

ARTICLES

THE DOCTRINE OF EFFICIENT PROXIMATE CAUSE, THE KATRINA DISASTER, PROSSER'S FOLLY, AND THE THIRD RESTATEMENT OF TORTS: CRACKING THE CONUNDRUM

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INTRODUCTION

Courts across the country have been unable to agree whether an insurer of real property is liable for loss caused by a combination of covered and excluded risks. In some jurisdictions, courts have found the loss covered, borrowing from analytical models of concurrent causation used to assign legal responsibility for tortious conduct. In other jurisdictions, courts have found the loss excluded, owing to disagreement over resorting to tort models of causation to inform contract construction. Unable to agree upon a well-suited paradigm to assess the responsibility of insurers in instances of concurrent causation, courts nationwide have applied indistinguishable contractual provisions inconsistently and unpredictably, repetitively reaching contradictory results on practically identical facts.

Catastrophic losses, which know no jurisdictional boundaries, draw particular attention to these paradoxical results. Identical classes of loss following an event such as Hurricane Katrina may be covered by insurance in one state, but excluded in another—solely because of varying enforcement of standardized insurance policy exclusions. This irregularity across jurisdictions has led to threats by some insurers to embargo states refusing to enforce exculpating provisions governing the concurrent causation issue. At the same time, residents of devastated communities, left without expected sources of insurance revenue for rebuilding, insist that underwriters' expectations yield to those of consumers bound to the invariable terms of an insurance product.

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Most courts refusing to enforce as written provisions of an insurance contract that purport to exclude loss concurrently caused by covered and excluded perils have relied upon the widely accepted, but poorly conceived “doctrine of efficient proximate cause.” The doctrine is deeply rooted in outdated and obsolete models of causation in tort law, some notably promulgated by Dean William L. Prosser and fixed in the Second Restatement of Torts while he served as its Reporter.

A model of causation more rational than the “doctrine of efficient proximate cause” is necessary to more reliably determine whether loss attributable to both insured and excluded causes is covered by standardized insurance policies—and that model is extant. This Article proposes supplanting the doctrine of efficient proximate cause with refinements in contemporary causation theory embodied by the forthcoming Restatement (Third) of Torts: Liability for Physical Harm.

Part One of this Article examines the doctrine of efficient proximate cause, and surveys the uneven and idiosyncratic application of the doctrine in Louisiana and Mississippi following Hurricane Katrina.

Part Two opposes selected root constructs of causation theory in tort upon which the doctrine of efficient proximate cause relies, and explores the toppling of those constructs, as described in the forthcoming Restatement (Third) of Torts: Liability for Physical Harm.

Part Three proposes uniform rules of contract construction, based on contemporary causation theory analytically superior to the doctrine of efficient proximate cause, and better able to address the concurrent causation conundrum in insurance coverage disputes.

I. THE DOCTRINE OF “EFFICIENT PROXIMATE CAUSE”

A. PROPERTY INSURANCE AND THE CONCURRENT CAUSATION CONUNDRUM

Insurance contracts typically provide a type of coverage for loss or damage to real property popularly known as “all risk.” As a practical matter, however, these policies rarely cover all loss or damage to the insured property caused by any risk. Rather, the insurer’s grant of coverage for “all risks” is usually subject to numerous provisions that except from a seemingly broad grant of coverage any loss or damage caused by an excluded “peril” or cause of loss.¹ Under an “all risk” policy, an insurer will gener-

1. Disputes sometimes arise concerning the meaning of the term “peril” in a property insurance policy. *See, e.g.,* Guice v. State Farm Fire & Cas. Co., No. 1:06CV1-LTS-RHW, 2006 WL

ally treat a loss as covered if not excluded.²

The structure of an “all risk” policy puts the burden squarely on the insurer to unambiguously define exclusions from a broad coverage grant.³ In the United States, over the span of more than a century, insurers have honed a set of exclusions from the standard “all risk” policy to a fine point.⁴ Those exclusions are now embedded in nationally distributed, standardized “all risk” homeowners insurance policies, commonly known as “ISO” pol-

2359474, at *3 (S.D. Miss. Aug. 14, 2006). “The . . . State Farm policy uses broad terms like ‘perils’ and ‘events’ in different contexts and without definition.” *Id.* For purposes of this Article, the term “peril” signifies an act, force, or event (“AFE”)—such as negligent construction, hurricane-force winds, or a flood—which has resulted in accidental, physical damage to real property.

2. “An ‘all-risk’ policy creates coverage of a type not ordinarily present under other types of insurance, and recovery is allowed for fortuitous losses unless the loss is excluded by a specific policy provision” 10A LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 148:50 (3d ed. 2007). *See also* *State Farm Fire & Cas. Co. v. Von der Lieth*, 820 P.2d 285, 290-91 (Cal. 1991). “[T]he scope of coverage under an all-risk homeowner’s policy includes all risks except those specifically excluded by the policy.” *Id.* An “all risk” policy therefore differs from a traditional “named peril” policy: “All-risk insurance covers all risks that are not specifically excluded in the terms of the contract, and takes the opposite approach of traditional policies, sometimes called ‘named perils’ or ‘specific perils’ policies, which exclude all risks not specifically named.” *Frank Coluccio Constr. Co. v. King County*, 150 P.3d 1147, 1150 (Wash. App. 2007); *see also* *Preis v. Lexington Ins. Co.*, 508 F. Supp. 2d 1061, 1071 (S.D. Ala. 2007).

3. *See, e.g., Zurich Am. Ins. Co. v. Keating Bldg. Corp.*, 513 F. Supp. 2d 55 (D. N.J. 2007). “The insurer bears the burden of proving that a provision limiting coverage (either an exclusion or limitation) applies to the particular loss at issue.” *Id.* Moreover, as the drafter of the insurance contract, courts generally will construe any ambiguity in a proffered exclusion against the insurer—in the words of the old maxim, “contra [against] proferentum [the one bringing the language forth].” *Id.* *See, e.g., Tuepker v. State Farm Fire & Cas. Co.*, No. 1:05CV559-LTS-RHV, 2006 WL 2794773, at *2 (S.D. Miss. Sept. 27, 2006) (quoting *BLACK’S LAW DICTIONARY* 328 (7th ed. 1999)) (“[C]ontra proferentem is defined as: ‘The doctrine that, in interpreting documents, ambiguities are to be construed unfavorably to the drafter.’ It is also termed the ‘ambiguity doctrine,’ and the Latin translation is ‘against the offeror,’”); *Caldwell v. Hartford Accident & Indem. Co.*, 160 So. 2d 209, 212-13 (Miss. 1964) (“The rule that the insurance policy prepared by the insurer must be construed more strongly against the insurance company, and that any fair doubt should be resolved in favor of the insured, is so well-settled in the law of insurance that we hesitate to cite any cases.”). *Cf. Brubaker v. Metro. Life Ins. Co.*, 482 F.3d 586, 591 (D.C. Cir. 2007) (quoting *United States ex rel. Dep’t of Labor v. Ins. Co. of N. Am.*, 131 F.3d 1037, 1043 n.11 (D.C. Cir. 1997) (“[T]he contra proferentum canon—a rule ‘that ambiguities in an insurance contract should be construed against the insurer who drafted the contract’ . . . [was] devised as a tiebreaker [and] is of no relevance when the language in question is clear.”)).

4. Owing to widespread dissatisfaction with anomalies in the fire insurance market, the National Board of Fire Underwriters—organized in 1866—unsuccessfully attempted to secure adoption of standardized fire insurance policy forms it created in 1867 and 1868. Following huge fires in Chicago and Boston in the early 1870s, state legislatures began codifying the permissible terms of fire insurance coverage. In 1943, the state of New York enacted the famous “165 lines,” a standard form fire insurance policy still in use today—albeit with amended terms. *See generally* Thomas L. Wenck, *The Historical Development of Insurance Policies*, 35 J. RISK & INS. 537, 538-44 (1968).

icy forms.⁵

In general, standardized “all risk” homeowners insurance policies unambiguously exclude loss caused by certain perils that are particularized to the insured’s property, such as wear and tear and deterioration.⁶ Categorically, these perils seldom present an existential threat to the insured property, and even more rarely present any threat at all to the life of the community in which the property resides. Loss or damage caused by excluded particularized perils in the main can be avoided by ordinary maintenance. Consequently, a lower stake in insurance coverage disputes concerning such loss regularly smoothes the process of claim adjustment.⁷

5. In 1971, a consortium of insurers formed the Insurance Service Office, Inc. (ISO). See Major Michele McAninch Miller, *Dep’t of Army Pamphlet 27-100-138: Defense Department Pursuit of Insurers for Superfund Cost Recovery*, 138 MIL. L. REV. 1, 16 (1992). See also ISO Homepage, http://www.iso.com/index.php?option=com_content&task=view&id=13&Itemid=114 6 (last visited Mar. 21, 2008) (providing information on ISO services). Among its other functions, “ISO develops standard policy forms and files or lodges them with each State’s regulators” *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993); see also *In re Katrina Canal Breaches Consol. Litig.*, 466 F. Supp. 2d 729, 741 n.4 (E.D. La. 2006), *vacated in part*, 495 F.3d 191 (5th Cir. 2007), *cert. denied sub nom. Xavier Univ. of Louisiana v. Travelers Cas. Prop. Co. of Am.*, No. 07-711, 2008 WL 423587 (U.S. Feb. 19, 2008); *Chehardy v. Allstate Indem. Co.*, No. 07-713, 2008 WL 423589 (U.S. Feb. 19, 2008) (“[ISO] . . . provides products and services help to the insurance industry to measure, manage and reduce risk [and] it provides standardized insurance policy language”). ISO fashioned the standard policies of homeowners insurance in general use today. A representative example of these standardized policy forms is commonly known as the “HO 03.” See, e.g., *Preis v. Lexington Ins. Co.*, 508 F. Supp. 2d 1061, 1070 n.2 (S.D. Ala. 2007) (“Lexington [the insurer] itself describes the Policy as the ‘HO3 form.’”). See, e.g., INSURANCE SERVICES OFFICES, INC., HOMEOWNERS 3—SPECIAL FORM (HOMEOWNERS HO 00 03 10 00) (1999), available at http://server.iii.org/yy_obj_data/binary/748905_1_0/HO3_samp le.pdf (last visited Mar. 21, 2008) [hereinafter HO3 FORM].

6. For example, the HO3 FORM includes the following provision:

Section I—Perils Insured Against

A. Coverage A—Dwelling and Coverage B—Other Structures

1. We insure against risk of direct physical loss to property described in Coverages A and B.

2. We do not insure, however, for loss:

....

c. Caused by:

....

(6) Any of the following:

(a) Wear and tear, marring, deterioration;

....

See HO3 FORM, *supra* note 5, Section I(A)(2)(c)(6)(a), at 8-9.

7. “All risk” insurance contracts are somewhat unique in that the key promise of the insurer (to pay upon the happening of a loss) is often avoided in whole or in part. Insurers employ a formidable array of methods to limit the scope of risks shifted to the insurer by the insurance contract. In addition to excluding from coverage broad categories of risks, insurers often obtain warranties from a prospective insured to reduce the likelihood of a covered loss, eliminate probable, smaller losses by means of deductibles, and avoid the greatest losses by way of policy limits. This cluster of techniques to limit insurer liability may invite the supposition that insurers are insulated

In contrast, calamitous perils, such as flood, earthquake, and landslide—sometimes described as “correlated risks”—often result in a widespread catastrophe that threatens to destroy the continued existence not only of the insured property, but also the community at large.⁸ The consequent losses can, and sometimes do dwarf the resources of insurers liable to pay for rebuilding.⁹ The continued vitality of devastated communities hangs in the balance. The stakes, indeed, are great.

Given these stakes, most insurance underwriters maintain that effective exclusion of loss caused by nearly all correlated risks is essential to preserve equilibrium in the private homeowners insurance market. Insurers in the private sector disclaim any greater coverage obligation.¹⁰ Public sector subsidization (when available) notwithstanding, calamitous perils predictably soon put an end to the unlimited availability of a more inclusive homeowners insurance policy in any event.¹¹

from risk. Yet, major catastrophes can and do present major threats to insurers. *See infra* note 9.

8. Particular and generalized risks are sometimes referred to as “uncorrelated” and “correlated” risks, respectively. One description of uncorrelated and correlated risks states:

[U]ncorrelated risk makes the writing of insurance economically viable [W]hen one insured in the risk pool suffers a loss . . . all insureds in the risk pool do not simultaneously suffer loss The risk in such an insurance pool is uncorrelated Risk for hurricane, flood, nuclear war, and the like . . . is correlated. If one insured suffers significant hurricane damage, a significant number of other insureds will likewise have such damage. Unlike a discrete [peril] that involves loss to only one insured, hurricanes and floods can involve massive losses to a large number of insureds from the same event.

See JEFFREY JACKSON, MISSISSIPPI INSURANCE LAW AND PRACTICE § 15:17 (2006).

9. The Federal Emergency Management Agency (FEMA) reports that its commitments to reimburse losses associated with Hurricane Katrina in the states of Florida, Louisiana, Mississippi, and Alabama have reached \$29,318,576,948 (68% funded as of April, 2007.) *See* FEMA, Most Expensive Presidentially-Declared Disasters, <http://www.fema.gov/hazard/hurricane/top10hu.shtm> (last visited Mar. 21, 2008). By comparison, the September 11 attacks resulted in FEMA-funded losses in New York, New Jersey, and Virginia of \$8,818,350,120. *Id.* Losses incurred by the insurance industry associated with Hurricane Katrina substantially exceed those funded by the federal government. *See* Douglas R. Richmond, *Insurance and Catastrophe in the Case of Katrina and Beyond*, 26 MISS. C. L. REV. 49, 49 (2006-07) (“[P]roperty insurance losses attributable to Katrina [are] at least \$38.1 billion and perhaps as much as \$55 billion. Either figure reflects ‘an amount large enough to wipe out most of the estimated pre-tax operating profit of the entire insurance industry for the year.’”) (internal citations omitted). Following Hurricane Andrew in 1992, ten insurers went out of business. *Id.* at 53 n.35.

10. Losses caused by catastrophic events are sometimes insured by means of federal or state subsidized or mandated specialty programs and insurance products. For example, in 1968, Congress passed the National Flood Insurance Act, creating the National Flood Insurance Program (NFIP). The NFIP permits private insurers to issue contracts of flood insurance backed by the full faith and credit of the United States. *See* FEMA & FEDERAL INS. & MITIGATION ADMIN., NATIONAL FLOOD INSURANCE PROGRAM: PROGRAM DESCRIPTION 22-23 (2002), available at <http://www.fema.gov/library/viewRecord.do?id=1480> (last visited Mar. 21, 2008). *See also infra* note 11.

11. The experience of Florida’s state-run insurance company is a case in point. In 2002, Florida created the Citizens Property Insurance Corporation (CPIC) to insure homeowners who could

As a result, standardized “all risk” homeowners policies widely available in the private insurance market uniformly contain unambiguous provisions intended by insurers to exclude all loss caused by most calamitous perils. Even so, such loss in every instance cannot be perfectly isolated from loss covered by the policy. For example, hurricane-force winds may blow off the roof of a home, allowing the intrusion of ruinous rain water (perils not excluded from coverage) while nearly simultaneously a flood (an excluded peril) advances and engulfs the property.

The combined effect of excluded and covered perils presents a knotty question of insurance contract construction that has made a simple solution impossible. Astonishingly, the fairly common confluence of covered and excluded causes of loss quite literally has confounded consistent interpretation of the provisions of insurance policies for centuries. The problem will be hereinafter described as “the concurrent causation conundrum.”

Courts remain divided on the means to crack the conundrum. Some courts give expansive and deferential effect to policy language expressly and unambiguously intended by insurers to exclude from coverage all loss caused concurrently by excluded and covered acts, forces, or events. Other courts refuse to give any effect at all to standardized exclusions intended to apply in instances of concurrent causation. The former point to the sanctity of contracts, the latter rely on a common law principle of causation described commonly as the “doctrine of efficient proximate cause” (“the Doctrine.”) This divergence has yielded unsteady results.

Spotty and uneven enforcement of exclusions from “all risk” policies applicable to losses caused by calamitous perils has obliged underwriters and policyholders alike to plot a course beset by confusion and uncertainty.

not find property coverage in the private insurance market. By 2006, CPIC became the largest property insurer in Florida. See JANET L. KAMINSKI, CONN. GEN. ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH, HURRICANE WINDSTORM INSURANCE IN FLORIDA (2006), available at <http://www.cga.ct.gov/2006/rpt/2006-r-0498.htm> (last visited Mar. 21, 2008). According to market analysts at Lloyd’s Worldwide Market Services, “as of April 30, 2006, [CPIC] had 850,266 policies in force, with total exposure of \$227 billion and premiums of \$1.5 billion.” Julian James, Director, Worldwide Markets, Lloyd’s of London, *Florida Property Insurance Issues*, MARKET BULL., June 22, 2006, at 3, available at [http://www.bulletins.lloydsolondon.com/bulletins/mktcircular/mktBulletins/Y3835/\\$file/Y3835.pdf](http://www.bulletins.lloydsolondon.com/bulletins/mktcircular/mktBulletins/Y3835/$file/Y3835.pdf) (last visited Mar. 21, 2008). Following the 2005 hurricane season, CPIC incurred a “\$1.7 billion deficit . . . offset by a direct appropriation of \$715 million in state tax revenues.” *Id.* at 2. In response, in 2005:

[T]he Florida legislature created [a] Task Force . . . to make recommendations . . . on keeping sufficient capacity in the property insurance market (private and public) to ensure continued availability of insurance coverage for hurricane losses The task force issued its first report in . . . 2006 with numerous recommendations, some of which were adopted by the legislature in 2006. [Among them, the CPIC] will no longer cover . . . homes [worth] more than \$1 million or vacation and second homes of any value, starting July 1, 2008.

See KAMINSKI, *supra* note 11.

Uniform and predictable judicial construction of standardized insurance contracts is vital, both to lessen instability in the insurance market occasioned by its absence and to protect devastated communities from unexpectedly uninsured calamity. Yet, the governing law is so characteristically dysfunctional that the outcome of insurance coverage disputes implicating the question of concurrent causation has become unendurably arbitrary. This intolerable inconsistency nearly entirely impedes the critical reckoning indispensable to prudent risk management.

B. THE LINEAGE AND MATURATION OF THE DOCTRINE OF EFFICIENT PROXIMATE CAUSE

Genealogical inquiries sometimes reveal unknown ancestors. The birthplace of the Doctrine is so often attributed to California that in 2005 the Supreme Court of California was compelled to deny paternity.¹² In fact, the origins of the Doctrine stretch back at least to Ancient Greece.¹³ Furthermore, in the United States, the Doctrine had a long and checkered history before the State of California was admitted to the Union. That stated, after debuting in some of the earliest United States Supreme Court deci-

12. See *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 906 (Cal. 2005) (citing Mark D. Wuerfel & Mark Koop, *Efficient Proximate Causation in the Context of Property Insurance Claims*, 65 DEF. COUNS. J. 400, 401 (1998)) (“The efficient proximate cause doctrine ‘is neither a California invention nor novel.’”). But see Stephen P. Pate, *Recent Developments in Property Insurance Law*, 33 TORT & INS. L. J. 659, 663 (1998) (citing *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704 (Cal. 1989) (en banc) (“In the 1980s courts seeking to resolve coverage issues in favor of the insured created the ‘concurrent causation doctrine.’”).

13. The maxim “*In jure non remota causa, sed proxima spectatur*”—“The law looks to the proximate, and not to the remote cause”—is generally attributed to Sir Francis Bacon. See BASIL MONTAGU, 3 THE WORKS OF FRANCIS BACON 223 (1850). Discussing the meaning of “proximate cause,” the Supreme Court of California observed:

The word ‘proximate’ is a legacy of Lord Chancellor Bacon, who in his time committed other sins. The word means nothing more than near or immediate; and when it was first taken up by the courts it had connotations of proximity in time and space which have long since disappeared. It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness.

Mitchell v. Gonzales, 819 P.2d 872, 877 (Cal. 1991) (en banc) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 42 (5th ed. 1984)) (internal citations omitted) See also Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 633-34 (1920) (internal quotation marks omitted) (quoting Bacon: “It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree.”). Yet, as Beale further noted, Sir Francis Bacon “was entirely familiar with the Aristotelian division of causes into four: the formal, the efficient, the material, and the final.” *Id.* (internal citations omitted). In Aristotelian terms, the “efficient” cause was “the initiating source of change or rest: the person who advises an action, for instance, is a cause of the action; the father is the cause of his child; and in general, what produces is the cause of what is changed.” See Aristotle, *Physics*, ch. II.3., at 194b (Daniel Graham trans. 1999). Thus, the very phrase “efficient proximate cause” is riddled with ambiguity of Delphic proportions.

sions, the Doctrine was undeniably promoted by the Supreme Court of California of the mid-twentieth century—finally reaching its apotheosis of incoherence after Hurricane Katrina. No other judge-made convention has so confounded the courts.

