2009) (May 26, 2009).
  \item \textsuperscript{76} 773 P.2d 413 (Wash. 1989); Sprague v. Safeco Ins. Co. of Amer., 241 P.3d 1276, 1278 (Wash. Ct. App. 2010) (“In analyzing coverage, Washington follows the efficient proximate cause rule. Under this rule, the predominant cause of the loss determines coverage”); \textit{but see} City of Everett v. American Empire Surplus Lines Insurance Co., 823 P.2d 1112, 1115 (Wash. Ct. App. 1991) (holding that insurance policies that use the phrase “arising out of” do not warrant efficient proximate cause analysis)
  \item \textsuperscript{77} \textit{Id}.
  \item \textsuperscript{78} \textit{Id}.
  \item \textsuperscript{79} \textit{Id}.
  \item \textsuperscript{80} \textit{Id}.
\end{itemize}
primer on concurrent causation. In Murray, State farm argued that its anti-concurrent clause “operates to defeat the efficient proximate cause doctrine.”

Further, State Farm “argue[d] that if earth movement in any way contribute[d] to a loss, regardless of the proximate cause, then under the lead-in [anti-concurrent] clause the entire loss is excluded from coverage.”

The court in Murray rejected State Farm’s contention and captured the essence of potential problems associated with abandoning the efficient proximate cause rule in the face of anti-concurrent causation clauses:

Indeed if we were to give full effect to the State Farm policy language excluding coverage whenever an excluded peril is a contributing or aggravating factor in the loss, we would be giving insurance companies carte blanche to deny coverage in nearly all cases.

Applying these principles, the West Virginia court rejected a broad reading of anti-concurrent clauses and held that the efficient proximate cause rule cannot be modified to abandon the reasonable expectations of the insured. The court held that the reasonable insurer expects to have losses covered where the predominant cause of the loss is covered.

One could certainly criticize the substantial factor approach because it essentially ignores the 1980s revisions to insurance policies and renders the anti-concurrent policy ineffective. As demonstrated by the Washington and West Virginia cases, these courts essentially apply the same analysis that they applied before the introduction of anti-concurrent causation clauses. Opponents to the approach, and insurers in general, can argue that courts applying the substantial factor approach make anti-concurrent clauses superfluous and meaningless.

In this author’s opinion, the criticism is unproblematic. Insurers introduced the anti-concurrent causation clauses to combat post-Partridge expansion of concurrent causation. Michael E. Bragg, assistant counsel for State Farm Insurance, wrote an article in the 1980s that discussed State

\[81\] 509 S.E.2d 1 (W.Va. 1998)
\[82\] Id. at 14.
\[83\] Id.
\[84\] Id.
\[85\] Id.
Farm’s specific attempts to draft policy language to avoid post-Partridge concurrent causation interpretations.

The difficulty of the industry’s task in combating concurrent causation embraces two distinct but related issues intertwined in the court’s decisions. First, the courts are creating new “causes” of loss never contemplated by property insurance policy drafters. Most important of these causes are negligence and other human conduct. Such conduct may be active, passive, willful, negligent, imprudent, untimely, or any other word which described how people act or fail to act. Second, the courts are telling us that the proper causation standard is no longer to attribute the loss to a single proximate cause, but rather to grant coverage if any of the causes of the loss has not been specifically excluded.86

As demonstrated by this influential article, anti-concurrent causation clauses were not intended to impact the efficient proximate causation standard employed by post-Sabella interpretations. The Sabella analysis seems to be a fair and reasonable interpretation from the insurer and policyholder perspective. Rather, the insurers wanted to prevent post-Partridge interpretations where the loss was covered if the insured could point to a single factor that contributed to the loss. While the case has not yet arisen in any jurisdictions following the pro-policyholder approach, the case can be made that the anti-concurrent exclusions would be effective in those jurisdictions and would move those jurisdictions from a post-Partridge analysis to a post-Sabella analysis.

Accordingly, by applying the substantial factor approach, as Washington and West Virginia did, insurers adequately safeguard post-Partridge interpretations. Additionally, the approach mitigates the potential for insurers to deny losses when the loss was proximately caused by a covered cause.