Arguments about the “proximate cause” of a loss, for purposes of establishing insurance coverage, began in the Supreme Court of the United States as early as 1810, under its fourth Chief Justice, John Marshall.¹⁴ Throughout the nineteenth century, the United States Supreme Court repeatedly relied on the Doctrine, as then conceived, to resolve the concurrent causation conundrum in insurance cases. One of the earliest of those cases was *Waters v. Merchants’ Louisville Ins. Co.*¹⁵

In *Waters*, the insured property (a ship) was destroyed as a result of a fire caused by the negligent conduct of a ship’s master and agents.¹⁶ The insurer conceded that loss of property caused by fire was covered, but contended that the risk of fire caused by the insured’s negligence was not.¹⁷ Writing for the majority, Justice Story found it “certainly somewhat remarkable, that the question now before us should never have been directly presented in the American or English courts; viz., whether . . . where the risk of fire is taken . . . a loss by fire, remotely caused by negligence, is a loss within the policy.”¹⁸ After reviewing the British authorities on the subject, the Court held:

[W]e must interpret this instrument according to the known principles of the common law. It is a well-established principle of that law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause; *causa proxima non remota spectatur*: and this has become a maxim, not only to govern other cases, but . . . to govern cases arising under policies of insurance. If this maxim is to be applied, it disposes of the whole argument in the present case; and why it should not be so applied, we are unable to see any reason.¹⁹

By finding the “proximate cause” standard disposed of the “whole argument,” Justice Story implicitly understood the common law to assign determinative consequence to the cause that most immediately preceded the loss: the loss was “proximately caused” by a “peril [fire] insured against

14. See, e.g., *Swan v. Union Ins. Co. of Md.*, 16 U.S. 168, 168-69 (1818); *United States v. Hall*, 10 U.S. (6 Cranch) 171, 172-73 (1810).

15. 36 U.S. 213 (1837).

16. *Id.* at 219.

17. See *id.* at 216-18.

18. *Id.* at 221.

19. *Id.* at 223.

[and therefore was] within the protection of the policy; notwithstanding it [the fire] might have been occasioned remotely by . . . negligence.”²⁰ Writing for the majority, Justice Story found common law principles of tort causation applicable to all “other” cases unconditionally appropriate to assess the scope of an insurer’s contractual liability in insurance cases, seeing “no reason” to search elsewhere.²¹

Into the nineteenth century, the Court adhered to more particular—if not more settled—rules of law to determine “the” proximate cause of a loss for purposes of determining insurance coverage.²² The sequence, sufficiency, and dependency of the examined causes of a putatively insured loss functioned prominently, but unsteadily in the Court’s analysis. If forces or events combined to produce a loss, then the most immediate, or recent, was considered the proximate cause of the loss, but only if that force or event was capable of producing the loss independently; if the immediate cause of the loss was dependent on other forces or events, then the trier of fact was required to engage in a process of selection to determine the “efficient” cause of the loss.²³ The proximate cause of loss was alternatively described as the moving cause—the cause which “set other causes in operation[.]”²⁴—

20. *Waters*, 36 U.S. at 224. Homeowners in New Orleans sought coverage for losses related to Hurricane Katrina under “all risk” homeowners policies by reversing the field—claiming that, despite the immediate effect of an excluded cause of loss (flood), precedent negligence (negligent construction and maintenance of the 17th Street flood walls) was the efficient proximate cause of resultant water damage. See *infra* Part I.C.

21. *Waters*, 36 U.S. at 224.

22. Students of more recent tort causation theory will not be indifferent to the article “the” preceding the term “proximate cause” in all of these cases.

23. See *Gen. Mut. Ins. Co. v. Sherwood*, 55 U.S. 351, 366-67 (1852). After declaring “a policy of insurance . . . [to be] an ‘obscure, incoherent, and very strange instrument,’” the Court held:

In applying this maxim [*causa proxima non remota spectatur*], in looking for the proximate cause of the loss, if it is found to be [an insured] peril . . . we inquire no further; we do not look for the cause of that peril. But if the [insured] peril . . . which operated in a given case, was not of itself sufficient to occasion, and did not in and by itself occasion the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause, to ascertain the efficient cause of the loss.

Id. at 362, 366 (internal citations omitted).

24. See, e.g., *Aetna Ins. Co. v. Boon*, 95 U.S. 117, 130 (1877). The Court held:

The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima, non remota spectatur*.

The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. A careful consideration of the authorities will vindicate this rule.

Id.

or the "predominating efficient" cause, especially in cases concerning indivisible loss following an uncertain sequence of events.²⁵

By the middle of the twentieth century, the Court had nearly, but not entirely refined its "efficient proximate cause" jurisprudence. In 1950, the Court again had an opportunity to restate the Doctrine, in almost paradigmatic terms.²⁶ A United States Navy minesweeper, clearing the channel approaches to New York harbor, collided with a steam tanker owned by Standard Oil Company.²⁷ The operators of both vessels were at fault.²⁸ After the collision, Standard Oil and the United States battled about coverage under a policy of war risk insurance issued by the United States that provided coverage to Standard Oil for "all consequences of hostilities or warlike operations."²⁹ The United States conceded that minesweeping the channel approaches was a "warlike operation," but argued that the collision with Standard's vessel was not a "consequence" of those operations.³⁰

The district court held for Standard Oil, finding as a fact that a "warlike operation was the proximate, predominant and determining cause of the loss."³¹ The Second Circuit Court of Appeals reversed, finding as a fact that the "evidence failed to show that the warlike phase of the minesweeper's operation had caused the collision."³² Standard Oil sought certiorari without relying on the divergence in the findings of fact on the question of causation, but rather on the ground that the Second Circuit failed to hold for Standard Oil as a matter of law.³³ Because certiorari was not granted to consider divergence in the findings of fact, the Court went "no further than to hold that the courts below properly considered the case as depending on

25. See, e.g., *Howard Fire Ins. Co. v. Norwich & N.Y. Transp. Co.*, 79 U.S. 194, 199 (1870). The Court held:

There is, undoubtedly, difficulty, in many cases, attending the application of the maxim, '*proxima causa, non remota spectatur*,' but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect (for example, to cause a loss), the law will never regard an antecedent cause of that cause, or the '*causa causans*.' In such a case there is no doubt which cause is the proximate one within the meaning of the maxim. But, when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished.

Id. (internal citations omitted).

26. *Standard Oil Co. of N.J. v. United States*, 340 U.S. 54, 58 (1950).

27. *Id.* at 55.

28. *Id.*

29. *Id.*

30. *Id.* at 56.

31. *Standard Oil Co. of N.J. v. United States*, 81 F. Supp. 183, 190 (1948).

32. *Standard Oil Co. of N.J. v. United States*, 178 F.2d 488 (2d Cir. 1949).

33. *Standard Oil*, 340 U.S. at 56-57.

the resolution of factual questions,” and affirmed the judgment of the Second Circuit.³⁴

The importance of the *Standard Oil* decision rests not on the outcome of the action, but on the reasoning of the Court. Writing for the majority, Justice Black did not reject Standard Oil’s contention that the “causal relationship between the warlike operation and the collision” was undisputed.³⁵ Rather, according to the majority opinion, the Second Circuit properly engaged in an evaluative “process of selection” among concededly “co-operating” factual causes, “applying the concept of proximate cause” to resolve the factual question presented.³⁶

Justice Black explained—over a vigorous dissent by Justice Frankfurter³⁷—that the district court, the appellate court, and the majority of the Supreme Court all agreed, if not on the outcome of the case, than on the wisdom of “adapting” the then-current canons of causation in tort law to resolve the concurrent cause conundrum in insurance cases:

The proximate cause method of determining on the facts of each case whether a loss was the “consequence” of [a covered peril] may fall short of achieving perfect results. For those insured and those insuring cannot predict with certainty what a trier of fact might decide is the predominant cause of loss. But neither could they predict with certainty what particular state of facts might cause a court to discover liability “as a matter of law.” Long experience with the proximate cause method in American and English courts has at least proven it adaptable and useful in . . . insurance cases. There is no reason to believe that its application in this case will disappoint the just expectations of insurer or insured.³⁸

Twelve years later, in a decision far more renowned than *Standard Oil*, the Doctrine was echoed in nearly identical terms by the Supreme

34. *Standard Oil*, 340 U.S. at 59

35. *Id.* at 57-58.

36. *See id.* at 56 n.3. Acknowledging that multiple causes always act to produce the examined harm, the majority stated: “It is true that the causes of an event are all the preceding circumstances which brought the event to pass—and they are myriad.” *Id.* (internal citations omitted). The Court then quoted with approval: “[T]he existence or non-existence of causal connection between the peril insured against and the loss has been determined by looking to the factual situation in each case and applying the concept of ‘proximate cause.’” *Id.* at 57-58 (citing *Aetna Ins. Co. v. Boen*, 95 U.S. 117 (1877)). When applying the “concept,” the Court stated: “[T]here is necessarily involved a process of selection from among the co-operating causes to find what is the proximate cause in the particular case.” *See id.* at 56 n.3 (internal quotation marks omitted) (alteration in original).

37. *See* discussion *infra* Part II.A.

38. *Standard Oil*, 340 U.S. at 61.

Court of California in *Sabella v. Wisler*.³⁹ The circumstances giving rise to the concurrent causation conundrum at issue in *Sabella* were characteristically uncomplicated.⁴⁰ National Union Fire Insurance Company agreed to insure the Sabellas' home "against all risks of physical loss except as hereinafter excluded."⁴¹ The policy excluded loss "[caused] by . . . settling, [and] cracking . . ."⁴² While the policy was in force, a sewer pipe near the house ruptured and began leaking.⁴³ After the sewer pipe had been emptying waste water near the foundation of the home for a period of months, the house "settled" and its "foundations and walls cracked."⁴⁴ The Sabellas contended that the damage was not the result of "settling" within the meaning of the exclusion from the National Union policy, because " . . . rupture of the sewer line [was] attributable to the negligence of a third party [and that negligence] was the efficient proximate cause of the loss."⁴⁵

The Supreme Court of California found that the insurance contract unambiguously excluded all loss caused by settling, "whether gradual or rapid,"⁴⁶ and observed that "an ordinary individual surveying the . . . damage could properly conclude that the house 'settled.'"⁴⁷ Nevertheless, citing a treatise by then a generation old, the *Sabella* court rejected the factual finding by the court below that "settling" caused the loss.⁴⁸ The court held instead, as a matter of law, that the broken sewer line "set in motion the forces tending toward settlement" and therefore was "the predominating or moving efficient cause of the loss."⁴⁹

39. See 377 P.2d 889 (1963).

40. The unpredictable and inconsistent methods that courts have used to resolve the concurrent causation conundrum have not been compelled in the main by the complexity of the circumstances at issue. Usually, cases presenting the conundrum involve relatively routine and recurring fact patterns, such as loss caused by the combination of wind and water, or negligence and resultant earth movement.

41. *Sabella*, 377 P.2d at 891.

42. *Id.* at 891-92 (internal quotation marks omitted).

43. *Id.* at 892.

44. *Id.*

45. *Id.* at 895.

46. *Id.*

47. *Id.* at 894.

48. See *id.* at 895 (citing 6 COUCH ON INSURANCE § 1463, at 5298 (1930)).

[I]n determining whether a loss is within an exception in a policy, where 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.

Id. (quoting 6 COUCH ON INSURANCE § 1466 (1930)) (alteration in original).

49. *Id.* The trial court held "[t]hat the cause of loss and damage to plaintiffs' dwelling is excluded by the terms of the policy . . . in that the proximate cause of said loss was settling." See *id.* (internal quotation marks omitted). In stark contrast to the majority analysis in *Standard Oil*, the state supreme court found no reason to defer to the trial court's findings concerning the proximate

The Doctrine, as articulated by the Supreme Court of California in *Sabella*, was implemented by the courts of lower jurisdiction in California and adopted elsewhere. At nearly the same time, however, a parallel line of authority more purely distilled from principles of concurrent causation in tort law grew up alongside the *Sabella* line of cases. In *State Farm Mutual Automobile Insurance Co. v. Partridge*, a question about the attribution to concurrent causes arose in the context of liability insurance.⁵⁰ The Supreme Court of California, holding that the loss at issue was covered, stated:

Although there may be some question whether either of the two causes in the instant case can be properly characterized as *The* “prime”, “moving” or “efficient” cause of the accident, we believe 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.⁵¹

For nearly the next twenty years, the decisions of California courts of appeal diverged in insurance cases resolving the concurrent causation conundrum. Some followed *Sabella*, some *Partridge*. Some courts sought to harmonize the two lines of authority by attributing significance to the “independence” of the factual causes at issue in *Partridge*.⁵² Finally, the divergent precedents were brought together for a final showdown in a case that pitted contracts law professor Jack I. Garvey, and Rita Garvey, against State Farm Fire and Casualty Company.⁵³

The Garveys purchased from State Farm an “all risk” homeowners policy of insurance that provided coverage for “all risks of physical loss” except as otherwise excluded; losses “caused by, resulting from, contributed to or aggravated by any earth movement” as well as losses caused “by. . .

cause of the loss because the “the facts on appeal [were] . . . not in dispute, [and therefore] the determination of proximate cause [became] a question of law.” *Sabella*, 377 P.2d at 895.

50. 514 P.2d 123, 124-25 (1973) (en banc).

51. *Id.* at 130 (emphasis in original). In so ruling, the *Partridge* Court without qualification relied on law governing the liability of tortfeasor.

In the [instant] case . . . the ‘efficient cause’ language is not very helpful, for here both causes were independent of each other . . . [and] [b]oth . . . caused the injury. In traditional tort jargon, both are concurrent proximate causes of the accident, the negligent driving constituting an intervening, but non-superseding, cause of the accident If committed by separate individuals, both actors would be joint tortfeasors fully liable for the resulting injuries. Moreover, the fact that both acts were committed by a single person does not alter their nature as concurrent proximate causes.

Id. at 130 n.10 (internal citations omitted).

52. See *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 717 (Cal. 1989) (describing decisions relying on *Partridge*’s “independence” requirement).

53. *Id.* at 704.

settling . . .” were excluded.⁵⁴ During the period that the policy was in force, a section of the Garveys’ home known as the “addition” started separating from the main structure, damaging it and other structures on the property.⁵⁵

Like the circumstances at issue in *Sabella*, there was really no dispute that earth movement and settling contributed to the loss, but the State Farm policy did not expressly exclude the loss or damage if caused by negligence. Like the Sabellas, the Garveys contended at trial that contractors’ negligence caused the loss.⁵⁶ After State Farm rested its case, the trial court directed a verdict for the Garveys on the coverage issue because “. . . negligent construction [was] a concurrent proximate cause of the loss.”⁵⁷ The jury subsequently found State Farm liable for \$47,000 in policy benefits and general damages, and \$1 million in punitive damages.⁵⁸

On appeal, the intermediate appellate court, attempting to harmonize *Sabella* and *Partridge*, fashioned a rule for determining coverage in instances of concurrent causation reminiscent of early United States Supreme Court jurisprudence.⁵⁹ The court of appeal relied heavily on then leading notions about the “dependency” and “sufficiency” of causes:

[W]hether the covered risk and excluded risk are causes in fact should be a court’s threshold inquiry in cases such as this. If (i) they both are causes in fact and if the two risks are independent of each other, *Partridge* analysis is triggered: the insured is covered if the covered risk was a concurring proximate cause of the loss. If (ii) the two risks are dependent on each other, *Sabella* analysis is triggered: the insured is covered only if the covered risk was the moving cause of the loss.⁶⁰

The court of appeal remanded the case for a new trial, to allow a jury to decide whether “the two risks were dependent on or independent of each other”—that is, whether “each . . . could have caused the loss regardless of the existence of the other.”⁶¹

On further appeal, the Supreme Court of California adopted the Doctrine.⁶² The court found the facts presented by the case posed “a classic Sa-

54. *Garvey*, 770 P.2d at 705 (omission in original).

55. *Id.*

56. *Id.* at 706.

57. *Id.*

58. *Id.*

59. *See id.* at 712.

60. *Id.* (excerpting the rule set forth by the intermediate appellate court).

61. *Id.*

62. The California Insurance Code, enacted in 1935, failed to resolve the matter: section 530

bella situation.”⁶³ If earth movement was the efficient proximate cause of the loss, then coverage would be denied. If negligence was the efficient proximate cause of the loss, then coverage would be found.⁶⁴ The efficient proximate cause of the loss was a question for a jury, because sufficient evidence was introduced to support both possibilities.⁶⁵ The court, in *Garvey*, described the “efficient proximate cause” as the one most important, or “predominant”;⁶⁶ and explained that “predominant” in this context indicates the primary, but not necessarily the “initiating” or “moving” cause of a loss.⁶⁷

assigns liability to the insurer “for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause;” section 532 provides, “If a peril is specially excepted in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted.” *Garvey*, 770 P.2d at 707 (citing CAL. INS. CODE §§ 530, 532 (West 2005)). Construing these statutes, the Supreme Court of California in *Garvey* declared:

We reasoned [in *Sabella*] that sections 530 and 532 were not intended to deny coverage for losses whenever ‘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 Rather, we explained that when section 532 is read along with section 530, the ‘but for’ clause of section 532 necessarily refers to a ‘proximate cause’ of the loss, and the ‘immediate cause’ refers to the cause most immediate in time to the damage.

Id. at 705 (internal citations omitted). A leading treatise in California is more direct:

These rather enigmatic statutes have caused a great deal of confusion. Section 532 seems to say there is *no* coverage for a loss that would not have occurred ‘but for’ an excluded peril, while § 530 says there *is* coverage if an insured peril was the ‘proximate cause’ of the loss. Neither statute really sets forth a workable test where the loss results from *both* excluded and covered perils.

See HON. H. WALTER CROSKEY ET AL., CALIFORNIA PRACTICE GUIDE: INSURANCE LITIGATION, § 6:134.2 (2007), available on Westlaw at CAINSL CH. 6A-E.

63. *Garvey*, 770 P.2d at 714.

64. *Id.* at 715.

65. *Id.*

66. *Id.* at 707.

67. *Id.* at 708. See also *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 12 (1998) (“The efficient proximate cause . . . is not necessarily the last act in a chain of events, nor is it the triggering cause. The efficient proximate cause doctrine looks to the quality of links in the chain of causation. The efficient proximate cause is the predominating cause of the loss.”). But see *Pau-lucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312 (M.D. Fla. 2002) which adhered to the view of the dissent in *Garvey*:

The concurrent cause doctrine and efficient proximate cause doctrine are not mutually exclusive. Rather, they apply to distinct factual situations. The concurrent cause doctrine applies when multiple causes are independent. The efficient proximate cause doctrine applies when the perils are dependent. Causes are independent when they are unrelated such as an earthquake and a lightning strike, or a windstorm and wood rot. 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.

Using this last example of dependent perils, the court notes that if an earthquake is an excluded/proximate cause but fire is a covered/secondary cause, coverage would not exist under the efficient proximate cause doctrine. Conversely, if the earthquake is a covered/proximate cause but fire is an excluded/secondary cause, coverage would exist under the

Paraphrasing the conclusion of the United States Supreme Court in *Standard Oil*, the *Garvey* court went beyond reluctant acquiescence, and actually praised the Doctrine as a “workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer.”⁶⁸ In dissent, Justice Mosk bitterly protested that the majority opinion was “totally devoid of standards,”⁶⁹ and, somewhat conversely, that the rule therein described, when applied, undoubtedly would result in a victory for the insurer.⁷⁰

Justice Mosk was in the dissent, but his views were watertight in one principal respect: the Doctrine is uncontrovertibly controversial. The *Garvey* opinion became a lodestar of sorts. Yet, courts cannot even agree on the definition of the term “proximate cause” in insurance cases.⁷¹ There is an almost complete dissimilarity of views. A thorough survey of state law iterations of the Doctrine is thus beyond the scope of this Article. An overview demonstrates that there is a near total absence of consensus about the means to crack the concurrent causation conundrum in insurance cases.

According to recent surveys, a variant of the Doctrine has been adopted by at least twenty-nine states.⁷² At least three states have expressly rejected the Doctrine.⁷³ In an effort to avoid the Doctrine entirely, standard-

efficient proximate cause doctrine. However, under a different factual setting where the excluded earthquake and covered fire were independent such as where loss is caused by an unrelated simultaneous earthquake and lightning strike, the efficient proximate cause doctrine would be inapplicable. In this scenario, the concurrent causation doctrine would apply and mandate coverage regardless of which peril was covered and which peril excluded.

... I am not persuaded by the Supreme Court of California's decision in *Garvey* ... which limited *Partridge's* concurrent causation analysis ...

Paulucci, 190 F. Supp. 2d at 1319.

68. *Garvey*, 770 P.2d at 708.

69. *Id.* at 724 (Mosk, J., dissenting).

70. *Id.* at 717 (Mosk, J., dissenting) (“The majority, I must acknowledge, have succeeded in reaching a clear result: in this court, the insurer wins and the insureds lose.”). After remand, the case was resolved without further reported decision.

71. See RUSS & SEGALLA, *supra* note 2, § 101:43 (“The concept of proximate cause is as ubiquitous in insurance law as it is in tort law. Courts have failed to reach a consensus on the concept definition of proximate cause.”).

72. See Wuerful & Koop, *supra* note 12, at 405-06 (29 states); Michael C. Phillips & Lisa L. Coplen, *Concurrent Causation Versus Efficient Proximate Cause in First-Party Property Insurance Coverage Analysis*, BRIEF, Winter 2007, at 33 (35 states).

73. See Wuerful and Koop, *supra* note 12, at 406-07 (listing Florida, Minnesota, and Wisconsin as “explicitly reject[ing]” the Doctrine and listing Alabama and Texas as following “distinctive rules”); cf. Randall L. Smith & Fred. A. Simpson, *Causation in Insurance Law*, 48 S. TEX. L. REV. 305, 366 (2006) (“Florida, like Texas, is one of the states that has not adopted the efficient proximate cause in property damage cases. [U]nder Florida law, when a loss is caused by covered and excluded perils, courts apply the concurrent cause doctrine.”); Phillips & Coplen, *supra* note 72 (listing seven states that follow the “concurrent causation” doctrine including Florida). The status of the Doctrine in Florida, however, may not be as clear as some see it. See, e.g., Wallach

ized “anti-concurrent cause” clauses are now incorporated in most homeowners insurance policies.⁷⁴ At least four states refuse to give effect to an “anti-concurrent cause” clause.⁷⁵ Other states, even some that have adopted the Doctrine, will enforce without demur an “anti-concurrent cause” clause drafted expressly to avoid it.⁷⁶ This cacophony evokes the *confusio linguarum*.

C. THE DOCTRINE IN MISSISSIPPI AND LOUISIANA AFTER HURRICANE KATRINA

The Doctrine is anything but economically “efficient.” Nationwide irregularity created by a patchwork of conflicting and confused state precedents grows more and more complex, as courts and juries unpredictably select from competing conditions the most important single reason for a loss.

v. Rosenberg, 527 So. 2d 1386, 1387 (Fla. Dist. Ct. App. 1988) (holding the efficient cause of the collapse of an insured sea wall to be a question of fact when water pressure or earth movement “excluded risks” and a neighbor’s negligence “a covered risk” combined); Arawak Aviation, Inc. v. Indem. Ins. Co. of N. Am., 285 F.3d 954, 957-58 (11th Cir. 2002) (“[Florida] cases [endorsing efficient causation doctrine] involved situations in which the efficient cause of the damage was not a necessary antecedent of the damage’s direct cause.”); Paulucci v. Liberty Mut. Fire Ins. Co., 190 F. Supp. 2d 1312, 1319 (M.D. Fla. 2002) (“The concurrent cause doctrine and efficient proximate cause doctrine are not mutually exclusive [under Florida law.]”).

74. See Pate, *supra* note 12, at 663 (“To avoid the application of the concurrent causation doctrine, many insurers now include an ‘anticoncurrent causation’ preface to a policy’s exclusions section.”); *In re Katrina Canal Breaches Consol. Litig.*, 466 F. Supp. 2d 729, 741 n.6 (E.D. La. 2006), *vacated in part*, 495 F.3d 191 (5th Cir. 2007), *cert. denied sub nom.* Xavier Univ. of Louisiana v. Travelers Cas. Prop. Co. of Am., No. 07-711, 2008 WL 423587 (U.S. Feb. 19, 2008); Chehardy v. Allstate Indem. Co., No. 07-713, 2008 WL 423589 (U.S. Feb. 19, 2008) (“To counteract these decisions [relying on the Doctrine], insurers began employing the anti-concurrent cause clause to exclude losses if caused in whole or in part, in any sequence of events by an excluded peril.”); Preferred Mut. Ins. Co. v. Meggison, 53 F. Supp. 2d 139, 142 (D. Mass. 1999) (internal citations omitted) (“Anticoncurrent causation provisions . . . have appeared in recent years in response to the concurrent causation doctrine, under which some courts have found that insurers are ‘obligated to pay for damages resulting from a combination of covered and excluded perils if the efficient proximate cause is a covered peril.’”). The ISO standardized homeowners policy form includes a garden variety anti-concurrent cause clause:

We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss results in widespread damage or affects a substantial area.

See HO3 FORM, *supra* note 5, Section 1—Exclusions, at 11.

75. See Phillips & Coplen, *supra* note 72; *In Re Katrina*, 466 F. Supp. 2d at 763 (citing DAVID L. LEITNER ET AL., 4 LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 53:35). But see Julie A. Passa, Comment, *Insurance Law—Property Insurance: Adopting the Efficient Proximate Cause Doctrine But Saying No to Contracting Out of It*, 79 N.D. L. REV. 561, 572 (2003) (“[O]nly California and Washington preclude parties from contracting out of the efficient proximate cause doctrine.”).

76. See Wuerful & Koop, *supra* note 12, at 407 (10 states); Phillips & Coplen, *supra* note 72 (20 states).

The coverage issue turned on whether the destruction of the insured property was in fact caused by tidal water, or by hurricane-force winds (a peril not excluded from coverage.)⁸² In *Grace v. Lititz Mutual Insurance Co.*, the Supreme Court of Mississippi found the question referable to the competence of the trier of fact, to be determined without jurisprudential fetters:

We have discussed in great detail the evidence . . . as to whether the [insured property was] destroyed by wind [a covered peril] The rule is well established in this state that where the question presented to the jury was whether the loss was due to windstorm or to water [an excluded peril], the entire question of proximate cause is treated as one of fact independent of the explicit application of any rule of law It is sufficient to show that wind was the proximate or efficient cause of the loss or damage notwithstanding other factors contributed to the loss⁸³

Insureds facing insurers in trials by jury generally are not averse to leaving an insurance coverage question to a jury drawn from their devastated community. The apparent decision by the Mississippi Supreme Court to adopt the Doctrine in *Grace* might have afforded just that thin solace. But, the Doctrine fared poorly in the federal district courts of Mississippi during the years between Hurricanes Camille and Katrina. For example, in *Rhoden v. State Farm Insurance Co.*, United States District Judge Barbour found that because the Mississippi Supreme Court had not “specifically”

[This policy] does not insure against loss: . . . (b) Caused by, resulting from, contributed to, or aggravated by any of the following: (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”

See *Boatner*, 254 So. 2d at 765; *Byrne*, 248 So. 2d at 778; *Grace*, 257 So. 2d at 219.

82. The force of winds associated with hurricanes indeed can be devastating. “The intensity of a landfalling hurricane is expressed in terms of categories that relate wind speeds and potential damage A Category 4 hurricane . . . on the average, would usually be expected to cause 100 times the damage of the Category 1 storm.” See Hurricane Hazards: Winds, http://www.fema.gov/hazard/hurricane/hu_winds.shtml (last visited Mar. 21, 2008). The distinction between damage caused by “wind” (generally not excluded by the typical homeowners policy) and “water” (typically excluded if associated with a hurricane driven “storm surge”) is now commonly referred to in the press as the “wind/water” insurance debate. See, e.g., Anita Lee, *A Jurist of Note*, SUN HERALD (Biloxi, MS), May 21, 2007, at A1, available on Westlaw at 2007 WLNR 9500941 (describing Senior United States District Judge L.T. Senter, Jr. as being “[a]t the center of the wind-water insurance debate . . . a man, a musician, [and] a guardian for fairness . . .”). The tune Judge Senter has played in this debate is described below.

83. *Grace*, 257 So. 2d at 224; see also *Boatner*, 254 So. 2d at 765 (citing *Kemp v. Am. Universal Ins. Co.*, 391 F.2d 533 (5th Cir. 1968)) (“[I]t is sufficient to show that wind was the proximate or efficient cause of the loss or damage notwithstanding other factors contributed to the loss.”).

adopted the Doctrine,⁸⁴ the Doctrine had no basis in Mississippi law.⁸⁵

The Rhodens constructed an addition to their home.⁸⁶ Several years later, the addition began separating from the main residence, as a result of (alleged) negligent construction, as well as other unspecified causes.⁸⁷ State Farm declined coverage under its “all risk” policy, based on exclusions for “earth movement” and “settling/cracking.”⁸⁸ The Rhodens moved for partial summary judgment, relying in part on a California appellate court decision controlled by the Doctrine.⁸⁹ District Judge Barbour held the Rhodens’ reliance on the Doctrine without merit, dubiously finding no support for the Doctrine in Mississippi law.⁹⁰

Whether rightly or wrongly decided, following Hurricane Katrina, the *Rhoden* decision presented no obstacle whatsoever to the rediscovery of the Doctrine in Mississippi law by Senior District Court Judge L.T. Senter, Jr. In a cluster of insurance coverage cases concerning damage caused by Katrina, Judge Senter supposed that the Mississippi Supreme Court would follow *Grace v. Lititz*, ignoring *Rhoden* and other like authority to the contrary.

The prototypical Katrina-related insurance coverage dispute that arose

84. *Rhoden v. State Farm Fire & Cas. Ins. Co.*, 32 F. Supp. 2d 907, 911 (S.D. Miss. 1998) (“Although Mississippi courts have not *specifically* adopted the efficient proximate cause doctrine, Plaintiffs argue that the [Mississippi Supreme] Court adopted the reasoning of the [D]octrine . . .”) (emphasis added) (internal citations omitted).

85. *See id.* at 912.

86. *Id.* at 908.

87. *Id.*

88. *Id.* at 909.

89. *See State Farm Fire & Cas. Co. v. Von Der Lieth*, 820 P.2d 285, 291 (Cal. 1991) (“When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss.”).

90. *Rhoden*, 32 F. Supp. 2d at 912 (“Mississippi courts have not adopted the doctrine of ‘efficient proximate cause . . .’”). At least one commenter has flatly declared *Rhoden* wrongly decided. *See Rhonda D. Orin, First-Party Coverage for Catastrophic Risks: Part I—Personal Lines*, in PRACTICING LAW INSTITUTE, LITIGATION & ADMIN. PRACTICE COURSE HANDBOOK SERIES: LITIGATION (PLI Order No. 11361), 101 n.27 (2007), available on Westlaw at 758 PLI/Lit 89 (“One federal court in Mississippi, attempting to apply Mississippi law . . . [based its] decision on the erroneous determination that Mississippi had not adopted the doctrine of efficient proximate cause.”). *But see Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F. Supp. 2d 606 (S.D. Miss. 2001) (“Since Mississippi courts have not adopted the doctrine of ‘efficient proximate cause,’ the Court declines to apply the doctrine in this case.”). In 2007, the Fifth Circuit found the Doctrine to be the “default causation rule in Mississippi regarding damages caused concurrently by a covered and an excluded peril under an insurance policy” based on an opinion by the Mississippi Supreme Court issued twenty-seven years before *Rhoden* was decided. *See Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 356 (5th Cir. 2007) (relying on *Lilitz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765, 767 (Miss. 1971)).

in *Tuepker v. State Farm Fire & Casualty Co.*,⁹¹ set the stage for one of the most interesting of Judge Senter's opinions. In *Tuepker*, the insured residence was inundated by tidal water from the Mississippi Sound driven over it by Katrina.⁹² According to the Tuepkers' complaint against State Farm, their home was also damaged by the confluence of hurricane-force winds and wind-driven rains.⁹³ Loss attributable to destruction of the Tuepker home by wind and rain was not excluded from the coverage of the Tuepker's State Farm insurance policy, but loss directly attributable to a storm surge was subject to a "water damage" exclusion.⁹⁴ Judge Senter found the State Farm "water damage" exclusion, at least insofar as applicable to loss caused by tidal water, unambiguous and enforceable.⁹⁵

The question presented, on State Farm's motion to dismiss the Tuepkers' complaint, was whether attribution to concurrent causes of damage to their home, including tidal water, compelled finding the State Farm "water damage" exclusion applicable to their entire loss, as a matter of law.⁹⁶ District Judge Senter summarized apposite Mississippi law regarding the Doctrine as follows:

If the evidence were to indicate that part of the plaintiffs' losses were attributable to wind and rain (making them covered losses under the applicable provisions of the policy), and part of the loss were attributable to flooding (which is excluded from coverage), the determination of which was the proximate cause of the damage to the insured dwelling or to any given item of property . . . would be a question of fact under applicable Mississippi law Under applicable Mississippi law, where there is damage caused by both wind and rain (covered

91. No. 1:05CV559 LTS-JMR, 2006 WL 1442489 (S.D. Miss. May 24, 2006), *rev'd in part*, 507 F.3d 346 (5th Cir. 2007).

92. *Id.* at *3.

93. *Id.* at *1.

94. *See id.* at *2.

95. *Id.* at *3 ("Losses directly attributable to water in the form of a 'storm surge' are excluded from coverage because this damage was caused by . . . tidal water . . . driven ashore by Hurricane Katrina. This is water damage within the meaning of [t]he [policy] exclusion . . . for water damage . . . a valid and enforceable policy [provision]."). The referenced "water damage" exclusion stated:

1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following events

. . . .

c. Water Damage, meaning:

(1) flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not;

. . . .

Id. at *2.

96. *Id.* at *1-2.

losses) and water (losses excluded from coverage) the amount payable under the insurance policy becomes a question of which is the proximate cause of the loss.⁹⁷

State Farm relied on policy language “leading-in” to the “water damage” exclusion: a well-developed “anti-concurrent cause” clause drafted to avoid application of the Doctrine.⁹⁸ Seemingly owing primarily to its implicit conflict with the Doctrine, Judge Senter found the “anti-concurrent cause” ambiguous,⁹⁹ and therefore unenforceable as written:

[P]rovisions [of the State Farm policy] which purport to exclude coverage for wind and rain damage, both of which are covered losses under this policy, where an excluded cause of loss, e.g. water damage, also occurs . . . are ambiguous in light of the other policy provisions granting coverage for wind and rain damage To the extent that plaintiffs can prove their allegations that the hurricane winds (or objects driven by those winds) and rains entering the insured premises through openings caused by the hurricane winds proximately caused damage to their insured property, those losses will be covered under the policy, and this will be the case even if flood damage, which is not covered, subsequently or simultaneously occurred.¹⁰⁰

Although Judge Senter was not quite as deferential to the trier of fact as the court in *Grace*, his decision was clearly in line with decisions in other jurisdictions that adhere to the Doctrine and refuse to give effect to an “anti-concurrent cause” clause. Be that as it may have been, soon after Judge Senter certified his decision in *Tuepker* for an interlocutory appeal,¹⁰¹ State Farm contended that it was therefore permitted to argue anew the enforceability of its “anti-concurrent cause” clause, and once again attempted to persuade Judge Senter to enforce it. In *Ruiz v. State Farm Fire and Cas.*

97. *Tuepker*, No. 1:05CV559 LTS-JMR, 2006 WL 1442489, at *1-2 (S.D. Miss. May 24, 2006), *rev'd in part*, 507 F.3d 346 (5th Cir. 2007). (citing *Grace v. Lititz Mut. Ins. Co.*, 257 So. 2d 217 (Miss. 1972)).

98. The “anti-concurrent cause” clause stated:

2. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, [or] arises from natural or external forces or occurs as a result of any combination of [expressly excluded perils].

Id. at *4.

99. *See id.* at *4.

100. *Id.* at *5.

101. *Tuepker v. State Farm*, No. 1:05CV559-LTS-RHW, 2006 WL 2794773 (S.D. Miss. Sept. 27, 2006).

Co.,¹⁰² Judge Senter again rejected, this time even more vigorously, State Farm's efforts to avoid liability for loss concurrently caused by covered and excluded causes:

State Farm [if correct] would have no liability under its homeowners policy if there were any water damage, no matter how minimal, that affected the insured property. In the context of wind coverage during a hurricane, this would mean that the wind coverage under the homeowners policy would be completely negated [If] the insured property that took an inch of water [but] lost its roof to the winds, State Farm [if correct] would owe the policy holder nothing under its homeowners coverage. I find this logic unpersuasive, and I find the [anti-concurrent cause clause] so poorly drafted and ambiguous that I am uncertain whether it could ever support the interpretation State Farm urges the Court to adopt.¹⁰³

Hence, in *Ruiz*, while reaffirming the enforceability of the "water damage" exclusion in the State Farm homeowners policy in cases of damage caused by the Katrina-driven storm surge, Judge Senter again unequivocally rejected the "unpersuasive logic" of State Farm's argument with respect to the effect of its "anti-concurrent cause" clause.¹⁰⁴

2. Louisiana

Meanwhile, the United States District Court for the Eastern District of Louisiana took a completely different tack in its pending Katrina coverage cases. In *In re Katrina Canal Breaches Consolidated Litigation*,¹⁰⁵ District Judge Stanwood R. Duval held that New Orleans was not "flooded" within the meaning of standardized "water damage" exclusions—exclusions that employed nearly the same operative definition of "water damage" Judge Senter found clear and unambiguous in Mississippi.¹⁰⁶ More than 80% of

102. No. 1:07CV89 LTS-RHW, 2007 WL 1514015 (S.D. Miss. May 21, 2007).

103. *Id.* at *3.

104. *Id.* Discussing his finding, Judge Senter stated:

As I ruled in *Tuepker*, the water damage exclusion in the State Farm homeowners policy is valid. State Farm is not liable under its homeowners coverage for any damage it can prove to have been caused by water, as that exclusion is defined in the policy. State Farm is liable, however, under its homeowners policy for wind damage because there is no exclusion for this type of loss. The 'anti-concurrent cause' provision does not clearly and unambiguously negate the broad coverages provided under the other terms of the State Farm homeowners policy.

Id.

105. 466 F.Supp. 2d 729 (E.D.La. 2006). Judge Duval certified his ruling as appropriate for immediate permissive appeal under the applicable federal statute. On August 2, 2007, his ruling was, in part, reversed. See *infra* Part I.C.3.

106. In *Tuepker*, Judge Senter found the following "Water Damage Exclusion" to be unambi-

the City of New Orleans was submerged in water immediately following Katrina.¹⁰⁷ Yet, Judge Duval found that circumstance was not unambiguously a “flood.”¹⁰⁸

In a slew of consolidated suits seeking payment under homeowners insurance policies for Katrina-related losses, Judge Duval found any standard “flood exclusion” unenforceable, subject to proof by the insureds that the negligent design, construction, or maintenance of various flood walls and levees “caused” the “flood” of New Orleans.¹⁰⁹

According to the district court, the word “flood” plausibly might be understood to mean—and therefore, in a coverage dispute about the meaning of the term, must be construed to mean—an inundation by water of usually dry land solely attributable to “natural” events:

It is the considered opinion of this Court that because the policies are all-risk, and because “flood” has numerous definitions, it reasonably could be limited to natural occurrences. Simply put, the language of

guous and enforceable:

1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following events

. . . .

c. Water Damage, meaning:

(1) flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not;

. . . .

Tuepker v. State Farm Fire & Cas. Co., No. 1:05CV559 LTS-JMR, 2006 WL 1442489, at *3 (S.D. Miss. May 24, 2006). In contrast, Judge Duval found the following “ISO Water Damage Exclusion” ambiguous and inapplicable to the inundation by water of New Orleans following Hurricane Katrina:

(1) We do not insure for loss **caused directly or indirectly by any of the following**. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

. . . .

(c) **Water Damage**, meaning:

Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

In re Katrina Canal Breaches Consol. Litig., 466 F. Supp. 2d 729, 741 (E.D. La. 2006), *vacated in part* by 495 F.3d 191 (5th Cir. 2007), *cert. denied sub nom. Xavier Univ. of Louisiana v. Travelers Cas. Prop. Co. of Am.*, No. 07-711, 2008 WL 423587 (U.S. Feb. 19, 2008); *Chehardy v. Allstate Indem. Co.*, No. 07-713, 2008 WL 423589 (U.S. Feb. 19, 2008) (emphasis in original) (internal footnote omitted).