C. The Rossmiller/Blue Pencil Approach

The third approach that courts have used employs a much more involved and detailed analysis of concurrent causation. It seems that

Corban v. USAA is the only court to have used this approach to date, but I have included it as its own approach, because it is quite likely another court will follow Mississippi’s lead. This approach has largely evolved from the work of concurrent causation scholar/practitioner David Rossmiller.87

Rossmiller published two influential articles in 2007 and 2008, which cogently argue for a particular interpretation of “concurrent” when used in relation to concurrent causation.88 Under Rossmiller’s view, concurrent should either refer to perils (a) acting in coordination or (b) acting in sequence. For instance, assume that a fire and earthquake both operated to cause a loss: (a) acting in coordination would occur if the earthquake worked in conjunction with the fire to cause the same damage; (b) acting in sequence would occur if the fire resulted from the earthquake; and (c) a non-concurrent result would occur if the fire merely occurred at the same time as the earthquake but was not brought about by the earthquake.

According to Rossmiller, Hurricane Katrina did not actually involve concurrent causes of loss “not because they came at different times but because each force acted separately to create unique damage”89 – as in the third earthquake/fire example described above. Under Rossmiller’s view, the fact that both wind and flood were “products of the same larger phenomenon, a hurricane is irrelevant.”90 The argument follows that losses are concurrent only where multiple causes produce the same damage, and losses are not concurrent when multiple causes result in multiple losses.

While Rossmiller’s article has been cited by other courts,91 the first court to adopt his approach was the Mississippi Supreme Court. The Mississippi Supreme Court addressed the concurrent causation question for the first time in Corban v. USAA after several federal courts had provided Erie-guesses as to how Mississippi would analyze concurrent causation questions.92

87 David P. Rossmiller, Katrina in the Fifth Dimension: Hurricane Katrina Cases in the Fifth Circuit Court of Appeals, NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW 71, 86 (April 2008) (“Rossmiller, Katrina”); David P. Rossmiller, Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond, NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW 43, 65 (October 2007) (“Rossmiller, Interpretation”).
88 Id.
89 Rossmiller, Interpretation, supra note __, at 65.
90 Rossmiller, Interpretation, supra note __, at 65.
92 For a fascinating history of the chronology of the federal courts Erie-guess
The Corbans owned a two-story home that was damaged—but not destroyed—by Hurricane Katrina.\textsuperscript{93} USAA inspected the home and determined that although the wind caused some damage to the roof and second floor, the majority of damage to the first floor was caused by flooding. Accordingly, USAA paid the portion of damages related to the wind damage and denied coverage for the first floor because of the anti-concurrent flood exclusion.\textsuperscript{94}

In order to determine whether the denial was proper, the Court in \textit{Corban} narrowly defined concurrent. Although there are numerous definitions that could have been used to define concurrent, \textit{Corban} used the following narrow definition: the “exclusion applies only in the event that the perils [1] act in conjunction, [2] as an indivisible force, [3] occurring at the same time, [4] to cause direct physical damage resulting in loss.”\textsuperscript{95}

Additionally, the court held that the provision “in any sequence” irreconcilably conflicts with Mississippi law and is void and unenforceable.\textsuperscript{96} By rejecting the “in any sequence language” in the exclusion, the court also addressed questions brought up by federal courts and held that “[a]n insurer cannot avoid its obligation to indemnify the insured based upon an event which occurs subsequent to the loss.”\textsuperscript{97}

Under the narrow definition of concurrent, the insurer has the burden of proving that two perils operate in conjunction and that the perils operated contemporaneously. In \textit{Corban}, and likely the majority of \textit{Katrina} claims, the wind and the flood did not operate contemporaneously or in conjunction because most experts estimate that the wind preceded the flooding by up to four hours.\textsuperscript{98}