107. *In re Katrina*, 495 F.3d 191, 196 (5th Cir. 2007), *cert. denied sub nom. Xavier Univ. of Louisiana v. Travelers Cas. Prop. Co. of Am.*, No. 07-711, 2008 WL 423587 (U.S. Feb. 19, 2008); *Chehardy v. Allstate Indem. Co.*, No. 07-713, 2008 WL 423589 (U.S. Feb. 19, 2008).

108. *In re Katrina*, 466 F. Supp. 2d at 756.

109. *Id.* at 760 (“[T]he allegations in this matter revolve around the concept that the flood walls involved collapsed precisely under the conditions that they were designed to withstand. If the pumps failed at a point which they were designed to handle, then arguably negligence might be present.”).

the ISO Water Damage Exclusion . . . is unclear The undefined term “flood” in the [ISO] Water Damage Exclusion is reasonably interpreted to be limited to flooding caused by natural acts, not those that were man-made.¹¹⁰

The district court consequently held the standard “ISO Water Damage Exclusion” to be inapplicable to water damage attributable to flooding caused by third-party negligence, but did not, as a result, find the resulting water damage attributable to concurrent causes. Distinguishing cases like *Tuepker v. State Farm*, Judge Duval found:

This case does not present a combination of forces that caused damage such as wind versus water as was present in the natural disaster which the Mississippi Gulf Coast experienced as a result of Hurricane Katrina In this case, the “cause” [of the damage at issue] conflates to flood¹¹¹

Paradoxically, the district court then granted State Farm’s motion to dismiss its insureds’ complaints, because the water damage exclusion in its policy was preceded by a non-standard “anti-concurrent cause” clause—the same “anti-concurrent cause” clause Judge Senter determined to be ambiguous and unenforceable in *Tuepker*.¹¹² Judge Duval reasoned that the “anti-concurrent cause” clause in the State Farm policy precluded consideration of the causes of flooding, and by this means avoided the ambiguity that invalidated standardized ISO “water damage” exclusions lacking a similar provision:

The State Farm policy does precisely what the ISO Water Exclusion Policy [sic] fails to do. It makes it clear that . . . there is no coverage provided for any flooding “regardless of the cause.” Such language is clear to the Court and as such, the Court must find that the State Farm policy as written excludes coverage for all flooding.¹¹³

110. *In Re Katrina*, 466 F.Supp. 2d at 762. In *Tuepker*, Judge Senter held the same provision to be unambiguous and enforceable. No. 1:05CV559 LTS-JMR, 2006 WL 1442489, at * 3 (S.D. Miss. May 24, 2006).

111. *In Re Katrina*, 466 F.Supp. 2d at 762.

112. The so-called “lead-in” clause of the State Farm policy to which Judge Duval referred, which preceded State Farm’s version of the flood exclusion (quoted above at note 106), was as follows:

“1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the excluded event; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, [or] arises from natural or external forces”

Id. (emphasis in original) (internal footnote omitted). *Cf. supra* note 98.

113. *Id.*

Essentially, Judge Duval ruled reconditely that a concurrent causation issue arose as to the causes of the flooding that resulted in damage, but not as to the causes of the damage that resulted from the flood. That challenge was deemed of no consequence, however. The State Farm "anti-concurrent cause" clause withstood judicial scrutiny and determinately negated coverage in any event, because Judge Duval defenestrated decisions by the courts of Louisiana plainly adopting the Doctrine.¹¹⁴ The district court straightforwardly held that a Louisiana court would give full and unqualified effect to a provision purposefully prepared by an insurer to dodge the means of cracking the concurrent causation conundrum preferred in Louisiana:

Louisiana has not spoken to the issue of whether the doctrine of efficient proximate cause overrides anti-concurrent cause clauses Louisiana has adopted the efficient proximate cause approach to coverage; however, the courts have not, to this Court's knowledge, squarely addressed this tension. Nonetheless . . . it appears that a Louisiana court would enforce the clear contractual intent to exclude coverage as found in this State Farm ["anti-concurrent cause" clause].¹¹⁵

Judge Duval acknowledged that his decision to give unrestrained deference to the State Farm "anti-concurrent cause" clause was "at odds" with the law of other jurisdictions adopting the Doctrine. In particular, the district court disagreed with *Murray v. State Farm*, a decision by the Supreme Court of West Virginia.¹¹⁶ The *Murray* court, based on nationwide authority, squarely refused to give effect to the same State Farm "anti-concurrent cause" clause at issue in *In Re Katrina*.¹¹⁷ Judge Duval was not persuaded by any authority anywhere that found an "anti-concurrent cause" clause unenforceable owing to its inherent conflict with the Doctrine.

114. See, e.g., *In Re Katrina*, 466 F.Supp. 2d at 746 (rejecting *Riche v. State Farm Fire & Cas. Co.*, 356 So. 2d 101 (La. Ct. App. 1978), writ denied, 358 So. 2d 639 (La. 1978)) ("[D]irect loss" means "the dominant and efficient cause of the loss . . ."); *Roach-Strayhan-Holland Post v. Cont'l Ins. Co.*, 112 So. 2d 680 (La. 1959) ("[I]t is sufficient, in order to recover upon a windstorm insurance policy not otherwise limited or defined, that the wind was the proximate or efficient cause of the loss or damage, notwithstanding other factors contributing thereto.").

115. *In Re Katrina*, 466 F. Supp. 2d at 763.

116. See *id.* (citing *Murray v. State Farm Fire & Cas. Co.*, 509 S.E. 2d 1 (W. Va. 1998)).

117. Judge Duval declared the *Murray* decision "substantially" based on "certain California [decisions]" and, as a result, inapplicable in Louisiana, because "California has statutorily limited the application of these types of clauses." See *id.* (citing LEITNER, *supra* note 75, § 52:35) ("The California courts have concluded that anti-concurrent causation policy provisions are contrast [sic] to the statutory mandate in that state's insurance code."). The statutory mandate in California, however, is not unequivocal. Moreover, the *Murray* court relied on decisions by courts not only in California, but also in Washington and Wisconsin (that expressly refused to give effect to "anti-concurrent cause" clauses in deference to the Doctrine), as well as decisions by courts in Nevada, Connecticut, Florida, and Michigan (that looked beyond contract language to judicially administer the concurrent causation conundrum). See *Murray*, 509 S.E. 2d at 12 n.11.

Without doubt, the decision in *In Re Katrina* was read with interest in the Eastern District of Louisiana. In *Axis Reinsurance Co. v. Lanza*, United States District Judge Carl J. Barbier added to the *In Re Katrina* analytical muddle, by using Judge Duval's decision as a starting point to put into practice conclusions about the concurrent causes of Katrina-related damage that Judge Duval expressly disclaimed.¹¹⁸ The district court in *Lanza* agreed with a policyholder that a "hurricane" exclusion did not apply to the sinking of a boat, because the flooding of New Orleans following Katrina was predominantly caused by the negligent design, construction, or maintenance of the 17th Street Canal levee.¹¹⁹ Judge Barbier read into the decision in *In Re Katrina* a finding far different from the conceivably narrow ruling intended by Judge Duval:

The *In Re Katrina* court determined that the proximate efficient cause of the damage in *In re Katrina* was negligence, not Katrina In other words, if man-made measures fail due to negligence under conditions which they are designed to withstand, they break the causal chain and become the proximate efficient cause of resulting damage [emphasis added].¹²⁰

As the relevant terms of art are traditionally understood in tort law, a precedent causal factor (negligence) that produced a subsequently occurring condition (flooding) was not a *superseding intervening* force that "broke the causal chain" leading to Lanza's loss. Moreover, Judge Duval did not determine in *In Re Katrina* that precedent negligence caused the flood of New Orleans, and Judge Duval expressly rejected attribution of resulting flood damage to negligence (instead holding that the sole cause of the damage at issue "conflate[d] to flood.")¹²¹ Nevertheless, based in large measure on the *In Re Katrina* decision, Judge Barbier found that antecedent negligence was "the proximate efficient cause" of Lanza's flood loss. The district court deemed Lanza's opposition to the motion for summary judgment by Axis a cross-motion, and granted it.¹²²

As the law has evolved in the Fifth Circuit, Axis might have been better advised to wait as long as possible before bringing its motion for sum-

118. *Axis Reins. Co. v. Lanza*, No. 05-6318, 2007 WL 1017323 (E.D. La. Mar. 29, 2007).

119. *Id.* at *1. Lanza obtained coverage from Axis for his 2004 Sea Doo Speedster 200 Jet Boat. A "Windstorm Exclusion" stated, "[w]e do not provide any coverage for loss or damage due to a tropical depression, tropical storm or hurricane." *Id.* One or two days after Hurricane Katrina, Lanza's Sea Doo boat sank in water. *Id.* Lanza contended the consequent loss of the Sea Doo resulted from breach of the 17th Street Canal levee. *Id.*

120. *Id.* at *2 (emphasis added) (internal citation omitted).

121. *In Re Katrina*, 466 F. Supp. 2d at 762.

122. *Lanza*, 2007 WL 1017323 at *3.

mary judgment.

3. *The Fifth Circuit Decisions*

In a pair of appellate court decisions, the United States Court of Appeal for the Fifth Circuit washed away significant elements of both the *In Re Katrina* and *Tuepker* district court decisions, leaving few remaining grounds to challenge the provisions of State Farm's standard homeowners insurance policy form with respect to Katrina-related losses.¹²³

Judge Duval's finding in *In Re Katrina* that a "flood" is not a "flood" if attributable to non-natural causes was the first to "recede." As the Fifth Circuit bluntly observed: "[I]n the aftermath of Hurricane Katrina . . . an enormous volume of water inundated the city. In common parlance, this event is known as a flood."¹²⁴ The Court thereupon reversed every ruling by Judge Duval that refused to give effect to a comparatively rudimentary "flood" exclusion.

That humdrum reversal of the tide preceded a pronouncement of much greater significance. Importantly, the Fifth Circuit agreed with the district court, and perspicuously rejected any attribution of the damage at issue to proffered concurrent causes:

[O]n these pleadings, there are not two independent causes of the plaintiffs' damages at play; the only force that damaged the plaintiffs' properties was flood. To the extent that negligent design, construction, or maintenance of the levees contributed to the plaintiffs' losses, it was only one factor in bringing about the flood; the peril of negligence did not act, apart from flood, to bring about damage to the insureds' properties. Consequently, as the plaintiffs argue and as the district court held, the efficient-proximate-cause doctrine is inapplicable.¹²⁵

In *In Re Katrina*, the Fifth Circuit drained the élan vital of the efficient proximate cause doctrine in cases of dependent causation. According to the court, precedent negligence leading to the flood was not even a candidate for causal attribution.¹²⁶ Conceivably, the court misunderstood the Doctrine

123. See *Tuepker v. State Farm & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007); *In re Katrina Canal Breaches Litigation*, 495 F.3d 191 (5th Cir. 2007), *cert. denied sub nom. Xavier Univ. of Louisiana v. Travelers Cas. Prop. Co. of Am.*, No. 07-711, 2008 WL 423587 (U.S. Feb. 19, 2008); *Chehardy v. Allstate Indem. Co.*, No. 07-713, 2008 WL 423589 (U.S. Feb. 19, 2008).

124. *In re Katrina*, 495 F.3d at 214.

125. *Id.* at 223.

126. *Cf. State Farm Fire & Cas. Co. v. Von Der Lieth*, 820 P.2d 285, 292-93 (Cal. 1991). The Supreme Court of California rejected the contention by State Farm that precedent negligence failed to trigger the Doctrine in like circumstances, explaining:

This is not, as the insurer claims, a case in which the 'negligence cannot be separated from

to apply only to cases involving the combination of independent forces (distinguishing *Tuepker* on that premise),¹²⁷ but it remains in doubt whether the Court understood the Doctrine ever to apply at all. Even though the court conceded that the Doctrine is the law in Louisiana,¹²⁸ it appeared to align more with *Rhoden*—the Mississippi district court opinion ignored by Judge Senter in *Tuepker* that erroneously disregarded support for the Doctrine in Mississippi law.

After blowing away the underpinnings of the Doctrine with respect to instances of “dependent” causation in *In Re Katrina*, the Fifth Circuit Court of Appeal then handed State Farm another major victory in the *Tuepker* appeal. In *Tuepker*, the Fifth Circuit broke staves in the Doctrine by suggesting that State Farm could avoid coverage even in instances of loss resulting from the simultaneous action of covered and excluded forces capable of independently producing the loss.¹²⁹

The analysis still turned on the State Farm policy form and Katrina-related losses, though, this time, the stage was set in Mississippi. District Judge Senter without difficulty found ambiguous the language “leading-in” to the State Farm “water damage” exclusion — a classic “anti-concurrent cause” clause drafted to avoid application of the Doctrine.¹³⁰ On that basis, Judge Senter refused to give the clause its intended sweeping effect.¹³¹ The Fifth Circuit unconditionally disagreed (begging the question whether reasonable minds could differ on the point), and found the State Farm anti-concurrent cause clause unambiguous “because it cannot be construed to have two or more reasonable meanings and it does not conflict with any other provisions in the policy.”¹³²

The jejune conclusion that the State Farm “anti-concurrent cause” clause did “not conflict with any other provisions of the policy,”¹³³ did not resolve the matter, however. Observing that the State Farm “anti-

the earth movement,’ thus leaving only one cause of the loss. Although the causes may be distinct in origin, they were dependent causes in the sense that, but for the negligence in building the structures on an ancient landslide site without the proper sewer system or stabilization of the mesa, the landslides might not have occurred or damaged the property to the extent it was damaged [T]his case presents the classic Garvey situation, in which the efficient proximate cause must be determined from a combination of covered and specifically excluded risks.

Von Der Lieth, 820 P.2d at 292-93..

127. See *In re Katrina*, 495 F.3d at 223.

128. *Id.* at 222-23.

129. *Tuepker v. State Farm Fire & Cas. Co.* 507 F.3d 346, 350, 353 (5th Cir. 2007).

130. *Id.* at 349.

131. *Id.*

132. *Id.* at 354.

133. *Id.*

concurrent cause" clause pertained only to losses that would not have occurred "in the absence of" the action of an excluded peril, the court concluded that the clause adequately, and therefore enforceably, distinguished covered from excluded losses.¹³⁴ Thus, coverage for any damage to the Tuepkers' property caused exclusively by a nonexcluded peril or event, such as wind, would remain entirely outside the scope of the State Farm "anti-concurrent cause" clause.

The court, however, offered no guidance with respect to the question of necessity in instances of the simultaneous action of covered and excluded causative factors, each capable of producing an indivisible loss. In such cases, the loss would occur "in the absence" of an excluded peril. Despite its close attention to that part of the State Farm "anti-concurrent cause" clause expressly excepting from exclusion any loss which would have occurred in the absence of an excluded peril, the court elided the issue of simultaneous sufficient causes entirely, broadly stating, "indivisible damage caused by both excluded perils and covered perils or other causes is not covered."¹³⁵

Making matters worse, the separate and perhaps more difficult analytical question whether to enforce the State Farm "anti-concurrent cause" clause as written, which properly should have preoccupied the field of inquiry, was similarly summarily eschewed by the most effortless of means. Judge Senter found the answer to the concurrent causation conundrum in long-standing Mississippi law that required adherence to the Doctrine. Unequivocally rejecting Judge Senter's reading of Mississippi law, the Fifth Circuit relied instead on its own "*Erie* guess" in an earlier case, which held the Doctrine nullified by a stroke of the insurer's pen:

The efficient proximate cause doctrine is the "default causation rule in Mississippi regarding damages caused concurrently by a covered and an excluded peril under an insurance policy." . . . However . . . [anti-concurrent cause] Clauses are enforceable under Mississippi law, [even if] they circumvent the efficient proximate cause doctrine.¹³⁶

In sum, in a pair of cases arising out of Katrina-related losses, the Fifth Circuit found State Farm's "water damage" exclusion determinative. By unilateral deployment of an "anti-concurrent cause" clause, State Farm was able to nullify the Doctrine—notwithstanding decisions by the supreme courts of Mississippi and Louisiana that made use of the Doctrine in nearly

134. *Tuepker*, 507 F.3d at 355.

135. *Id.* at 354.

136. *Id.* at 356 (quoting *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 431 (5th Cir. 2007)).

identical circumstances and the facts that triggered its application. Unless otherwise unmistakably compelled by state law, these results suggest that at present, in the Fifth Circuit, mere “contribution” of an excluded cause to an otherwise covered loss will vitiate insurance coverage entirely in instances of concurrent causation.

4. Preliminary Observations about the Katrina cases

The issues addressed by the decisions described in the preceding two subsections of this Article have been and will be subject to further adjudication. Although the United States Supreme Court recently denied certiorari in *In Re Katrina*,¹³⁷ disputes about the concurrent causes of Katrina-related damage rage on in the state courts of Louisiana.¹³⁸ No matter how these cases are ultimately decided, policyholders whose homes and lives have been devastated, and insurers too, have engaged too long in a futile attempt to make sense out of a mishmash of conflicting and sometimes bizarre decisions. These questions should have been decided a long time ago. The ex-

137. See *In Re Katrina*, 495 F.3d 191 (5th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 3433, 76 U.S.L.W. 3304, 76 U.S.L.W. 3438 (U.S. Feb. 19, 2008) (No. 07-713), *available at* 2008 WL 423589.

138. The Supreme Court of Louisiana recently granted certiorari in *Landry v. Louisiana Citizens Property Insurance Co.* to review a decision by an intermediate court of appeal that directly addressed “the causation issue which often arises, particularly in hurricane cases, in determining whether an insurance contract provides coverage for a total loss where multiple perils converge.” 07-247 (La. App. 3 Cir. 8/28/07); 964 So. 2d 463, *writ granted* (La. 12/7/07) (No. 07-1907) (emphasis in original). In *Landry*, the court held:

Citizens does not dispute that the Landrys sustained a total loss of their property. Therefore, if it is determined that the ‘efficient or proximate cause’ of the damage to the property was wind, rain, or hail (covered perils), as provided in . . . the policy, Citizens is liable, as a matter of law, to the Landrys . . . for the full face value of the policy covering said property, without offset or deduction for flood waters.

Landry, 964 So. 2d at 484. Echoing nearly verbatim the reasons for Justice Mosk’s dissent in *Garvey*, appellate Judge Genovese dissented in *Landry*, asking rhetorically:

And just what, pray tell, is ‘efficient or proximate cause’? Though one may be legally versed in the understanding of proximate cause in a tort sense, what is its meaning in a contractual sense, such as the case at bar? Better yet, what is ‘efficient cause’? The majority remands this case for a trial on the merits with no guidance whatsoever as to the legal standard or definition of ‘efficient or proximate cause’ as it relates to this case. How will the trier of fact be able to determine whether or not Plaintiffs have proven, presumably by a preponderance of the evidence, that a covered peril was the ‘efficient or proximate cause’ of the damage to their home which resulted in a total loss of their home?

Id. at 487. The Louisiana Supreme Court recently reversed *Sher v. Lafayette Insurance Co.*, 972 So. 2d 1153 (La. App. 4 Cir. 11/19/07), an intermediate court of appeal decision that found, *inter alia*, a standard water damage exclusion inapplicable to Katrina-related flood damage because the term “flood” is “ambiguous . . . [as to] what types of floods are excluded . . . [.]” the very issue seemingly decided by the Fifth Circuit Court of Appeals in *In re Katrina*. See *Sher v. Lafayette Ins. Co.*, 07-0757, p. 8 (La. App. 4 Cir. 11/19/07); 973 So. 2d 39, 51 *rev’d*, 07-2441, 07-2443, p. 1 (La. 4/8/08). The Supreme Court of Louisiana held that the meaning of the term “flood” was plain and not ambiguous, relying in part on the reasoning of the Fifth Circuit Court of Appeals in *In Re Katrina*. See *Sher*, 07-2441, 07-2443, pp. 7-10 (La. 4/8/08).

penditure of substantial time and money, and the consequent heartache, are inexcusable burdens to impose on the often homeless victims of a tragedy. Meanwhile, the problem of deciding how to decide the causation question in insurance cases drags on and on in the courts—with different results at different times in different states. Insurers are able to push the envelope of ever-shifting, and sometimes nonsensical judgments governing concurrent causation in coverage cases. Insurers usually can afford to wait to see which way the judicial tide will turn.

The only conclusion that one can take away from the ebb and flow in these decisions is the conclusion that the Doctrine has failed: it has failed the interested parties, and it has failed courts obliged to provide principled and coherent adjudication. There just is not much more to be learned about the Doctrine. It is time to find a better way to crack the concurrent causation conundrum that continues to vex insurance coverage disputes.

II. A QUIET REVOLUTION IN THE CANONS OF CAUSATION IN TORT

A. THE PRELIMINARY QUESTION

Before turning to those advances in contemporary tort theory apposite to cracking the concurrent causation conundrum, there are some good reasons to question whether causation models shaped in tort should be appropriated to do the work of interpreting causation clauses in insurance contracts.¹³⁹ Justice Felix Frankfurter presented those reasons colorfully in *Standard Oil Co. of New Jersey v. United States*.¹⁴⁰

Dissenting in *Standard Oil*, Justice Frankfurter not only disparaged tort principles of causation as “sophistries” that had no bearing on the construction of insurance contracts, but also labeled the Doctrine an “unreal metaphysical game”:

Unlike obligations flowing from duties imposed upon people willy-nilly, an insurance policy is a voluntary undertaking by which obligations are voluntarily assumed. Therefore the subtleties and sophistries of tort liability for negligence are not to be applied in construing the

139. The tort system is generally thought to reward carefulness, discourage malfeasance, and ensure just compensation for injury—thereby discouraging private retribution. Certain of the core bases for enforcement of contracts may be somewhat congruous, but the list of reasons for enforcing contracts does not as commonly include allowing finders of fact to determine just compensation for wrongful conduct. Contract theory relies instead on discerning the intent of the parties and remedies focus on effectuating the parties' bargain. These differences suggest that principles developed to govern tort liability should have no bearing on contract interpretation.

140. *Standard Oil Co. of N.J. v. United States*, 340 U.S. 54 (1950) (Frankfurter, J., dissenting).

covenants of a policy. It is one thing for the law to impose liability by its own notions of responsibility, and quite another to construe the scope of engagements brought and paid for The law does not play an unreal metaphysical game of trying to find a single isolatable factor as the sole responsibility to which is to be attributed a loss against which insurance has been bought. As a matter of experience and reason such losses are invariably the resultant of a combination of factors It is partly the law's endeavor, in view of the inevitable treacheries of language, to shield the insurer from liability for a loss on the basis of a factor too remote, and therefore too tenuous, in the combination of elements that converged toward the loss.¹⁴¹

Justice Frankfurter's dissent presaged the danger of utilizing tort principles of causation "willy-nilly" to resolve the concurrent causation conundrum. Yet, deficiencies in contract theories of causation compelled this yielding because causation doctrine in contract law is generally limited to the nexus between breach and damages—an analysis foreign to the determination of insurance coverage.¹⁴² As much as Justice Frankfurter may have hoped otherwise, there is no body of contract doctrine sufficiently supple to resolve the coverage issue presented by loss caused by both excluded and covered perils.

By its very articulation, the Doctrine represents the considered, if acquiescent judgment by the courts that have adopted it that tort doctrine expresses the most highly developed system of logical analysis of the issue of legal causation.¹⁴³ The conceptual underpinnings of the Doctrine are so deeply rooted in tort law, and the Doctrine has been so unquestionably influenced by evolving principles of legal causation governing the imposition of tort liability, that allusions to the doctrines of causation in tort to improve it are inevitable.¹⁴⁴ This Article endorses the repurposing of tort law to crack the conundrum.

141. *Standard Oil Co.*, 340 U.S. at 66-67 (Frankfurter, J., dissenting).

142. See RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (1981) ("[T]he requirement of foreseeability [of damage] is a more severe limitation of liability [for breach of contract] than is the requirement of substantial or 'proximate' cause in the case of an action in tort or for breach of warranty. Compare Restatement, Second, Torts § 431 . . .").

143. To illustrate the opposite extreme, consider Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007). Schwarcz contends that tort doctrines governing products liability can serve as a model for judicial administration of insurer liability, replacing the "reasonable expectations" analytical tool. As relevant here, although courts nearly always pay lip service to "reasonable expectations" in deciding a case pursuant to the Doctrine, any such reference should not be misconstrued as *contra proferentum* or favoring the expectations of the insured in cases of ambiguity in the drafter's instrument.

144. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (1981).

Unfortunately, faulty aspects of mid-twentieth century tort law, such as the “substantial factor” test of factual causation,¹⁴⁵ infected the Doctrine just as the contagion proliferated. Common law courts can and should quarantine those faulty precepts. The concurrent causation conundrum in insurance cases at present can be more sensibly cracked by relying upon the recently reformed canons of causation in tort.¹⁴⁶ Those reformations most relatable to this end are surveyed below.

B. THE SUBSTANTIAL FACTOR TEST IS DEPOSED

Before imposing legal responsibility upon an actor in tort, a fitting connection or nexus must first be found between that actor’s conduct and legally cognizable harm. During the twentieth century, the term “legal causation” was coined to describe a two-step process to evaluate that connection.¹⁴⁷ Many a law student in her first semester of torts still learns that the first step in a causation analysis is to determine the “cause(s) in fact,” or factual cause(s) of an examined harm.¹⁴⁸

The intricacies of factual causation in tort notwithstanding, the problem of identifying all of the necessary factual “causes” of harm or injury for the purpose of tort liability usually can be resolved with perhaps deceptively appealing simplicity: if absent a particular act (or failure to act) the harm would not have occurred, then any such conduct may be considered “a” necessary cause of the harm, even if not “the” only necessary “cause” of it.¹⁴⁹ This “but for” test of factual causation is generally capable of stable

145. See RESTATEMENT (SECOND) OF TORTS § 431 (1965) (“[N]egligent conduct is a legal cause of harm to another if (a) [the] conduct is a substantial factor in bringing about the harm”).

146. At the 82nd Annual Meeting of the American Law Institute, and subject to “the discussion at the Meeting and to the usual editorial prerogative,” a proposed final draft of the Restatement (Third) of Torts: Liability for Physical Harm was approved. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 (Proposed Final Draft No. 1 2005).

147. See *id.* cmt. a. (“Both the Restatement Second of Torts and the Restatement of Torts employed the term ‘legal cause’ to encompass two distinct inquiries: factual cause and proximate cause.”).

148. See Jim Gash, *At the Intersection of Proximate Cause and Terrorism: A Contextual Analysis of the (Proposed) Restatement Third of Torts’ Approach to Intervening and Superseding Causes*, 91 KY. L. J. 523, 529 (2002-03). Describing the development of causation within the Restatement:

[I]n 1977, in conjunction with a new Chapter addressing misrepresentation, Restatement Second Reporter Dean John Wade endeavored to sever factual cause from what we know as proximate cause Wade nevertheless eschewed the more popular ‘proximate cause’ terminology in favor of retaining ‘legal cause,’ though now that term purported to refer only to the proximate cause aspect of causation.

Id.

149. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. b (Proposed Final Draft No. 1 2005) (“With recognition that there are multiple factual causes of an event

application, recognizing there are always multiple, necessary factual causes of a loss.¹⁵⁰

According to a pure “but for” test of factual causation, all necessary acts, forces, or events qualify as factual causes because “but for” any one of them, an indivisible harm would not have occurred. This conclusion is sustained even if a particular act, force, or event was insufficient to cause the harm alone,¹⁵¹ and even if all necessary acts, forces, or events were not simultaneous.¹⁵² Collectively, the factual causes of a result are known as a “causal set.”¹⁵³

... a factual cause can also be described as a necessary condition for the outcome.”). It is sometimes possible to distinguish between conditions, on the one hand, and acts, forces, and events on the other. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. d (Proposed Final Draft No. 1 2005) (“Because many of the causes necessary for an outcome . . . are unimportant for legal or other purposes, some would distinguish them from causes and describe them as conditions [T]o emphasize the empirical nature of factual causal determinations, all necessary elements for an outcome are described as causes in this Restatement.”). For example, breathable air is a necessary but insufficient condition to human life, as are food and water. It would be awkward, however, to characterize air with respect to a particular human life as a “cause.” The distinction is usually insignificant in tort law, as legal responsibility hinges on tortious conduct by at least one actor—even if that actor merely failed to remedy, when under a duty to do so, a condition upon which another act, force or event operated to “cause” the harm.

150. *See id.* § 26 cmt. c, titled “Tortious conduct need only be one of the factual causes of harm”:

[T]here will always be multiple (some say, infinite) factual causes of a harm, although most will not be of significance . . . and many will be unidentified. That there are a large number of causes of an event does not mean that everything is a cause of an event. The vast majority of acts, omissions, and other factors play no role in causing any discrete event.

Id.

151. *See id.* § 26 reporter’s note cmt. j, titled “Substantial factor”:

While factual causes are not a matter of degree with regard to the outcome, in some cases, the inputs of the causes can be compared on a common scale. Thus, three actors may each contribute an equivalent dose of poison, all three of which are required to cause another’s death In this respect, one may, in comparing the inputs, determine that one is smaller or even trivial by comparison to the others, even though each is a necessary link in the causal chain that produced the outcome [T]here are no degrees of factual cause. A necessary condition for a relevant harm is a factual cause of that harm, without limitation.

See also id. § 36 cmt. a (“[E]ven an insufficient condition (along with background causes) can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm, even if there also exist other sets of causes sufficient to cause the harm.”).

152. Scholars generally agree that a combination of causes necessary to produce an indivisible harm need not be simultaneous. *See id.* § 26 cmt. c, titled “Tortious conduct need only be one of the factual causes of harm”:

This causal-set model does not imply any chronological relationship among the causal elements involved, although all causes must precede the . . . harm. [A factual cause] may occur well before the . . . harm and require a number of subsequent events to produce the harm [T]his model [likewise does not] imply any [necessary] relationship among the causal elements; causal elements may operate independently

Id. The simultaneous combination of sufficient causes to produce indivisible harm raises an important issue of necessity, however, as will be discussed later in this Article.

153. *See id.* (“A useful model for understanding factual causation is to conceive of a set made

There is an irrefragable hole in the “but for” test, however, sometimes known as the problem of “overdetermined” harm.¹⁵⁴ When independent and sufficient causes (or causal sets) simultaneously combine to produce an indivisible harm, each quite legitimately may be said to have failed a “but for” test of causation.¹⁵⁵ Tort theorists have long almost unanimously agreed upon a simple solution: a “simultaneity exception” from the rule of “but for” causation.¹⁵⁶ Several persuasive rationales easily explain excepting from the “but for” test an act, force or event that would have been sufficient (and necessary) absent the simultaneous action of another sufficient act, force or event.¹⁵⁷

up of each of the necessary conditions for plaintiff's harm. Absent any one of the elements of the set, the plaintiff's harm would not have occurred.”).

154. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM. § 26 cmt. i (Proposed Final Draft No. 1 2005), titled “Multiple causes distinguished from multiple sufficient causes”:

The recognition of multiple causes . . . should be distinguished from multiple causes that overdetermine the outcome [F]or any harm that occurs, multiple factors will be necessary in a but-for sense. No modification of the but-for standard is necessary or appropriate to account for the multiple causes in every causal set. By contrast, [with respect to a] much more limited situation—that in which there are separate causes (more accurately, separate causal sets), each of which is sufficient to cause the . . . harm, the . . . harm is ‘overdetermined’ because while either of the causal sets would produce the harm, neither is by itself a but-for cause of the harm.

Id.

155. *Cf.* RESTATEMENT (SECOND) OF TORTS § 432(2) (1965). The classic example is the “two fires” hypothetical: A lights a fire to the west side of B's house, C lights a fire to the east side, and each fire thus started is capable alone of burning B's house to ashes. If the two fires combine simultaneously to so burn B's house, then neither A nor C can be found to have been a “but for” cause of the indivisible loss. Absent A's conduct, C's conduct would have done the job; and, of course, C has the same argument. *See id.* § 432(2) illus. 3-4. Another simple example is the conduct of each person participating in a firing squad.

156. Each otherwise necessary and sufficient cause that combines “simultaneously” with other like causes amounts to a factual cause pursuant to the simultaneity exception. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 (Proposed Final Draft No. 1 2005) (“If multiple acts exist, each of which alone would have been a factual cause under § 26 of the physical harm at the same time, each act is regarded as a factual cause of the harm.”). According to the Reporters' Summary of the 2005 Meeting of the American Law Institute, a motion was defeated that would have amended section 27 by entitling it “Simultaneously Overdetermined Harm” and developed two subsections to further delineate whether conduct was a duplicative factual cause or, instead, a preemptive factual cause or preempted condition. The Reporters indicate that consideration will be given to stating in a comment that all of the conditions for the competing causes in question need to be “in existence” before the harm occurs. *See* 28-FALL ALI Rep 4 (RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 (Proposed Final Draft No. 1, 2005)).

157. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 cmt. c (Proposed Final Draft No. 1 2005), titled “Rationale”:

A number of justifications exist for the rule in this Section. [Liability arising out of conduct] fully capable of causing plaintiff's harm should not [be avoided] . . . merely because of the fortuity of another sufficient cause When two tortious multiple sufficient causes exist, to deny liability would make the plaintiff worse off due to multiple [culpable sufficient

Taking a short analytical step away from consideration of independently sufficient acts, forces, or events that simultaneously combine to produce an indivisible harm, Dean William L. Prosser and his contemporaries walked off a cliff. Building on the simultaneity exception, Dean Prosser theorized that any cause among many that might have “played a role” in producing indivisible harm might be deemed “a” cause of it, provided that role was “substantial” enough.¹⁵⁸ An evaluative or normative decision by the finder of fact whether any factual cause was a “substantial factor” in bringing about the examined result has come to be known as the “substantial factor test” of factual causation.¹⁵⁹

The “substantial factor” test invites the finder of fact to determine a necessary causal factor too “insubstantial” to be a factual cause, or alternatively, an unnecessary causal factor “substantial” enough to be so considered.¹⁶⁰ Dean Prosser’s view that contributing causes should be evaluated by the finder of fact for “substantiality”—documented in his famous treatise, and embodied in the Second Restatement of Torts—was posthumously

causes] than would have been the case if only one . . . existed. Perhaps most significant, is the recognition that, while the but-for standard . . . is a helpful method for identifying causes, it is not the exclusive means for determining a factual cause. Multiple sufficient causes are also factual causes because we recognize them as such in our common understanding of causation, even if the but-for standard does not. Thus, the standard for causation in this Section comports with deep-seated intuitions about causation and fairness in attributing responsibility.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 cmt. c (Proposed Final Draft No. 1 2005).

158. See RESTATEMENT (SECOND) OF TORTS § 431 (1965).

159. See *id.* § 431 cmt. a, titled: “Distinction between substantial cause and cause in the philosophic sense”:

In order to be a legal cause of another’s harm, it is not enough that the harm would not have occurred had the actor not been negligent. Except as stated in § 432(2) [the simultaneity exception], this is necessary, but it is not of itself sufficient. The [examined cause] must also be a substantial factor in bringing about the . . . harm. The word ‘substantial’ is used to denote the fact that the [examined cause] has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called ‘philosophic sense,’ which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called ‘philosophic sense,’ yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Id.

160. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 reporter’s note cmt. j (Proposed Final Draft No. 1 2005), titled “Substantial factor”:

With the sole exception of multiple sufficient causes, ‘substantial factor’ provides nothing of use in determining whether factual cause exists To the extent that substantial factor is employed instead of the but-for test, it is undesirably vague. As such, it may lure the factfinder into thinking that a substantial factor means something less than a but-for cause or, conversely, may suggest that the factfinder distinguish among factual causes, determining that some are and some are not ‘substantial factors.’

Id.

withdrawn from his treatise,¹⁶¹ and has been identified by the authors of the Third Restatement as a major source of confusion and misunderstanding.¹⁶²

The Third Restatement unequivocally abandons a Prosserian view of substantiality that permits a jury to leave out a necessary condition as a factual cause. Even a trivial contribution by a necessary act, force, or event may not be deemed too “insubstantial” to constitute a factual cause.¹⁶³ The result obtained from the combination of necessary but insufficient causes thus presents little conceptual difficulty pursuant to a pure test of “but for” causation: each necessary causal factor must remain so characterized, despite the absence of any single, identifiably sufficient cause.¹⁶⁴

The Third Restatement also unequivocally abandons a Prosserian view of substantiality that permits a jury to attribute factual causation of harm to the contribution of an unnecessary act, force, or event. Any act, force, or event not needed to produce the harm (and not subject to the simultaneity exception) generally does not qualify as a factual cause pursuant to a pure and contemporary “but for” view of factual causation.¹⁶⁵

161. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 41, at 43-45 (5th ed. Supp. 1988), acknowledging the confusion created by the use of the term “substantial factor”:

Even if “substantial factor” seemed sufficiently intelligible as a guide in time past . . . the development of several quite distinct and conflicting meanings for the term “substantial factor” has created a risk of confusion and misunderstanding, especially when a court, or an advocate or scholar, uses the phrase without indication of which of its conflicting meanings is intended.

Id.

162. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 reporter’s note cmt. j (Proposed Final Draft No. 1 2005), titled “Substantial factor”:

The treatment of ‘substantial factor’ in both Torts Restatements is confusing In the Reporter’s Notes to § 433 of the Restatement Second of Torts, Prosser stated, ‘the “substantial factor” element deals with causation in fact.’ Ironically, the author of the substantial-factor test, Jeremiah Smith, intended it to address the problem of proximate cause, not factual cause. See Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103 (1911)

Id. (internal citations omitted).

163. See *id.* § 36 cmt. a. (“So long as an actor’s tortious conduct is a necessary condition to produce the harm it is a factual cause of harm, without qualification. The concept of a necessary condition does not admit of any gradations, but rather exists or not.”). See also *id.* § 36 cmt. b (“[A] limitation on the scope of liability [may be not be provided] if [a] trivial contributing cause is necessary for the outcome; . . . the actor who negligently provides the straw that breaks the camel’s back is subject to liability for the broken back.”).

164. See *supra* note 151.

165. It still may be possible to aggregate otherwise unnecessary and insufficient causes into a subset necessary to produce the examined harm. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 illus. 3 (Proposed Final Draft No. 1 2005):

Able, Baker, and Charlie, acting independently but simultaneously, each negligently lean on Paul’s car, which is parked at a scenic overlook at the edge of a mountain. Their combined force results in the car rolling over the edge of a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by each of Able, Baker, and Charlie would have been insufficient to propel Paul’s car past the curbstone, but the combined force of any two of them is sufficient. Able, Baker, and Charlie are each a factual cause of the destruction

The Third Restatement unequivocally declares the “but for” test to be the superior test of factual causation, and rightly so.¹⁶⁶ Eliminating assessment of the “substantiality” of necessary causal factors based on evaluative or normative grounds leads jurors to consider evidence concerning factual causation, often consisting of expert opinion, on a basis better tailored to oblige factual assessments. The more concrete “but for” test of factual causation is thus more finely adjusted to reliably strengthen the core fact-finding function of juries, and less likely to produce peculiar results. The only remaining legacy of the mistakenly adopted “substantial factor” precept of factual causation rightfully governs instances of overdetermined harm—where an act, force, or event that would have been necessary and sufficient, absent the simultaneous effect of another sufficient act, force, or event, is deemed a factual cause of the resulting harm.

C. THE TEST OF PROXIMATE CAUSATION IS OUSTED

The second step in a classic twentieth-century analysis of legal causation requires finding an actor’s conduct the “proximate cause” of examined harm. Judge Andrews, in an insightful dissent destined to become a law school classic, observed in *Palsgraf v. Long Island R. Co.*,¹⁶⁷ that the term “proximate cause” has no fixed legal definition:

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations . . . Any philosophical doctrine of causation does not help us. . . . You may speak of a chain, or, if you please, a net.¹⁶⁸ An analogy is of little aid. Each cause brings

of Paul’s car.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 illus. 3 (Proposed Final Draft No. 1 2005). See also *Warren v. Parkhurst*, 92 N.Y.S. 725, 728 (N.Y. Sup. Ct. 1904), *aff’d*, 93 N.Y.S. 1009 (N.Y. App. Div. 1905), *aff’d*, 78 N.E. 579 (N.Y. 1906) (finding the contribution of sewer discharge into a creek above plaintiff’s property by each defendant was unnecessary and insufficient to create the complained-of stench arising from the creek and stating: “The only injury to the plaintiff arises from the foulness of the stream at his place. No one defendant caused that injury. All of the defendants did cause it”).

166. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. b (Proposed Final Draft No. 1 2005), titled “‘But-for’ standard for factual cause”:

The standard for factual causation in this [s]ection is familiarly referred to as the ‘but-for’ test, as well as a *sine qua non* test. Both express the same concept: an act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred. With recognition that there are multiple factual causes of an event . . . a factual cause can also be described as a necessary condition for the outcome.