\textit{Corban} also established the relevant burdens of proof for insurance

\textsuperscript{93} Id.
\textsuperscript{94} \textit{Corban} v. \textit{USAA}, 20 So.3d 601, 606 (Miss. 2009).
\textsuperscript{95} Id. (brackets added for clarity).
\textsuperscript{96} The court presumably could have declared the entire exclusion void as a result of this provision, but for reasons unexplained by the court, the court seems to have severed this provision from the rest of the exclusion.
\textsuperscript{97} Indeed, USAA also rejected the Fifth Circuit’s analogy when pressed during trial. According to USAA, “if an insured’s roof is breached and rainwater comes in, damaging a carpet, USAA pays for rainwater damage to the carpet . . . even if storm surge . . . subsequently destroy[s] the carpet.” 20 So.3d at 613.
\textsuperscript{98} Id.
claims. Under an all risk policy, the insured has the burden to prove that a loss occurred. After proving that a loss occurred, the burden shifts to the insurer to prove an affirmative defense—for example, demonstrating that the peril is excluded under the policy. In Corban, it was clear that a loss occurred; therefore USAA had the burden of proving by a preponderance of evidence that the damages were caused by the excluded peril of flooding.  

I refer to this approach as the “blue pencil” approach because it strikes a portion of the anti-concurrent exclusion, but does not invalidate the entire clause. As stated previously, anti-concurrent exclusions generally exclude losses caused concurrently and “in any sequence.” Corban held that the “in any sequence” language was unenforceable, but held that anti-concurrent clauses are enforceable. While this represents a more policyholder-friendly approach than the courts that simply enforce anti-concurrent causation clauses wholesale, it still leaves open the possibility that anti-concurrent causation exclusions can exclude losses where 99% of the loss is covered but 1% of the loss is excluded.

V. A CALL FOR CLARITY AND A REVISION OF THE TERMS OF INTERPRETATION

As stated at the outset, and as evidenced by the approaches to concurrent causation and anti-concurrent causation exclusions, the nomenclature of concurrent causation has become so bastardized that the concurrent and efficient proximate cause language has become and untraceable mess. Because of this mess, courts and commentators should re-visit concurrent causation to redefine the terms to more accurately reflect the underlying policies in order to provide clarity to other courts, insurers, and policyholders. In addition to redefining the relevant concurrent causation terms, courts, insurers, and policyholders, should take a new approach to analyzing concurrent causation questions.

A. Definitional Clarity

There are two terms that proliferate “concurrent causation” analyses and courts continuously apply these definitions inappropriately: concurrent causation and efficient proximate cause.

As currently defined, these terms are inexact and create confusion and result in inconsistent application. Concurrent is used (1) to refer to any multi-factor causation analysis, (2) to refer to a particular type of multi-

\(^{99}\text{Id.}\)
factor causation analysis, and (3) as a method or approach to multi-cause losses. Similarly, efficient proximate cause is used (1) as a method or approach to multi-cause losses, (2) as the “moving cause of loss” when there is a chain-of-events preceding a loss, and (3) as the “predominant” factor in non-chain-of-event losses when multiple perils combine to cause a loss.\textsuperscript{100}

Given the conflation of terms, it is time to redefine these terms to allow greater accuracy and precision. Additionally, given the current confusion generated by the term “concurrent,” courts, commentators, and insurers should drop the term “concurrent” from the insurance lexicon.\textsuperscript{101}

In order to provide clarity on “concurrent causation” questions, the term concurrent causation must be addressed first. Although by definition concurrent requires temporal proximity, the term has been eviscerated to the point that concurrent no longer has any definitional meaning. To demonstrate this point, Rossmiller—one of the most well-versed and persuasive writers on the subject—argues that temporal proximity—the essence of concurrence—is “irrelevant” to the question of whether a loss is concurrent.\textsuperscript{102} If concurrent does not envision temporal proximity, then no concurrent causation analysis can truly be said to be necessarily related to concurrence. Correspondingly, when courts attempt to define the term, they are unable to appropriately define concurrent while maintaining some semblance of the term as defined by dictionaries or as originally intended by courts and insurers.

For that reason, courts and commentators should avoid using the term “concurrent” to refer to a loss caused by more than one cause. Instead, courts and commentators should use “multi-cause” in its place. Either a loss is caused by one cause, or the loss is caused by multi-causes. If the loss is caused by one cause, the analysis is simple and the court determines whether that loss is covered. If, however, the loss is caused by multi-causes, then courts should engage a new approach to the multi-cause loss.