Id.

167. 162 N.E. 99 (N.Y. 1928).

168. Here, Judge Andrews referred to the famous elocution by Lord Shaw:

To treat *proxima causa* as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a

about future events. Without each the future would not be the same. Each is proximate in the sense it is essential. But that is not what we mean by the word. Nor on the other hand do we mean sole cause. There is no such thing.¹⁶⁹

For Judge Andrews, factual causation was a necessary but insufficient condition to the imposition of legal liability.¹⁷⁰ Liability must be properly delimited, he reasoned, upon a further, evaluative finding of justification — based not on philosophy, based not even upon legal principles — but instead, based on an almost whimsical view of adjudication by “common sense” disguised as “proximate cause”:

What we . . . mean by the word “proximate” is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics

It is all a question of expediency. There are no fixed rules to govern our judgment This is rather rhetoric than law. There is in truth little to guide us other than common sense.¹⁷¹

As a means to limit the scope of liability for harm determined to have been factually caused by specific action, “common sense” was not a standard particularly predictive of consistent and principled decision-making. The doctrine of “proximate cause” has shown itself in practice as only a means to the end of arbitrariness and caprice. Even the examples of “proximate cause” determinations cited by Judge Andrews in *Palsgraf* revealed the “proximate cause” doctrine at work serving as an random check on the scope of legal responsibility, yielding inconsistent outcomes in cases involving similar, if not identical facts.¹⁷² Worse still, jurors seem often to

chain, but-if this metaphysical topic has to be referred to-it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.

See *Leyland Shipping Co., Ltd. v. Norwich Union Fire Ins. Soc’y, Ltd.*, [1918] A.C. 350, 369 (H.L.).

169. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

170. *Id.* at 104 (Andrews, J., dissenting) (“[T]he proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen . . .”).

171. *Id.* at 103-04 (Andrews, J., dissenting) (internal citations omitted).

172. In one such example, it would seem Judge Andrews compared attribution of the great Chi-

have missed the meaning of the term “proximate cause” completely.¹⁷³

Despite some shortcomings, however, Judge Andrews’ insights in *Palsgraf* have constructively informed the contemporary view that “proximate cause” has no relationship at all to causation. As explained by the authors of the Third Restatement, more recent and better reasoned authority suggests that the term “proximate cause” should be abandoned entirely.¹⁷⁴

In its place, the Third Restatement describes a “risk standard” better suited to determine the “scope of liability.”¹⁷⁵ Implementation of this stan-

cago fire to Ms. O’Leary’s famous cow with the circumstances at issue in *Ryan v. N.Y. Central R.R. Co.* 35 N.Y. 210, 210-13 (1866). *Ryan* precluded, on grounds of “proximate cause,” the liability of a railroad for a negligently occasioned fire which spread to the nearest property. Judge Andrews suggested the *Ryan* rule was a purely arbitrary decision:

An overturned lantern may burn all Chicago. We may follow the fire from the shed to the last building. We rightly say the fire started by the lantern caused its destruction.

A cause, but not the proximate cause Take our rule as to fires We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor’s fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently.

Palsgraf, 162 N.E. at 103-04 (Andrews, J., dissenting).

173. In deciding that California’s model jury instruction employing the term “proximate cause” resulted in reversible error, the Supreme Court of California cited a study showing that 23% of jurors hearing the instruction understood the term “proximate” to mean “approximate.” *Mitchell v. Gonzales*, 819 P.2d 872, 877-78 (Cal. 1991). “In a scholarly study of 14 jury instructions, [the proximate cause instruction] produced proportionally the most misunderstanding among laypersons [I]n one experiment, ‘the term ‘proximate cause’ was misunderstood by 23% of the subjects They interpreted it as ‘APPROXIMATE cause,’ ‘estimated cause,’ or some fabrication.” *Id.* at 877 (internal citations omitted) (emphasis in original). Worse still, courts have sometimes identified the “sole proximate cause” of harm in an effort to distinguish among potentially liable parties. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 34 cmt. f (Proposed Final Draft No. 1 2005), discussing the confusion thus engendered:

Courts sometimes employ the doctrine of ‘sole proximate cause’ to limit the liability of a defendant The most common usage of sole proximate cause is as an alternative to superseding cause. But there is no meaning distinct to sole proximate cause. Sole proximate cause terminology is confusing for two reasons: 1) it incorrectly implies that there can be only one proximate cause of harm; and 2) it obscures a more direct and precise explanation for denying liability. In light of the confusion it can generate and the availability of more precise explanations for denying liability, it is a term best avoided.

Id.

174. *See id.* § 29 cmt. b, titled “Proximate-cause terminology and instructions to the jury”: [The] term ‘proximate cause’ is a poor one to describe limits on the scope of liability. It is also an unfortunate term to employ for factual cause or the combination of factual cause and scope of liability Even if lawyers and judges understand the term, it is confusing for a jury Thus, the term ‘causation’ should not be employed when explaining this concept to a jury.

Id.

175. *See id.* § 29 cmt. d, titled “Harm different from the harms risked by the tortious conduct”: [The scope of liability is properly limited by] consideration, at an appropriate level of generality . . . of: a) the risks that [were engendered by the examined factual cause], and b)

dard remains, in the appropriate case, for the finder of fact,¹⁷⁶ but the court does not cede to the finder of fact determination of the scope of liability based solely on a finding of factual causation.¹⁷⁷ A verdict concerning the scope of liability retains aspects of an evaluative or normative judgment about the range of harms predictably created by a particular factual cause, but a decision based on the risk standard is predictive of less arbitrary results than one based on “common sense” posing as “proximate causation.”¹⁷⁸

The road to understanding the scope of liability as an assessment of the scope of risk created by an examined factual cause has been long and twisty. Some will be relieved to know that not all of the signposts along the way have been abandoned entirely by contemporary authorities. Resonating in the Third Restatement are many of the same “considerations” Judge Andrews proposed in *Palsgraf* to guide a determination of “proximate cause” – considerations that found full expression in the Second Restatement of Torts.¹⁷⁹

Thus, whether an intervening factual cause was extraordinary or improbable is permissibly considered by the court and, if appropriate, by the jury in determining the scope of liability.¹⁸⁰ Trivial contributions to overde-

whether the harm for which recovery is sought was a result of any of those risks.

....

Th[is] standard . . . is often referred to as the requirement that the harm be ‘within the scope of the risk,’ or some similar phrase, for liability to be imposed. For the sake of convenience, this limitation on liability [may be] referred to . . . as the ‘risk standard.’

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 34 cmt. f (Proposed Final Draft No. 1 2005).

176. *Id.* § 29 cmt. f (“[T]he scope of liability, although very much an evaluative matter, is treated as a question of fact for the factfinder.”).

177. *See id.* *See also id.* § 29 cmt. q, titled “Judge and jury”:

[T]he court’s role is to instruct the jury on the standard for scope of liability when reasonable minds can differ as to whether the type of harm suffered . . . is among the harms [risked], and it is the function of the jury to determine whether the harm is within the . . . scope of liability.

Id.

178. *See id.* § 29 cmt. d (“The risk standard can be employed to do justice in a wide range of cases in which the particular facts require careful consideration and thereby resist any rule-like formulation. Yet it does so within an understandable and coherent framework that avoids standardless determinations.”).

179. *See* RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 492, 512 (7th ed. 2000) (crediting the dissenting opinion in *Palsgraf* for the test for proximate cause expressed by the Restatement Second of Torts).

180. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 34 cmt. e (Proposed Final Draft No. 1 2005) (“[When] those [intervening] causes . . . are unforeseeable, unusual, or highly culpable they may bear on whether the harm is within the scope of the risk.”). *Cf. id.* § 29 cmt. o (“Many varied, odd, and extraordinary acts, forces, and events may concur to produce a given harm, such that it can readily be said that the manner of harm was unusual, extraordinary, or unforeseeable. Such a statement is unhelpful in a scope-of-liability analysis . . .”).

terminated harm may be found too insignificant to justify the imposition of liability.¹⁸¹ In addition, conduct that did not engender the risk of harm for which liability is sought to be imposed may be excluded by a court from the set of necessary conditions considered by the trier of fact.¹⁸²

Old dogma concerning intervening causes and “dependent” causation is passé, however.¹⁸³ Seeking to harness emerging ideas about the cause of causes, the Second Restatement laid out a complex series of interrelated considerations to assess whether an act, force, or event following a necessary and usually insufficient cause “superseded” it and thereby “broke the chain of causation.”¹⁸⁴ These formulaic directions suffer from the same vague demands for normative and evaluative judgment associated with the means prescribed by the Second Restatement to determine factual causation.¹⁸⁵ In cases requiring determination of so-called “superseding” causa-

181. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 36 cmts. a-b (Proposed Final Draft No. 1 2005), discussing a trivial contribution to overdetermined harm:

When an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of . . . [overdetermined] harm, the harm is not within the scope of . . . liability. Th[is] limitation on the scope of liability . . . is not applicable if the trivial contributing cause is necessary for the outcome; this [s]ection is only applicable when the outcome is overdetermined.

Id.

182. See *id.* § 29 cmt. d, titled “Harm different from the harms risked by the tortious conduct”:

When defendants move for a determination that plaintiff's harm is beyond the scope of liability as a matter of law, courts must initially consider all of the range of harms risked by the [examined factual cause] that the jury could find as the basis for determining [liability]. Then, the court can compare the . . . harm with the range of harms risked . . . to determine whether a reasonable jury might find the former among the latter.

Id.

183. See *id.* § 29 cmt. g (“[C]ommon instructions on proximate cause that employ language requiring that the tortious conduct cause the harm in a ‘natural and continuous sequence,’ sometimes accompanied with the additional requirement that the causal sequence ‘be unbroken by any efficient intervening cause,’ do not reflect the risk standard adopted in this [s]ection.”).

184. See RESTATEMENT (SECOND) OF TORTS § 442 (1965). See also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 34 cmt. a (Proposed Final Draft No. 1 2005), titled “History and introduction”:

The extensive rules for when intervening acts become sufficient to ‘supersede’ an actor’s earlier tortious conduct were developed at a time when the prevailing jurisprudence was that law was scientifically based and correct legal principles could be deduced through logical and objective inquiry. Consistent with this philosophy, the ‘proximate cause’ of any event could be determined through a neutral, scientific inquiry. Rules regarding which intervening acts prevented prior acts from being the cause of subsequent harm were integral to this inquiry.

Id.

185. See *id.* § 34 cmt. b, titled “Intervening acts and superseding causes”:

The terminology used by the first and Second Restatements of Torts and courts includes ‘intervening forces (or acts),’ which consist of acts, omissions, or other forces that occur after the tortious conduct of the actor A ‘superseding cause’ is an intervening force or act that is deemed sufficient to prevent liability for an actor whose tortious conduct was a factual cause of harm These terms are only conclusory labels. A reasoning and normative process is required in order to separate background causes from intervening forces and to decide which intervening forces under what circumstances are superseding

tion, the finder of fact often ascertains not only the “substantiality” of the factors that necessarily caused the harm, but also their relative significance.¹⁸⁶

The views expressed in the Third Restatement reflect general disapproval and elimination of the need to assign analytical importance to the dependency of intervening factual causes, in favor of a standard more predictive of principled and consistent results. Liability may be imposed for harm within the scope of the risk created by a necessary factual cause, even if a more immediate intervening factual cause independent of the examined antecedent produced it. Assessing the scope of the risk does not preclude consideration of the interdependence of factual causes; however, it differs markedly in the examination of that relationship by employing a different frame of reference.

Nearly a century after *Palsgraf*, Judge Andrews’ beloved but whimsical view of “proximate causation”—a vague limitation on tort liability based on expediency, common sense, and practical politics—has been surpassed. Contemporary authorities aim for better-reasoned and less arbitrary results, by employing a practical standard to ensure that the nexus between an examined factual cause and the resulting harm justifies the imposition of legal responsibility.¹⁸⁷

III. CRACKING THE CONUNDRUM

A. THE TASK AT HAND

This Article proposes judicial repurposing of the reformations in tort causation doctrine described above because successful efforts to resolve the concurrent causation conundrum by extra-judicial means are improbable. State legislative efforts intended to codify or reject the Doctrine have either failed, or resulted in unique state law, creating yet another layer of conflict-

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 34 cmt. b (Proposed Final Draft No. 1 2005).

186. See RESTATEMENT (SECOND) OF TORTS § 440 (1965) (“A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.”). See also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 cmt. a (Proposed Final Draft No. 1 2005) (“The ‘substantial factor’ requirement for legal cause in the Second Restatement of Torts has often been understood to address proximate cause, although that was not intended.”).

187. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 cmt. e (Proposed Final Draft No. 1 2005) (“Limiting liability to harm arising from [identified] risks . . . has the virtue of relative simplicity. It also provides a more refined analytical standard than a foreseeability standard or an amorphous direct-consequences test.”).

ing state regulation of largely unknown consequence.¹⁸⁸ Efforts in Congress to introduce legislation governing the concurrent causation conundrum have been likewise ineffectual, and if ever successful in whole or part, will implicate controversial regulation of the insurance industry by the federal government.¹⁸⁹ A recent proposal to create a federal bailout fund for

188. A fascinating case in point is described brilliantly in Passa, *supra* note 75, at 561. In *Western National Mutual Insurance Co. v. University of North Dakota*, 643 N.W.2d 4, 10-11 (2002), the Supreme Court of North Dakota adopted the Doctrine, based on statutes nearly identical to California Insurance Code sections 530 and 532. The following year, the North Dakota legislature introduced and passed amendments to those statutes stating: "The efficient proximate cause doctrine applies only if separate, distinct, and totally unrelated causes contribute to the loss," N.D. CENT. CODE § 26.1-32-01 (2003), and "[a]n insurer may contract out of the efficient proximate cause doctrine," *id.* § 26.1-32-03. Passa, *supra* note 75, at 585-87. During the debate on these amendments, proponents testified that passage would protect the insurance market and preserve consumer choice. Passa, *supra* note 75, at 586. Opponents testified that these amendments would "transform a currently gray area into a more black and white one . . . to the benefit of the insurer, not the insured." Passa, *supra* note 75, at 587. Since passage, neither amendment has been construed in a reported decision; seemingly simple, these amendments cannot be coherently applied. Following Hurricane Katrina, Senator Julie Quinn (R-District 6) introduced bills in the special and regular legislative sessions of the Louisiana State Legislature which would have voided any "anti-concurrent cause" clause in an insurance policy. See S.B. 7, 2006 Legis., 1st Extraordinary Sess. (La. 2006); S.B. 510, 2006 Legis., Reg. Sess. (La. 2006). Intense debate ensued, and the bills were defeated. Senator Quinn recently expressed that "she was stunned at how vigorously the insurance industry and its allies fought to kill her proposal." See Rebecca Mowbray, *Critics Decry Policy Clauses—They Allow Insurers to Avoid Payments*, TIMES-PICAYUNE, July 22, 2007, at A1, available on Westlaw at 2007 WLNR 13987385. At the same time, Bob Hunter, director of insurance of The Consumer Federation of America, called on insurance commissioners and governors across the country "to work to completely ban the use of the [anti-concurrent cause] provision." *Id.*

189. Before the United States Supreme Court decided *Paul v. Virginia*, 75 U.S. 168 (1869), insurers favored the advent of federal insurance regulation, to avoid being subjected to different rules in every state. The *Paul* decision, which held that Congress had no Commerce Clause authority to regulate insurance, put an end to those efforts for the next seventy-five years. In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the Court overruled *Paul* and declared insurers potentially liable under the Sherman Act (which was enacted in 1890.) In a word, insurers panicked. In response to this "crisis," Congress almost immediately passed the McCarran-Ferguson Act in 1945, which provides generally that an insurer subject to state regulation is exempt from the provisions of the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. Congress retained residual authority to regulate insurance, but that authority is infrequently exercised. The Employee Retirement Income Security Act of 1974 (ERISA) is a notable exception. One commentator notes:

The system of state regulation of insurance that exists in this country—and the near-total lack of federal involvement in it—results from what amounted to a miscalculation of the power and tenacity of the industry six decades ago by President Franklin D. Roosevelt. The story is a lesson for insurance industry opponents, such as Mississippi Republican Sen. Trent Lott, who say it's past time for the federal government to impose some rules.

Shawn Zeller, *How the States Came to Rule on Insurance Regulation*, CQ WKLY., May 4, 2007, at 1, available on Westlaw at 2007 WLNR 8989330. Senator Lott indeed showed great interest in such regulation after Katrina destroyed his home on the Mississippi coast. See Anita Lee, *Katrina Propels Insurance Factor—Costs Skyrocketed After Storm*, SUN HERALD (Biloxi, MS), Aug. 19, 2007, at P4, available on Westlaw at 2007 WLNR 16100669 ("Several bills are pending in Con-

Katrina homeowners, like the September 11th Victim Compensation Fund, might be “. . . an appropriate, timely, and essential response to the Katrina homeowners property insurance dilemma . . .[.]”¹⁹⁰ but invites fanciful reliance upon sporadic efforts on a national scale to make available vast federal bailouts after natural disasters. At present, uncertain dependence upon inconsistently adopted *ad hoc* programs to displace private insurance, and immunizing tortfeasors to boot, appears extremely imprudent. Likewise, creation of federal and state-owned or subsidized insurance programs to cover the risk of catastrophic events has resulted in chaotic funding and inconsistent payment of claims, and even some allegedly improper exploitation of government resources owing to the overlap of government and private insurance and the ever uncertain effect of the Doctrine.¹⁹¹ In short, a

gress aimed at changing the way insurance is regulated and sold Sen. Trent Lott is pushing to repeal the industry’s exemption from anti-trust laws. [He] sued [his] insurance company, State Farm, for refusing to cover [his Katrina-related] losses, but the case [has] been settled.”). The attorney general for Mississippi supported Senator Lott’s reaction in testimony at a hearing on the property and casualty insurance industry conducted on April 11, 2007 by United States Senator Daniel K. Inouye:

I appreciate Senator Lott standing up and fighting for his people down on our coast and the people in Mississippi statewide, because you see, when [State Farm] pulled out, they stopped writing policies all over the state—stopped writing new homeowner policies. And that impacted their own insurance agencies up in north Mississippi where I’m from. They’re not able to do it, and it was just punishment. It was an attempt to intimidate the people of the state of Mississippi—particularly a federal judge, who is senior status now, a very conservative federal judge who found that one of their provisions was void: the anti-concurrent cause provision, because it basically made the policy worthless. And furthermore, he found what has been in Mississippi the state law of approximate [sic] cause for over a hundred years.

See Jim Hood, Mississippi Attorney General, Testimony Before the Senate Commerce, Science and Transportation Committee on Property and Casualty Insurance (Apr. 11, 2007), *available on Westlaw at 2007 WLNR 6898611*.

190. Mitchell F. Crusto, *The Katrina Fund: Repairing Breaches In Gulf Coast Insurance Levees*, 43 HARV. J. ON LEGIS. 329, 372 (2006).

191. See, e.g., *Citizens Prop. Ins. Corp. v. Scylla Properties, LLC*, 946 So. 2d 1179 (2006) (addressing the potential overlap of coverages under the NFIP, see *supra* note 10, and Florida’s CPIC, see *supra* note 11). According to an official statement by the CPIC:

In the case, *Scylla Properties, LLC et al. v. Citizens Property Insurance Corporation*, plaintiffs are demanding Citizens pay full policy limits in cases where hurricane winds did minor damage or was [sic] not the major contributing factor in the actual or constructive loss of a structure. It is Citizens’ position that it should not pay for damages caused by flood or other excluded perils.

[A] case out of Broward County last year [involving damage caused by wind and water associated with Hurricane Irene] . . . supports the plaintiffs’ position that they may be able to recover more in windstorm insurance than the amount of loss caused by wind. Citizens believes that . . . case is wrong and is asking the court in the *Scylla* case to rule . . . that Citizens is only obligated to pay for the portion of total losses caused by windstorm damage, and that Citizens is not obligated to pay for flood damages, which are expressly excluded from coverage under its policy.

Citizens Property Insurance Corporation, Class Action Statement, ¶ 2, <http://www.citizensfla.com/about/generalinfo.cfm?show=pdf&link=/shared/notices/mierzwa/ClassActionStatement.pdf> (last visited Mar. 21, 2008). In stunning contrast, the uncertain boundary between coverage under

viable extra-judicial alternative to crack the conundrum is unlikely.