This presents a simple remedy to an unnecessarily complicated problem. There is no reason that multi-cause losses should be referred to as concurrent, but that is what has been done for years. If there were some

\textsuperscript{100} Shinrone, Inc. v. Insurance Co. of North America, 570 F.2d 715 (8th Cir. 1978).

\textsuperscript{101} Perhaps the word need not be dropped permanently, but certainly a long hiatus would be beneficial to avoid the current conflation of terms currently applied to “concurrent.”

\textsuperscript{102} See supra __.
reason to use the term concurrent, I would refrain from suggesting a replacement. However, there is absolutely no reason whatsoever to refer to a loss caused by multiple causes as a “concurrent” loss.

Second, the term efficient proximate cause has been used in so many different ways that there is confusion about its definition as well. As originally envisioned, efficient proximate cause related to chain-of-event questions. Courts would attempt to determine the efficient proximate cause to decide which event “set the other events in motion.” Thus, the precise definition for efficient proximate cause is the cause that sets the others in motion and relates expressly to chain-of-event losses. This is the only place where the term efficient proximate cause should be used.

Over time, courts and commentators began to use efficient proximate cause more loosely and applied the term to non-chain-of-event multi-cause losses. Efficient proximate started being defined as the “predominant factor” in a loss and has been used to refer to the dominant-cause approach. This has generated confusion because courts now attempt to look for the “moving” cause of loss even when there is not a chain-of-events preceding the loss. For non-chain-of-event losses, however, there is no “moving” cause of loss and courts must look to the predominant or substantial cause of the loss.

B. New Analysis for Multi-Cause Losses

Rather than having courts attempt to analyze insurance policies in a vacuum, I would propose that courts and commentators address concurrent causation issues using a more methodical, categorical approach.

In insurance coverage, categorization is often essential to understanding the issues. Indeed, the proliferation of confusion concerning multi-cause losses can be traced to deficiencies in categorization. For instance, the post-Partridge proliferation largely occurred because courts failed to appropriately categorize the losses. Different concerns arise in property and liability disputes and courts should treat the disputes differently.

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104 Garvey v. State Farm, 770 P.2d 704, 705 (Cal. 1989) (citing Michael E. Brag, Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers, 20 FORUM 385, 386 (1986)) (“Liability and corresponding coverage under a third-party insurance policy must be carefully distinguished from the coverage analysis applied in a first-party property contract. Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability.”).
the post-Partridge era, courts failed to properly distinguish property from liability cases and inappropriately applied liability standards to property cases.

To avoid these types of categorical problems, this article advocates a more methodical approach and recommends that courts engage in an analysis using a number of discreet, step-by-step questions. The discreet questions would encourage courts to appropriately categorize the loss and subsequently apply the proper means of analysis to that particular category of loss. This approach would more uniformly address multi-cause losses and would lead to improved consistency and efficiency throughout jurisdictions, would avoid inequitable results, and would lead to greater contract certainty.\(^{105}\)

When addressing insurance coverage questions, the key concern is causation and whether the peril causing the loss is covered or excluded. The approach advocated in this article presents a more direct-line, causal, approach to causation questions that the piecemeal approach currently employed by the courts.

Obviously the threshold question in a coverage dispute concerns the determination of what specific peril or perils contributed to the loss. When losses only involve one peril, the analysis is straightforward: was the peril covered or excluded? Conversely, when losses involve multiple causes, the analysis becomes far more complicated. Accordingly, once the stakeholders recognize that the loss involves multiple causes, it would behoove the courts to address a series of questions before opining on the resulting coverage question: (1) did the causes operate in an unbroken chain of events or did the causes operate independently?; (2) if the losses operated independently, did they act simultaneously or sequentially?; (2a) if the losses were simultaneous, were the various causes independently sufficient or independently insufficient to cause the loss?; (2b) if the losses were sequential, what cause and resultant loss came first and did the second cause exacerbate the preceding loss?\(^{106}\)

1. Did the Causes Operate in an Unbroken Chain or did the Causes Operate Independently?

Different analyses are required when dealing with losses caused by an unbroken chain-of-events and losses caused by independent perils. For

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\(^{105}\) As with most insurance questions, these issues are often best addressed by a flowchart and I have attached the flowchart to the appendix for review.

\(^{106}\) See flowchart attached to appendix for clarity on the steps.
unbroken chains-of-events, courts typically try to determine what was the “moving” cause of the loss, or stated in other terms, “if the immediate cause of the loss was dependent on other forces or events, then the trier of fact [is] required to engage in a process of selection to determine the ‘efficient’ cause of the loss.”

If there is a chain-of-events, the court should look to the “efficient proximate cause of the loss.” In chain-of-event scenarios, typically the event that sets the others in motion is well established and easy to determine. For instance, in a relatively recent Ninth Circuit Court of Appeals case, the parties unequivocally agreed on the efficient proximate cause of the loss stemming from an unbroken chain of events. In *Terminal Freezers*, the policyholder had built a commercial freezer facility. After some time, it was discovered that ice was accumulating in the ceilings and walls. The parties unanimously agreed that the ice was caused due to an unbroken chain-of-events. During construction, the contractor had defectively installed a vapor barrier, the defective vapor barrier allowed water vapor to enter the facility, the water vapor infiltrated ceiling tiles and insulation, and the water vapor froze in the ceiling tiles and insulation; thereby destroying the interior of the facility and causing significant damage. In *Terminal Freezers*, the immediate cause of the loss was water vapor freezing; however, there was no doubt between the parties that the real “cause,” or the “efficient” cause of the loss, was the defectively installed vapor barrier: but-for the defectively installed vapor barrier, the ice would not have accumulated in the building. Like *Terminal Freezers*, most chain-of-event cases provide a relatively straightforward question that is often capable of agreement between the parties.

Accordingly, for chain-of-event cases, the court should continue to seek to determine the efficient proximate cause of the loss and determine whether the efficient proximate cause is covered or excluded. If the cause is covered, the entire loss should be covered; conversely if the efficient proximate cause is excluded, then the entire loss should be excluded.

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109 2008 U.S. Dist. LEXIS 48280 (W.D. Wash. June 23, 2008) (the parties did dispute, however, whether the resultant ice formations should be covered or excluded, but the case is illustrative of how courts employ the chain-of-events analysis works).
In non-chain-of-event cases, however, there is no “efficient proximate cause” setting in motion an unbroken chain of events. Accordingly, the efficient proximate cause analysis is inappropriate in independent cause cases and explains why courts have had such difficulty attempting to fit the efficient proximate cause framework into independent causation analyses. Therefore, courts should employ an entirely different analysis when evaluating these types of losses. In these cases, courts should determine whether the causes operated simultaneously or sequentially.

2. Did the Causes in the Multi-Cause Loss operate Simultaneously or Sequentially

Simultaneity is important in the insurance context. Modern “concurrent causation”—multi-cause—jurisprudence arose when California addressed a loss where simultaneous causes operated to create the loss.\(^\text{110}\)

In this author’s view, perils operating simultaneously should be analyzed separately from independent perils operating sequentially.\(^\text{111}\) The temporal differences raise independent questions. Just as in the case of conflating chain-of-event and independent losses, when courts and commentators begin classifying simultaneous and sequential losses together, confusion results because the concerns in the issues in both cases are separate and distinct.

a. Simultaneous Losses

For perils operating simultaneously, courts should first determine whether the various perils were independently sufficient or independently insufficient to cause the loss. By way of analogy, the quintessential independent-simultaneous-multi-cause loss would present itself if an earthquake (excluded peril) occurred at the exact same time that as a fire (covered peril). For this analogy, the two events are entirely unrelated, and the property was completely destroyed as a result of the loss.

In this analogy, the court would determine whether a covered peril was independently sufficient to cause the entire loss. If a covered peril is sufficient to cause the entire loss, then the entire loss should be covered. For example, in this analogy, if the fire could have caused the entire loss, \(^{\text{110}}\)Partridge.\(^{\text{111}}\) It is important to note that once we are in step 2, sequential losses do not refer to sequential unbroken chain-of-events. Rather, sequential refers solely to independent perils occurring sequentially. For chain-of-event losses, courts should continue applying the efficient proximate cause analysis as discussed above in Part V.B.1.
then the loss should be covered, even if the earthquake could have caused the entire loss.