The concurrent causation conundrum thus invites judicial rule-making. The overbreadth of exclusions and anti-concurrent causation clauses threatens to negate coverage under an “all risk” insurance policy in too many instances unexpected from the standpoint of the insured, particularly in the aftermath of catastrophic events. The creation and promulgation of the Doctrine therefore has been an understandable and organic response by common law courts to an evident imbalance. Likewise, resort by common law courts to the tools at hand — principles of legal causation derived from tort law — finds justification in the main. Yet, by their efforts, courts employing the Doctrine have magnified doctrinal faults in twentieth-century tort causation theory and have differed too broadly on the durability of the Doctrine when confronted with express contractual provisions drafted to avoid it.

Improvements in the root tenets of causation theory in tort, reflected by the forthcoming Third Restatement of Torts, can utterly supplant the outdated Doctrine, while preserving the traditional role courts have played in adjudication of insurance coverage disputes. From emerging reformed canons of causation in tort, a consensus can arise that may finally crack the conundrum.

B. CRACKING THE CONCURRENT CAUSATION CONUNDRUM IN INSURANCE COVERAGE DISPUTES USING THE THIRD RESTATEMENT OF TORTS AS A FRAME OF REFERENCE

Set forth below are four theorems apposite to superior judicial administration of the concurrent causation conundrum in insurance coverage disputes. These theorems govern four common fact patterns; nevertheless they cannot be all-encompassing or determinative in every circumstance.

The first common concurrent causation fact pattern giving rise to insurance coverage disputes concerns a loss caused by a necessary and sufficient act, force, or event not excluded by the policy, under circumstances where that act, force, or event would not have occurred but for the action of an excluded peril. For example, negligence (an excluded peril) causes a fire

NFIP and private insurance policies is claimed to have enabled independent adjusters in Louisiana to improperly shift Hurricane Katrina-related wind losses to the United States by characterizing the entire loss as “flood damage.” See Stephanie Grace, Editorial, *Flood Program Free-For-All--Did Insurance Companies Take a Blank Check?*, TIMES-PICAYUNE, June 17, 2007, at B7, available on Westlaw at 2007 WLNR 11340468 (“Evidence is mounting that many adjusters who settle flood claims on the government’s behalf—but actually work for the private companies that insure against wind damage—have used their dual roles to [increase the liability] of the government flood program while minimizing costs to their employers.”).

(a covered peril.) This scenario is perhaps the most easily resolved and is commonly addressed by insurers, at least in part, by so-called “ensuing loss” provisions (discussed below). The first theorem assigns determinative coverage consequence to an unexcluded necessary and sufficient factual cause of indivisible loss, drawing on the simultaneity exception without qualification in an appropriate case.

A second common scenario concerns a loss caused by a necessary and sufficient act, force, or event excluded by the policy, under circumstances where that act, force, or event would not have occurred but for the action of a peril not excluded from coverage. For example, a rain storm (a peril not excluded from coverage) causes a landslide (a peril excluded from coverage.) The second theorem borrows directly from contemporary tort law, accepting the “scope of the risk” formulation (discussed in the preceding Part) as a logical and effective check on liability. Thus, an insurer’s unambiguous exclusion should be enforced, except insofar as the happening of the excluded peril was within the scope of a risk covered by the policy. Significantly, in this second respect as well, insurers have begun drafting so-called “combined peril” exclusions (discussed below), which have been upheld, even in jurisdictions that have refused to enforce “anti-concurrent cause” clauses owing to adherence to the Doctrine.

A third common scenario concerns a loss caused by the combined effect of necessary acts, forces or events not capable alone of producing the loss, some excluded by the policy, and some not. For example, a home weakened by deterioration (a peril excluded from coverage) but still standing, is racked by a slight wind otherwise incapable of damaging a well-maintained home (“windstorm” being a peril not excluded from coverage.) The third theorem once again borrows directly from contemporary tort law, employing “but for” factual causation theory in its most basic sense. Thus, an insurer’s coverage covenant should be enforced, insofar as the happening of a loss would not have occurred but for the operation of a peril covered by the policy.

The fourth and final theorem addresses the contribution of unnecessary, insufficient acts, forces, or events to an indivisible loss. This hypothetical construct is more often postulated by courts than at issue in actual coverage disputes. Employing “but for” factual causation theory in its most basic sense again cracks the conundrum by eliminating from the relevant causal set unnecessary acts, forces or events.

**1. AN INSURER MAY NOT PERMISSIBLY EXCLUDE FROM COVERAGE
UNDER A POLICY OF “ALL RISK” INSURANCE INDIVISIBLE LOSS
CAUSED BY A NECESSARY AND SUFFICIENT ACT, FORCE, OR EVENT
NOT EXCLUDED BY THE POLICY OF INSURANCE.**

A finding that a necessary and sufficient act, force, or event (“AFE”) not excluded from coverage factually caused indivisible loss should always result in the conclusion that the loss is covered by a policy of “all risk” insurance.¹⁹² Inherent in this proposition is the embedded recognition that an indivisible loss cannot be found to have been factually caused simultaneously by more than one necessary and sufficient AFE except in true instances of overdetermined harm governed by the simultaneity exception.¹⁹³ In such instances, each AFE is considered a factual cause in tort law, and likewise should be so considered for the purpose of assessing insurer liability under an “all risk” policy of insurance.

The simultaneity exception is well-suited to manage the concurrent causation conundrum in instances of uncertain attribution to one of two or more AFEs that would have been necessary and sufficient but for the other(s). Practically speaking, if the evidence is lacking to establish attribution definitively to a necessary and sufficient AFE excluded from coverage, then the simultaneity exception should prevail over doubt in these circumstances—just as it does in cases concerning the liability of a tortfeasor. Thus, under an “all risk” policy, coverage will be established if a necessary and sufficient AFE not excluded from coverage is found to have factually caused indivisible harm in concert simultaneously with another AFE (or other AFEs) excluded from coverage. In such instances, the insured can prove direct physical loss of the insured property and the insurer cannot meet its burden of proof that an exclusion applies. Any attempt to determine the “efficient proximate cause” of loss in these circumstances should

192. Insurance policies are contracts which require payment of a premium in exchange for a promise by the insurer to pay money upon the occurrence of a “condition.” The “condition” triggering payment pursuant to an “all risk” policy of property insurance is the action of a “peril” — i.e., any act, force or event (“AFE”) fortuitously producing loss of or damage to the insured property not excluded from coverage. Authorities often signify a provision which excludes loss or damage caused by a particular AFE by naming the peril excluded, as in reference to a “pollution exclusion” or a “mold exclusion.” Some courts have distinguished resultant loss, such as “mold damage,” from loss caused by a named AFE. See, e.g., *Liristis v. Am. Family Mut. Ins. Co.*, 61 P.3d 22 (Ariz. Ct. App. 2002) (“Careful examination of the language used by [the insurer] supports the distinction between mold damage and loss caused by mold.”).

193. In the following discussion, the hypothetical loss at issue is described as “indivisible” to underscore that discrete loss attributable to potentially different factual causes must be considered independently. See, e.g., *Lititz Mut. Ins. Co. v. Buckley*, 261 So. 2d 492, 495-96 (Miss. 1972) (distinguishing hurricane-related water damage from wind damage based on high-water mark, holding damage above the high-water mark not to be factually caused by water).

be abandoned.

In practice, the simultaneity exception will find utility only in uncertainty cases, where an indivisible loss resulted from two or more AFEs that operated together in such a manner that attribution by experts of factual causation to one or another becomes impossible.¹⁹⁴ In all cases where sequence can be established, a necessary and sufficient AFE, shown to have produced indivisible harm before the occurrence of a second AFE that would have been necessary and sufficient but for the first, will "preempt" the later causal candidate.¹⁹⁵ In such instances, coverage will depend on whether the preemptive AFE was within the scope of coverage.

Assigning determinative coverage consequence to preemptive AFEs finds ample support in existing case law. For example, in *Lititz Mutual Insurance Co. v. Boatner*,¹⁹⁶ the insured property at Long Beach, Mississippi, was totally destroyed by Hurricane Camille on the night of August 17, 1969; only the concrete slab on which the house had been erected remained.¹⁹⁷ The insurance company refused to pay upon the theory that the insured property was not destroyed by wind, but was destroyed by a tidal wave.¹⁹⁸ The court observed:

There can be no question but that the tidal wave covered the cement slab on which the home of the appellees had been erected, to a depth of more than seven (7) feet, but the great weight of the evidence shows

194. In a footnote, the majority in *Garvey* addressed what it thought to be a "novel" circumstance, and called for the development and judicial administration of a standard similar but not identical to the Doctrine:

For example, if property loss were to result from the simultaneous crash of an aircraft into a structure (a covered peril in a typical all risk homeowner's policy) during an earthquake (typically excluded from coverage when it operates alone to cause a loss), it might be impossible to determine (under a *Sabella* analysis) which cause was the efficient proximate cause of the loss. In that 'novel' case, we might consider developing a doctrine similar to the . . . independent concurrent causation standard.

See *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 713 n.9 (Cal. 1989). Authorities demonstrate that the inability to attribute a total loss to one of many potential AFEs is not nearly as novel as the *Garvey* court postulated. Moreover, the "concurrent cause" standard could not resolve the question posed by the *Garvey* court absent the simultaneity exception, which was already well-established by the time *Garvey* was decided.

195. The issue of preemptive causation received scant attention by the Second Restatement. If the proverbial fire set by A burns down 75% of B's home before C strikes a match, then it cannot be plausibly asserted that any later conduct by C caused the loss of the first 75% of B's home destroyed solely as a result of A's action. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 cmt. k (Proposed Final Draft No. 1 2005) ("An act or omission cannot be a factual cause of an outcome that has already occurred.").

196. *Lititz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765, 765 (Miss. 1971).

197. *Id.*

198. *Id.*

that the house and its contents had already been destroyed [by wind] and distributed over a large area long before the tidal wave came ashore at 11:00 to 11:30 P.M. . . .¹⁹⁹

Likewise, in *Ruiz*, Judge Senter noted that every expert who rendered an opinion in the Hurricane Katrina cases before him uniformly agreed that wind, an AFE not excluded by the policy, sufficient to damage the insured property preceded the highest storm surge flooding (an excluded AFE).²⁰⁰ The insurer nevertheless contended that any loss attributable to the wind was not recoverable as a “prior unrepaired loss.” The court found:

The reasoning seems to be that if the insured property was damaged by wind, a covered peril under the homeowners policy, no benefits could be collected because the wind damage was exacerbated by flood damage, an excluded peril. This logic is not supported by the citation of any Mississippi authority, and it seems to me to fly in the face of the many cases decided in Mississippi after Hurricane Camille.

[If] there is wind damage covered under a homeowners policy, the right to collect the insurance applicable to that damage would come into existence at the time the damage occurred.²⁰¹

Judge Senter correctly found that a subsequent flood could not “aggravate” or “contribute” to the damage already done, while allowing for the possibility that divisible harm, attributable to an excluded AFE, might later occur.²⁰²

The proposition is thus well-established in case law that if a necessary and sufficient AFE factually causes indivisible harm before the occurrence of an AFE that also might have been considered a necessary and sufficient cause but for the occurrence of the first, then the second AFE must be disregarded for purposes of determining coverage.²⁰³ In the parlance of tort

199. *Boatner*, 254 So. 2d at 766; see also *Grace v. Lititz Mut. Ins. Co.*, 257 So. 2d 217, 224 (Miss. 1972) (“The material facts in the record are in severe dispute and therefore the jury had ample testimony to sustain the [verdict that the insured property] was destroyed by wind before the tidal waters reached the property.”).

200. *Ruiz v. State Farm Fire & Cas. Co.*, No.1:07CV89 LTS-RHW, 2007 WL 1514015, at *4 (S.D. Miss. May 21, 2007).

201. *Id.*

202. Judge Senter adopted the preemptive causation approach as to indivisible loss—albeit never so stating—while suggesting that, if established, divisible harm could be separately considered: “If the insured property were later more severely damaged by flooding [not covered by the policy] . . . the insurer under [an “all risk”] homeowners policy would still be responsible for this wind damage.” See *id.*

203. Indivisibility of the loss is an especially important consideration in these circumstances. As Judge Senter noted in *Buente v. Allstate Ins. Co.*, 422 F. Supp. 2d 690, 696 (S.D. Miss 2006),

causation theory, once a necessary and sufficient AFE not excluded from coverage operates to factually cause an indivisible loss, that AFE preempts and renders any subsequent AFE unnecessary.²⁰⁴

Finally, properly construed and subject to the analysis below concerning concurring necessary but insufficient AFEs, so-called “ensuing loss” clauses become superfluous.²⁰⁵ The term “ensuing loss” in an insurance policy generally connotes a direct nexus between an excluded AFE and a separate, subsequent, necessary, and covered AFE that would not have otherwise occurred.²⁰⁶ In all cases, loss or damage factually caused by a necessary and sufficient AFE not excluded by an “all risk” policy of insurance may not be permissibly excluded by reference to insufficient precedent AFE, even if a necessary causal factor.²⁰⁷ Thus, the need for the typical

damage factually caused by an AFE subsequently occurring, if divisible, must be separately considered: “[I]f the evidence shows that the damage occurred over time, so that wind damage preceded damage from a ‘storm surge,’ the wind damage would be a covered loss even if *subsequent damage* from the ‘storm surge’ that exacerbated the loss were properly excluded from coverage.” *Buente*, 422 F. Supp. 2d at 696 (citing *Boatner*, 254 So. 2d 765 (Miss. 1971)) (emphasis added).

204. The obverse, of course, must also be true.

205. Standardized insurance policies often except “ensuing loss” from exclusions, though the term “ensuing loss” is usually not expressly defined by the policy. A typical “ensuing loss” clause is as follows: “We do not insure for loss to property . . . caused by any of the following. However, any ensuing loss to property . . . not precluded by any other provision in this policy is covered.” See HO3 FORM, *supra* note 5, Section I—Exclusions, Para. B. A Wisconsin court of appeal recently construed the term “ensuing loss” as follows: “A reasonable insured would understand that an ensuing loss is not simply any loss to covered property that chronologically follows a loss . . . [T]he meaning of ‘ensuing’ here is a loss that follows the excluded loss ‘as a chance, likely, or necessary consequence’ of that excluded loss.” See *Arnold v. Cincinnati Ins. Co.*, 2004 WI App 195, ¶ 27, 276 Wis. 2d 762, ¶ 9, 688 N.W.2d 708 ¶ 9. See also *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 749 (Tex. 2006) (“To ‘ensue’ means ‘to follow as a consequence or in chronological succession; to result, as an ensuing conclusion or effect.’ An ‘ensuing loss,’ then, is a loss which follows as a consequence of some preceding event or circumstance.”). Whether the “consequence” to which the *Arnold* and *Fiess* courts referred is simply loss or loss caused by another, distinct AFE has not been uniformly decided. In instances of indivisible loss, the latter is the better reasoned view.

206. See, e.g., *Acme Galvanizing Co., Inc. v. Fireman’s Fund Ins. Co.*, 270 Cal. Rptr. 405 (Cal. Ct. App. 1990). In *Acme*, the insured contended that damage caused by molten zinc, which spilled out when a poorly welded kettle ruptured, came within the “ensuing loss” exception to a latent defect exclusion which precluded coverage for loss or damage caused by a faulty weld. According to the insured, only damage to the kettle was excluded. The court found that items of loss the insured carved out from the overall damage, including damage to the floor surrounding the failed kettle, did not constitute ensuing losses, stating: “If the molten zinc had ignited a fire or caused an explosion which destroyed the plant, then the fire or explosion would have been a *new covered peril* with the ensuing loss [i.e., damage caused by the “*new covered peril*”] covered.” *Id.* at 180 (emphasis added).

207. Cf. *Fiess*, 202 S.W.3d at 750. The court stated, with respect to a policy that excluded “...loss caused by: (1) wear and tear, deterioration or loss caused by any quality in property that causes it to damage or destroy itself [;] (2) rust, rot, mold or other fungi [;] (3) dampness of atmosphere, extremes of temperature [;] (4) contamination [;] (5) rats, mice, termites, moths or other

“ensuing loss” clause is obviated.

Questions of the simultaneity or sequence of AFEs and divisibility of loss are exceedingly well-suited to the precise function the finder of fact is best able to perform. Tort precepts of factual causation work quite well where there is a confluence of necessary and sufficient AFEs. The simultaneity exception in particular is quite apt to crack the conundrum in a sizeable majority of the “wind v. water” variety of insurance coverage disputes.

2. AN INSURER MAY PERMISSIBLY EXCLUDE FROM COVERAGE UNDER A POLICY OF “ALL RISK” INSURANCE INDIVISIBLE LOSS CAUSED BY A NECESSARY AND SUFFICIENT ACT, FORCE, OR EVENT EXPRESSLY EXCLUDED BY THE POLICY OF INSURANCE, UNLESS THE LOSS WAS WITHIN THE SCOPE OF THE RISK CREATED BY A NECESSARY ACT, FORCE, OR EVENT NOT EXCLUDED BY THE POLICY OF INSURANCE.

Courts have long struggled in vain to determine the liability of the issuer of an “all risk” policy for loss factually caused by an excluded necessary and sufficient AFE that would not have occurred but for the precedent operation of an AFE not excluded from the policy. Captivated by notions of dependent causation, beguiled and confused by notions of “substantial factors” and beleaguered by imponderable chains of remote, recent, and immediate “causes,” courts nationwide have found it literally impossible to reliably resolve this issue.

Early constructs of causation in tort that considered the problem of “remote” causes to be one of “proximate causation” evolved in insurance cases to a rule permitting the finder of fact to choose only one “efficient proximate cause” from among many factual causes. In circumstances that might be otherwise described as a raising an issue of “dependent causation,” the Doctrine often does the work of determining whether an excluded AFE “superseded” an earlier causative factor not excluded from coverage. As this Article has already demonstrated, this construct cannot be reliably and predictably applied, and it is outdated. Current tort doctrine requires the finder of fact to determine factual causation (necessity) and reframes the “proximate cause” question as one of “scope of the risk.”

Taking the additional step of describing whether an excluded neces-

insects . . .”:

The 15 risks excluded . . . all damage a home incrementally; when they cause major damage, generally the home was not destroyed in a day. These 15 risks are also very common; construing the . . . policy to cover them all would convert it from an insurance policy into a maintenance agreement.

Instead, the ensuing-loss clause provides coverage only if these relatively common and usually minor risks lead to a relatively uncommon and perhaps major loss

sary and sufficient AFE was within the “scope of the risk” created by a covered, precedent, necessary, but as yet insufficient AFE, is totally consistent with the current practice of issuers of “all risk” policies of insurance. Defining the scope of the underwritten risk is within the core expertise of insurers, and several clauses currently included in standardized “all risk” insurance policies effectively limit the scope of the risks underwritten. Moreover, these clauses have been nearly unanimously upheld, even in jurisdictions that have embraced the Doctrine.

For example, the “all risk” insurance policy at issue in *Julian v. Hartford*²⁰⁸ did not exclude losses caused by rain, but a “combined peril” exclusion expressly excluded the risk of loss or damage caused by a rain-induced landslide.²⁰⁹ After the Julians home was ruined by a landslide that would not have occurred but for heavy rain, the Julians argued that because the policy provided coverage for losses caused by rain, it must also cover losses caused by a landslide caused by rain — i.e., rain was the efficient proximate cause of their loss. While *Julian* was in progress, a parallel case, on nearly the same facts, arose in another district.²¹⁰

The California courts of appeal were divided on whether the so-called “combined peril” exclusion violated the efficient proximate cause doctrine. In *Julian*, the court of appeal held the limited grant of coverage for losses caused by rain that did not “contribute in any way with” a landslide did not render the clause invalid or turn it into a coverage provision for all losses caused by rain.²¹¹ In *Palub v. Hartford Underwriters Ins. Co.*, the court of appeal disagreed and found precisely to the contrary, holding that the same clause at issue in *Julian* could not be given effect under California law.²¹²

The Supreme Court of California granted certiorari in *Julian* to resolve the split in the courts of appeal. The question, as framed by the court, was whether “the efficient proximate cause doctrine inflexibly prohibit[s] an insurer from insuring against some manifestations of [rain], but not oth-

208. 110 P.3d 903 (Cal. 2005).

209. The “weather conditions” clause was follows:

1. We do not insure against loss caused directly or indirectly by [landslide]. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss

. . . .

2. We do not insure against loss . . . caused by any of the following

a. [Rain]. However, this exclusion only applies if [rain] contribute[s] in any way with a cause or event excluded in paragraph 1. above to produce the loss

See *id.* at 905.

210. *Palub v. Hartford Underwriters Ins. Co.*, 112 Cal. Rptr. 2d 270 (Cal. Ct. App. 2001).

211. *Julian v. Hartford Underwriters Ins. Co.*, 123 Cal. Rptr. 2d 767 (Cal. Ct. App. 2002).

212. *Palub*, 112 Cal. Rptr. 2d at 274-75.

ers.”²¹³ The Supreme Court of California held:

[A]n insurer is not absolutely prohibited from drafting and enforcing policy provisions that provide or leave intact coverage for some, but not all, manifestations of a particular peril [W]here the limitations of our language require an insurer to describe a specific peril in terms of a relationship between two otherwise distinct perils (e.g., rain and landslide) in order to plainly and precisely communicate an excluded risk . . . the fact that a policy provides coverage for some, but not all, manifestations of each constituent peril does not necessarily render the clause naming and excluding the “combined” peril invalid pursuant to . . . the efficient proximate cause doctrine.²¹⁴

This enlightened decision by the Supreme Court of California reflects a better way to effectively crack the conundrum in instances of “dependent” causation. Though never mentioned, the utility here of contemporary “scope of the risk” analysis is patent. Insurers can reliably limit the scope of the risk undertaken in “all risk” policies, even in jurisdictions that refuse to give effect to “anti-concurrent causation” clauses, by careful drafting to expressly take into account the scope of the risks not excluded by the policy. Putting the burden squarely on insurers to expressly demarcate the broad scope of the risks covered by an “all risk” policy of insurance makes irresistibly good sense. When clarity prevails, all parties benefit.

Yet, careful drafting will not always suffice. It may be that, in some instances, an insurer can not be held to have anticipated and expressly defined the full range of possible manifestations of risks not excluded from coverage. Furthermore, although the finder of fact may be competent to determine whether a particular necessary and sufficient AFE was within the scope of the risk created by a precedent necessary but insufficient AFE not excluded from coverage, as in every “scope of the risk” determination, the court must retain some role as gatekeeper. Any rule that depends upon determination by the finder of fact of the scope of a particular risk must depend also on the court to eliminate from potential coverage the occasionally extraordinary resultant AFE.

An excellent illustration of this principle is found in *Lorio v. Aetna Insurance Company*.²¹⁵ In *Lorio*, after destruction of a portion of a stable by winds associated with Hurricane Betsy, the insured was compelled to move his horse to another part of the stable.²¹⁶ After being housed in its new stall,

213. *Julian*, 110 P.3d at 910.

214. *Id.* at 910-11; *accord* *Findlay v. United Pac. Ins. Co.*, 917 P.2d 116 (Wash. 1996).

215. 232 So. 2d 490 (La. 1970).

216. *Id.* at 491.

the horse ate itself to death, owing to its access to unlimited amounts of wheat, which would not have been possible in its original stall.²¹⁷ The insured claimed that the loss was caused by wind, which blew down a portion of the barn, forcing relocation to a stall with unrestricted access to food-stuffs.²¹⁸ The trial court held that the horse would not have died but for the hurricane, and found coverage. An intermediate appellate court reversed.²¹⁹ The Supreme Court of Louisiana agreed with the court of appeal, and held that the death of the horse by overeating could not be regarded as having been "proximately caused" by wind.²²⁰

In the context of contemporary causation theory, *Lorio* makes perfect sense. The risk of hurricane-force winds surely includes the loss of a barn blown to bits, and even the loss of a consequently loosed horse. But it would be unreasonable to suppose an insurer could have anticipated and expressly excluded animal death occasioned by overeating induced by wind. That risk simply was not in the scope of the risk of loss "caused" by the wind.²²¹

**3. AN INSURER MAY NOT PERMISSIBLY EXCLUDE FROM COVERAGE
UNDER A POLICY OF "ALL RISK" INSURANCE INDIVISIBLE LOSS
CONCURRENTLY CAUSED BY A NECESSARY BUT INSUFFICIENT ACT,
FORCE, OR EVENT NOT EXCLUDED BY A POLICY OF INSURANCE AND
A NECESSARY BUT INSUFFICIENT ACT, FORCE, OR EVENT EXCLUDED
BY A POLICY OF INSURANCE.**

A set of insufficient AFEs that pass muster under the "but for" test of factual causation must by definition combine to produce the examined harm. Tasking the finder of fact to determine which among these AFEs "predominated" is too closely aligned with an evaluative, normative, and sometimes arbitrary judgment of "substantiality." Indeed, in practice, the

217. *Lorio*, 232 So. 2d at 492.

218. *Id.*

219. *Id.*

220. The Louisiana Supreme Court speculated, however, that:

[W]ere the evidence sufficient to establish that the temporary stable used to quarter the horse [King So Big] was so weakened as a consequence of the storm that it enabled [King So Big] to break through, kick out or push down the two slats of the partition between his quarters and the feed stall, then it would be proper to conclude that the windstorm provided him access to the feed in the adjoining stall and thus was the proximate cause of his subsequent death.

Id. at 494.

221. The Third Restatement disfavors use of a "foreseeability standard" to draw the boundaries of the scope of a risk. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 cmt. e (Proposed Final Draft No. 1 2005). However conceived, any test excluding the unusual and extraordinary nature of the loss in *Lorio* from the range of harms risked by strong winds requires only a modicum of sound judgment.

Doctrine has proved to be an undependable method of determining whether coverage under an “all risk” insurance policy is triggered by one or more necessary but insufficient causes not excluded from coverage, found to be among a causal set including no single necessary and sufficient cause.

If an insurer has undertaken the risk that a straw might break a camel’s back, then it should be no defense to coverage that the camel’s back was also burdened by some other, excluded (and by definition, insufficient) weight. An insurer should be able to mount no defense to coverage based on the claim that the straw was incapable alone of breaking the camel’s back. If the straw was a necessary causal factor, and the insurer agreed to pay for loss caused by the force of it, then factual causation by an unexcluded AFE, and hence coverage, must be deemed established, else the insurer’s covenant of coverage be nullified.

An insurer might be expected to complain, just like a tortfeasor, that its liability to pay for the loss of the camel should not depend on so thin a reed. Any such appeal would invite retreat to the now discredited substantial factor test of factual causation. An analytically necessary cause of loss constitutes a factual cause, irrespective of its weight or sufficiency.²²²

The theorem proposed above with respect to the confluence of necessary but insufficient causes is predicated on the principle that a loss is excepted from the scope of an “all risk” policy of insurance only if produced by an expressly excluded necessary and sufficient AFE. Refusing to give effect to provisions of an “all risk” policy purporting to exclude from coverage losses attributable to the concurrent contribution of necessary but insufficient causes is entirely consistent with current precepts of factual causation that eschew notions of substantiality. This theorem likewise owes much to the logical conclusion that a loss cannot at once be excluded and

222. Likewise, evidence that the camel’s back was unusually weak has never proven persuasively problematic. Readers might wonder whether this circumstance is simply a variant of the colloquial “thin-skull” rule, so familiar to students of “classic” tort causation theory. Generally, the Third Restatement recognizes that, in most cases, pre-existing conditions that might affect the extent of harm are not considered determinative, by reason of the risk standard, although, in some case, liability might be imposed for injury outside the scope of risk. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 31 cmt. b (Proposed Final Draft No. 1 2005), RESTATEMENT (THIRD), titled “Relationship to general scope-of-liability principles”:

In many cases, [the ‘thin-skull’] rule simply reflects the outcome of application of a general approach, such as the risk standard [S]ome cases that fall within this rule . . . subject [an actor] to liability regardless of the foreseeability of the extent of harm In addition, even when the preexisting condition . . . is extraordinary and unforeseeable, often the harm that results is not Nevertheless, even in those cases in which the harm may be found to be beyond the risk standard, the thin-skull rule . . . applies

Id. For purpose of determining insurance coverage, adhering to the risk standard appears most appropriate, so as not to unduly restrict or expand the insurer’s liability.

covered by a policy of insurance, and finds support in extant common law.²²³

Finding coverage under an "all risk" insurance policy owing to the inability of an insurer to establish factual causation by a necessary and sufficient AFE excluded from coverage is also consistent with principles of sound underwriting. For example, as noted in *Koory v. Western Cas. & Sur. Co.*, insurers are free to extend coverage only to buildings meeting certain structural qualifications or to inspect buildings before issuing any coverage.²²⁴ An insurer permissibly may refuse to insure, or may condition insurance coverage on warranties by the insured of fitness. But by reason of broad exclusions for wear and tear,²²⁵ deterioration,²²⁶ defective design and inadequate construction,²²⁷ latent defect,²²⁸ and almost all manner of the other most common contributing causes of loss, an insurer should not be deemed to have eliminated from the coverage of an "all risk" policy all losses caused by the force of external events not excepted from coverage

223. In the complete absence of any necessary and sufficient cause, the confluence of insufficient but necessary causes presents an issue of insurer liability in circumstances not entirely dissimilar to those which give rise to the simultaneity exception in torts. As the court explained in *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 653 (Minn. 1986):

This is true even though an excluded cause may have also contributed to the loss . . . In this case, the testimony established there were eight possible causes of the collapse, but no one factor was considered to be the overriding cause. Even if one of the three [excluded] causes [asserted by the insurer was] established, therefore, [the insurer] could not deny coverage.

Id. (internal citations omitted). See also *Kraemer Bros., Inc. v. U.S. Fire Ins. Co.*, 278 N.W.2d 857, 863-64 (Wis. 1979) ("Where a policy expressly insures against loss caused by one risk but excludes loss caused by another risk, coverage is extended to a loss caused by the insured risk even though the excluded risk is a contributory cause."). Cf. *Paulucci v. Liberty Mut. Fire Ins. Co.* 190 F. Supp. 2d 1312, 1322-23 (M.D. Fla. 2002) (considering whether Tropical Storm Gordon, or wear and tear caused a loss):

[The insured] argues that the Wear and Tear exclusion . . . defies common sense because all buildings have some wear and tear that will be a contributing factor in any collapse. Therefore, [the insured] argues, if the wear and tear exclusion was sufficient to deny coverage, the policy is a sham and unconscionable. This argument is unpersuasive. Although all buildings may have some wear and tear and many buildings have some rot, not all buildings have rot so severe as to jeopardize the structural integrity the building. When this threshold is reached . . . a condition of the subject building may reasonably constitute the cause of its demise. Thus, under the . . . policy, buildings with rot are not excluded from coverage unless that rot can be reasonably determined to be a contributing 'cause' of the loss. This interpretation comports with the public policy objectives of promoting safety and keeping insurance premiums down. By allowing parties to an insurance contract to exclude coverage when the loss is caused or partially caused by rot, the party in control of the insured property has a greater incentive to correct potentially dangerous rot damage.

Id.

224. 737 P.2d 388 (Ariz. 1987).

225. See HO3 FORM, *supra* note 5, Section I—Perils Insured Against, Para.A.2.c.(6)(a).

226. See HO3 FORM, *supra* note 5, Section I—Perils Insured Against, Para. A.2.c.(6)(a).

227. See HO3 FORM, *supra* note 5, Section I—Exclusions, Para. B.3.(b).

228. See HO3 FORM, *supra* note 5, Section I—Perils Insured Against, Para. A.2.c.(6)(b).

that would have been otherwise insufficient absent any of these conditions.²²⁹

Lastly, triggering insurer liability under “all risk” policy of insurance in these circumstances does not invite attribution to any condition among the almost infinite array of insufficient but necessary conditions included in a causal set that includes no necessary and sufficient excluded cause of loss. Recognition that almost any loss can be attributed to an insufficient but necessary “condition” not excluded from coverage does not suggest that every such condition might be considered a cause of loss. Otherwise, an insurer would never be able to exclude any loss from an “all risk” policy of insurance.

Contemporary causation theory expects a judiciary that will competently exclude from any causal set submitted for decision to the finder of fact necessary, but insufficient AFEs that had no bearing on the occurrence of the loss. Insufficient but necessary conditions not excluded from coverage, which did not increase the risk of the occurrence of a loss, can and should be excluded by the court from the set of causal factors considered by the finder of fact—thus precluding the sort of tracing of “chains of causation” to remote causes or conditions that might again threaten anomalous results.²³⁰

4. THE LIABILITY OF AN INSURER PURSUANT TO A POLICY OF “ALL RISK” INSURANCE FOR INDIVISIBLE LOSS IS NEITHER TRIGGERED NOR PRECLUDED BY REASON OF THE OCCURRENCE OF ACTS, FORCES, OR EVENTS NOT NECESSARY TO ITS MANIFESTATION.

In every instance of physical and accidental loss, at least one necessary AFE must and will easily be found. An “all risk” insurer insures against loss factually caused by an AFE not expressly excluded by the terms of the policy, and necessity is determinative of factual causation. Therefore, except with respect to instances of overdetermined harm to which the simultaneity exception applies, the role of unnecessary AFEs can and should be properly disregarded.

The straw that broke the camel’s back always must be considered causative, but another weight thereafter placed onto the unfortunately crippled ungulate should always be deemed irrelevant to a coverage determination.²³¹ Likewise, the presence of a single straw on the camel’s back prior to the placing there of a load sufficient to break it should be disregarded

229. Cf. *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 750 (Tex. 2006), *supra* note 207.

230. See *supra* notes 150, 175, 182.

231. See *supra* note 195.

completely, particularly if no identifiable and divisible portion of the harm was thereby occasioned.²³²

The influence of the “substantial factor” construct can be seen to have had its most dramatically detrimental effect on the reasoning by courts administering insurance coverage cases in these circumstances. Many courts, relying on the Doctrine, have suggested that an unnecessary and insufficient AFE might be relied upon by an insurer as an excluded “cause” of “the” loss—clearly ignoring any determination of factual causation under a “but for” test of causation and usually overlooking the postulated divisibility of the hypothetical loss. Again and again, courts have created from straws a concurrent causation conundrum in circumstances not properly subject to its perplexities.

For example, in *Mills v. State Farm Ins. Co.*,²³³ Judge Senter knocked all the straws out of the implausible contention that, pursuant to State Farm’s “anti-concurrent cause” clause, the mere occurrence of an unnecessary, insufficient AFE, in any sequence, might vitiate coverage with respect to the whole of an otherwise divisible and covered loss completely unaffected by it:

Following the logic of [its] argument, State Farm would have no liability under its homeowners policy if there were any water damage, no

232. Instances of identifiable and divisible harm, as noted previously, are generally well-governed by the doctrine of preemptive causation. A somewhat more perplexing question of factual causation arises when an insufficient condition, which might have been necessary to the result under other circumstances, is exceeded by the action of an unusually overwhelmingly AFE. The Third Restatement examines a negligently constructed flood wall that would collapse in an ordinary flood, which was overwhelmed by a flood so large and unforeseeable that even a properly constructed flood wall could not have contained it. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. i (Proposed Final Draft No. 1 2005) (illustrating this instance of enduring uncertainty). In classic “but for” terms, the negligent construction of the flood wall would not be considered a cause. According to the Third Restatement, “the negligent construction of the [flood wall] could be characterized as [a] cause[] if one conceptualizes [it] as combining with something less than the actual event ... that occurred.” *Id.* See also Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1099-1100 (2001), providing the following illustration:

[A]ssume a chain has a maximum load capacity of 200 pounds, so that putting more than 200 pounds on the chain will cause it to break Bob knowingly or negligently allows a link in the chain to get rusty. The link is thereby weakened, such that the chain will only hold 150 pounds without breaking. Carol, who is aware of the load limit, but unaware of the chain's weakened condition, deliberately or negligently puts 220 pounds on the chain. The chain breaks at its rusty, weakened link. [The Second Restatement of Torts] [s]ection 432(2) would incorrectly deny that the rusty, weakened link (which is a passive condition caused by Bob's inaction) contributed to the chain's breaking, even though (1) the chain broke at the rusty, weakened link and (2) the rusty, weakened link was actually sufficient to cause the chain to break independently of Carol's putting 20 excess pounds on the chain.

Id.

233. No. 1:07CV1047-HSO-JMR, 2007 WL 1514021 (S.D. Miss. May 21, 2007).

matter how minimal, that affected the insured property. In the context of wind coverage during a hurricane, this would mean that the wind coverage under the homeowners policy would be completely negated in many instances. If this argument were accepted, it would follow that in the case of an insured property that took an inch of water and lost its roof to the winds, State Farm would owe the policy holder nothing under its homeowners coverage. I find this logic unpersuasive, and I find the exclusion so poorly drafted and ambiguous that I am uncertain whether it could ever support the interpretation State Farm urges the Court to adopt.²³⁴

Taking “an inch” does not mean taking the whole. If only one inch of tidal water affected the insured’s home, then a concurrent causation conundrum might be presented only as to damage factually caused by that one inch of water.

Like many hypotheticals, the “99% of the loss affected by a 1% excluded contribution” is a particularly faulty analytical construct. An unnecessary AFE unable to cause an identifiable and divisible 99% of loss is not properly regarded as a factual cause of that damage; and that conclusion owes nothing to the Doctrine.

It is not clear whether this defect in reasoning was also evident in *Julian*. The Supreme Court of California appeared to ask the same implausible man of “straw” defeated in *Mills* to bear its blows:

The Julians and supporting amici curiae . . . contend that the weather conditions clause is invalid because the existence of the excluded “peril” identified in the clause, and therefore application of the exclusion, turns on even the most minor contribution of a remote, excluded peril such as earth movement. Amicus curiae . . . argues that as written, the weather conditions clause allows Hartford to deny coverage when a loss is caused 99[%] by weather conditions and 1[%] by earth movement. For example, coverage for a loss by all appearances caused by a windstorm could be denied where the damage also could be linked in some manner to modest earth movement . . . that occurred long before the storm.

We agree . . . that application of the policy language in situations like the one described . . . would raise troubling questions regarding the clause’s consistency with the efficient proximate cause doctrine Indeed, the phrase “contribute in any way with” that links weather conditions with earth movement in the present cause seems particu-

234. No. 1:07CV1047-HSO-JMR, 2007 WL 1514021, at *3 (S.D. Miss. May 21, 2007)..

larly designed to circumvent the efficient proximate cause doctrine. [A] mechanistic approach toward avoiding efficient proximate cause analysis would have us endorse excluded “perils” regardless of how they mingle or concatenate distinct risks, and whether or not they provide “a fair result within the reasonable expectations of both the insured and the insurer.”²³⁵

The negative influence of the “substantial factor” test can be seen on full display in the hypothetical posed by the Supreme Court of California in *Julian*. By reference to “situations like the one described,” the Court imagined an infinitesimal “contribution” by excluded earth movement to an otherwise covered windstorm loss. The central means to crack the conundrum here is to recognize that the notion of a “1% contribution” in this context appears to point to an inappropriate assessment by the Court of relative importance.

Ancient earth movement, in the hypothetical posed by the Court, did not cause the windstorm. A divisible “1%” of the loss was not the Court’s concern. And, owing to the theorem set forth immediately above, unnecessary antecedent conditions that merely preceded a loss are irrelevant, and are properly screened out of a coverage analysis. The Court’s “1% contribution” hypothetical addressed only one plausible scenario: a loss produced by the *de minimis* but necessary effect of an antecedent AFE, sufficient only when combined with a later necessary, but likewise insufficient causative factor.²³⁶ Such loss cannot be determinately excluded from coverage, based on contemporary principles of factual causation.

Abandoning the “substantial factor” test of causation means that the contribution of unnecessary AFEs must be disregarded. Excluding unnecessary AFEs from the causal set permissibly considered by the trier of fact will beneficially serve to demarcate the bounds of admissible fact and expert opinion relevant to a verdict in insurance cases presenting the concurrent causation conundrum, and help do away with the haphazard guess about “substantiality” so often made compulsory in cases governed by the Doctrine.

CONCLUSION

Advances in causation theory reported by the forthcoming Restatement (Third) of Torts reflect, in this Author’s view, magnificent efforts to drain the primordial swamp of classic tort doctrine. The “doctrine of effi-

235. See *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005) (citing *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704 (Cal. 1989)).

236. See *supra* Part III.B.3.

cient proximate cause” is a misshapen organism that inched out of that old swamp, bearing several vestigial appendages of causation theory that should have fallen into desuetude long ago. The time has come to recognize the *dégringolade* of the Doctrine. There is no persuasive logical or compelling reason to retain it.

This Article proposes supplanting the Doctrine with superior precepts of causation described by the forthcoming Restatement (Third) of Torts. Contemporary canons of causation, which subject the issue of factual causation to pellucid rules and eliminate entirely obsolete principles of proximate causation, surely will surpass the dated doctrine and perform well in practice.

As it happens to be, insurers promise to pay for loss suffered as a result of factual, not proximate, causes. That is all one really needs to know to crack the concurrent causation conundrum in insurance cases.