If the covered peril was not sufficient to cause the entire loss, and the excluded peril could have independently caused the loss, then the entire loss should be excluded. Continuing the analogy, if the fire could not have caused the entire loss, but the earthquake could have caused the entire loss, then the entire loss should be excluded.

If, however, neither the fire nor the earthquake could have independently caused the loss, then the court should determine which of the two perils was the “predominant” cause of loss.\textsuperscript{112} If the court determines that the fire is the predominant cause of loss, then the entire loss should be covered. If however, the court determines that the earthquake is the predominant cause of the loss, then the entire loss should be excluded.

The rationales for this approach relate to reasonableness and notions of fairness. If one covered cause of loss was sufficient to cause the entire loss, then the insurer should not benefit from the fortuitous circumstance that an excluded loss operated at the same time. The insurer underwrites the policy and intends to provide insurance for certain events. Once that event is triggered, the insurer should not be able to benefit because an additional cause occurred at the same time. The policyholder pays a premium for particular coverages, and once those coverages are triggered, the insurer is obligated to pay. Conversely, if an excluded peril could have caused the entire loss, then the policyholder should not be able to benefit when the property would have been completely destroyed and the damages caused by the covered perils were less than the damages caused by the excluded perils. Similarly, if neither peril could have independently caused the loss, fairness dictates that the court should attempt to determine which cause was the predominant cause of the loss. If the predominant factor of the loss was excluded, the policyholder should not be able to receive coverage when the bulk of the damage is caused by excluded causes. By that same token, the insurer should not be able to avoid coverage when covered losses predominate.

\textit{b. Sequential Losses}

For independent causes occurring in sequence, the threshold question

\textsuperscript{112} It is important to note the definitional consistency that needs to be employed in this category. This analysis should be referred to as seeking the “predominant” cause of the loss. This should not be referred to as the “efficient proximate cause” of the loss because that term is limited to chain-of-event situations, which are not present in this example.
should attempt to determine which cause and resultant loss came first. The second question would ask whether the subsequent loss exacerbated the damage or created new damage.

While some courts have ignored the sequence of losses, fundamental notions of insurance dictate that the sequence is essential to determine whether there should be coverage. As prudently stated by the Mississippi Supreme Court:

No reasonable person can seriously dispute that if a loss occurs, caused by either a covered peril (wind) or an excluded peril (water), that particular loss is not changed by any subsequent cause or event. Nor can the loss be excluded after it has been suffered, as the right to be indemnified for a loss caused by a covered peril attaches at that point in time when the insured suffers deprivation of, physical damage to, or destruction of the property insured. An insurer cannot avoid its obligation to indemnify the insured based upon an event which occurs subsequent to the covered loss.¹¹³

In *Corban*, the court addressed immutable principles of insurance coverage. Covered losses do not become excluded merely because a subsequent cause operates on the loss.¹¹⁴ Similarly, excluded losses do not become covered merely because subsequent covered perils happen to impact the loss. Thus, the key question should be which peril came first and was that peril covered or excluded: If the peril is covered, the loss should be covered, and the reverse holds true as well.

After determining which loss came first, the court should determine whether the subsequent peril exacerbated the loss or created new damage. If the subsequent cause exacerbated the loss, then the exacerbated damages should be categorized according to the prior loss. If, however, the subsequent cause creates new damage, then the court should re-analyze whether that cause is covered or excluded and provide coverage for the new loss accordingly.

For example, if an earthquake (excluded) damaged a property and two hours later a fire (covered) came and merely

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¹¹³ Corban v. USAA, 20 So.3d 601, 613 (Miss. 2009).
¹¹⁴ *Id.*
exacerbated the earthquake damage, the entire loss would be excluded. If, however, the earthquake damaged the foundation of the property causing distinct damages, and the fire later damaged the roof and framing, then the fire damage should not be excluded merely because an earthquake caused some damage to the property.

The rationale for this approach relates to reasonableness and doctrines of fairness. It should be an immutable doctrine of insurance coverage that covered losses do not become uncovered merely because the insurer has not had yet paid the claim.

By way of analogy, if a policyholder suffered a loss on the 1st of the month, and the insurer acknowledged the loss was covered and payment should be made on the policy. No reasonable insurer would argue that the covered loss on the 1st of the month becomes excluded simply because the policyholder suffers a subsequent loss caused by an excluded peril on the 31st of that month. Although that analogy seems absurd, that is essentially the argument that insurers make during sequential multi-cause losses. These arguments should be rejected when a excluded peril merely subsequently impacts the property and causes the same damage or merely exacerbates the previous loss.

Similarly, the policyholder should not be able to receive an undue benefit. By analogy, if an automobile is in an accident and the hood is mangled and unfit for daily use, no reasonable policyholder would argue that the policyholder should be able to recover for a key-scratch on the same hood. The same analogy applies. The fact that a covered event occurs after an excluded event should not morph the excluded loss into a covered one.

The area for potential pushback in this approach concerns the exacerbation/new loss distinction. If the subsequent loss significantly exacerbates the loss, the stakeholders may have a claim that there should be some offset. However, experience indicates that bifurcating losses is extremely difficult, and apportionment is inexact and difficult to prove. The problem only becomes more complicated in cases of total losses. Thus, for clarity and policy consistency, a subsequent exacerbation of a previous loss should not affect the prior loss determination.

In cases where the losses and subsequent causes can be clearly bifurcated, the subsequent loss should be analyzed under general principles of insurance interpretation.

Revisiting the earthquake-fire analogy, if an earthquake were to damage the foundation and then an unrelated fire were to strike the property, the damage from the earthquake would clearly be excluded since it occurred first. If the earthquake caused the total loss of the property, then the loss would be excluded, even if a subsequent unrelated fire struck the location and would have assuredly burned the building to the ground. If the earthquake did not cause a total loss of the property, and an unrelated fire later struck the same property, then the court would look to the impact on the property and the nature of the fire damage. If the fire damage exacerbated structural problems caused by the earthquake, then the resultant fire-structural damage would be excluded. Conversely, if the fire damaged property undamaged by the earthquake, then the policy would cover the resultant unrelated fire damage.

C. Arguments Against the Revised Approach

As for my proposal calling for definitional clarity, most courts and commentators would probably agree that the current definitional landmine is unworkable and that it is time to revisit the terms relating to these issues. While some may disagree with the terms used in this article, most commentators will probably agree that the current lexicon is unworkable.

As for the approach this article takes with respect to jurisprudential analysis, there are probably two main areas for attack: (1) the article essentially adopts the dominant cause approach in most circumstances and would result in a pro-policyholder jurisprudential shift and (2) the steps could lead to further confusion.

1. The Dominant-Cause or Efficient Proximate Cause Critique

In many ways, the approach advocated for in this article does adopt some iterations of the dominant-cause approach. However, this incorporation is intentional: (1) when insurers began inserting anti-concurrent causation clauses into insurance policies, the insurers were trying to combat post-Partridge analyses to multi-cause losses; and (2) policyholders do not possess the same negotiating leverage or coordination of effort to institute the reasonable changes proffered in this article.

First, Insurers sought to avoid situations where a minor covered cause in
a chain-of-events operated to cover the entire loss. By applying the approach advocated in this article, the insurer is back in the pre-Partridge analysis of multi-cause losses. In the perfect world, there would be much greater uniformity across jurisdictions, which would allow insurers to be able to maintain some sense of contractual certainty. Insurers would know ex ante how courts would address multi-cause losses, and insurers and policyholders alike would have a better understanding of the scope of insurance policies. In a recent conversation with one of the nation’s premier and preeminent property insurance coverage experts, Jim Costner indicated that it is virtually impossible to maintain contract certainty in the current state of multi-cause loss jurisprudence. Adopting the approach advocated in this article would undoubtedly improve contract certainty.

Second, policyholders do not possess the power or capacity to unilaterally alter Insurance Services Office policies. While courts often discuss the freedom to contract and reason that policyholders could have bargained to avoid the “anti-concurrent exclusions,” these courts fail to acknowledge that insurance contracts are pure contracts of adhesion, meaning that the contracts are presented on take-it-or leave it basis. Additionally, the policyholder generally has no idea that anti-concurrent exclusions exist, much less any inclination as to how the policies will be interpreted. Accordingly, the approach advocated in this article attempts to align doctrines of reasonableness with policyholder expectations. It should be unconscionable for a loss that is 99% covered to be excluded merely because 1% of the loss was excluded.

The unconscionability extends even further when the potential for an 99%-covered loss is excluded under an “all risk” policy. Policyholders understandably overestimate what is included in an “all risk” policy, but no reasonable policyholder would expect a 99%-covered loss to be excluded simply because a crafty adjuster is able to find some small amount of the loss that is excluded. Also, if these types of exclusions are included, they should come with a disclaimer specifically alerting the policyholder of the nature of the potential exclusion.

Thus, while the approach advocated in this article does follow some elements of the dominant-cause approach, it is a deliberate choice, which more accurately reflects what should be the default position between insurer and policyholder.

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117 Personal notes and conversation with Jim Costner February 9, 2011.
This approach also limits the dominant-cause approach analysis to chain-of-event losses, and parts ways with the dominant-cause approach for independently caused losses. As advocated in this article, independent losses should be analyzed separately and distinctly from chain-of-event losses. Accordingly, the approach advocated in this article, attempts to provide a new method of analysis for independent losses.

2. Confusion About How to Approach the Analysis
Because this approach recommends a series of questions relating to categorization, some may argue that the categorization itself could prove more problematic than the original problem. For instance, questions may arise as to how a court should determine whether causes harmonized to create a clear chain-of-events or whether the causes operated independently.

To be sure, there exists an element of discretion in this approach. There will invariably be difficult decisions to make whether a loss was caused by a chain-of-events or independent causes. Similarly, it may not always be easy to determine whether causes operated simultaneously or sequentially.

This approach addresses those concerns by making those close calls fact issues. The fact-finder will determine whether the causes operated sequentially or simultaneously. The approach is not designed to remove fact finding from the calculus. Rather, the approach attempts to clearly delineate fact questions from legal questions. Once the fact-finder determines the relevant facts, the law is easily applied.

Certainly, there will be results where parties disagree with courts’ conclusions respecting whether the losses were harmonious or independent. However, the application of the facts will be uniformly applied and will generate some consistency in the muddled “concurrent causation” web. Further, the approach will allow courts to look to other jurisdictions and clearly understand how a court ruled and while the court ruled as it did.

Creating clear legal guidelines will allow parties to understand ex ante the types of issues that will be addressed. Policyholders will have a clearer understanding of perils that are covered and excluded and will not have to play the concurrent-causation-roulette currently employed across jurisdictions. Similarly, insurers will understand how courts interpret their policies, which will create greater contract certainty and more accurate

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118 This idea is not novel and was discussed by the California Supreme Court in Garvey. 514 P.2d 130-31 at n. 10.
underwriting determinations.

VI. CONCLUSION

“Current causation” has evolved into an unworkable mess. The concurrent causation lexicon has become so muddled and amalgamated that it is impossible to forecast how a court, insurer, or policyholder will interpret “concurrent causation” questions. For those reasons, this article concludes that the “concurrent causation” lexicon should be revised and recommends that courts analyze multi-cause losses according to a formulaic, categorical approach. By applying more precise and accurate language to multi-cause losses, courts and commentators will avoid unnecessary confusion and potential conflation of terms; thereby assuring contract certainty and ensuring that reasonable expectations are maintained.
How was Loss Caused

Determine how loss was caused

Multiple Causes

Single Cause

Determine whether loss is covered or excluded

Sequence or Chain of events

Multiple contributing causes

Entire loss is covered

Entire loss is excluded

Determine most important peril

Determine whether causes were simultaneous or sequential

Determine which loss came first

Determine whether cause was covered

Independent Insufficient

Most important peril excluded

If peril is covered

If peril is excluded

Independent Insufficient

If covered

If all excluded