CONSTRUCTION RISK MANAGEMENT

SEQUENTIAL AND CONCURRENT CAUSES OF LOSS

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When a construction project suffers a loss attributable to a single act or event, determining whether the loss is covered by the builders risk insurance policy is a relatively simple process. By comparing the identified cause of loss against the specified peril or exclusionary provisions of the policy, an assessment of coverage can usually be made quickly. Frequently, however, a loss cannot be ascribed to one isolated act or event, but instead involves a number of contributing causes. In such cases, a loss may be the result of sequential (i.e., chain-of-event) or concurrent (i.e., simultaneous) causes. If all of the contributing causes are covered, or all are excluded, the coverage assessment remains simple. However, when some causes of loss are covered and others are specifically excluded, ascertaining coverage becomes much more complicated.

Determining the applicability of builders risk coverage in cases involving concurrent and/or sequential causes of loss requires the consideration of several factors, as outlined in Exhibit 1.

First, as with any insurance claim, the particular language of the policy must be assessed. Certain provisions, such as "ensuing loss" and "anti-concurrent/anti-sequential" clauses, may specifically address the question of coverage under such circumstances. Second, attention must be paid to state or jurisdictional laws and standards applying to these types of losses, such as application of the "efficient proximate cause" rule or "doctrine of concurrent causes." Third, public policy and issues of equity may also

EXHIBIT 1
FACTORS THAT INFLUENCE COVERAGE—CONCURRENT/ SEQUENTIAL CAUSES OF LOSS

1. Policy language, including definitions of "ensuing loss" and "anti-concurrent/anti-sequential" clauses.
2. State or jurisdictional laws and standards, such as an "efficient proximate cause" rule or "doctrine of concurrent causes."
3. Public policy and issues of equity.

play a role. Given these variables, the application of insurance coverage for claims involving concurrent or sequential losses is relatively unpredictable. Moreover, court opinion regarding such claims has been diverse.[1] This article reviews each of these issues.

Distinguishing Sequential and Concurrent Causes of Loss

The terms "sequential cause of loss" and "concurrent cause of loss" are sometimes used interchangeably and/or lumped together by courts, as well as in insurance articles and commentaries. In reality, they each have a distinct meaning and application. A sequential cause of loss involves a series of *dependent and related* acts or events.[2] Like a chain reaction, one event leads to another which ends in a loss. For example, suppose an electrical short causes a small fire that triggers the sprinkler system, which causes water damage and ultimately results in mold, which requires the removal and replacement of sheet rock. The loss associated with the damaged sheetrock would be attributable to a sequence of related events. The sequential nature of this type of loss is illustrated in Exhibit 2.

A concurrent cause of loss involves two or more *independent and unrelated* events that come together to cause damage. There are two general categories of concurrent cause of loss. The first category involves losses from the combination of acts or events which, independently, are insufficient to create damage. An example of this type of concurrent causation is a contractor's failure to place a protective covering over certain project building materials, which are then exposed to rain water, causing damage to the property. Neither of these is sufficient to cause a loss in and of itself. That is, if the contractor had placed a protective covering over the materials, the rain would not have resulted in damage. Likewise, had it not rained, there would be no damage even without a protective covering. Instead, it is the combination of the two independent and unrelated acts—negligence and rain—which causes a loss.

In the second category of concurrent causation, each distinct act or event is responsible for causing damage on its own. However, attributing or isolating the particular damage to one cause independent from the other cannot be readily accomplished. For example, suppose a construction project is damaged by a violent storm. Building materials are tattered, bent, and/or broken as a result of gusting winds, and are also structurally compromised due to water saturation caused by heavy rainfall. In this scenario, the building materials are equally ruined by the wind or the rain. That is, the materials would have been just as damaged had they been subjected to only heavy rain or only to gusting wind. The distinction between the two types of concurrent causation are also illustrated in Exhibit 2.

Analyzing Sequential Causes of Loss

Sequential losses present a unique set of issues and challenges with respect to the application of builders risk insurance, including: (1) identifying and correctly applying the appropriate legal standard;

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[1] The concepts discussed in this article transcend the limited area of builders risk insurance. For this reason, many of the cases cited concern other forms of insurance coverage. However, the conclusions reached have equal application to builders risk insurance.

[2] *See* IRMI's *Glossary of Insurance & Risk Management Terms* (11th ed.).

(2) discerning the cause of loss from the loss itself; and (3) assessing the impact of "ensuing loss" provisions upon a sequential cause of loss analysis. These particular nuances are examined below in greater detail.

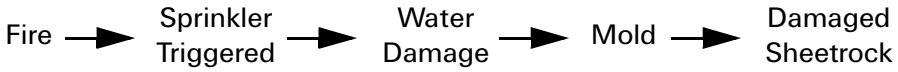
The Efficient Proximate Cause Standard

Losses involving sequential causes are usually examined under an efficient proximate cause standard. The efficient proximate cause standard is designed to prevent the application of unreasonably narrow or overly broad interpretations of coverage. An overly narrow interpretation may result in illusory coverage by negating almost every insurance claim based on a policy exclusion that may have some relation to the damage in question, however slight. Conversely, an overly broad interpretation would result in coverage for virtually any loss based on any link, no matter how remote, to a covered

EXHIBIT 2
ILLUSTRATION OF SEQUENTIAL AND CONCURRENT CAUSES OF LOSS

Sequential Cause of Loss

A series of dependent and related acts or events.



Concurrent Cause of Loss (Type 1)

Two or more independent and unrelated events; all are required for damage to occur.

Exposed Materials + Rain = Damaged Materials

Covered Materials + Rain = No Damage

Exposed Materials + No Rain = No Damage

Concurrent Cause of Loss (Type 2)

Two or more independent and unrelated events; each is sufficient to cause the damage on its own.

Rain + No Wind = Damaged Materials

No Rain + Wind = Damaged Materials

Rain + Wind = Damaged Materials

cause of loss.[3] Under the efficient proximate cause standard, a determination is made as to which among a series of factors contributing to a loss is the most significant (i.e., dominant). Insurance coverage, accordingly, hinges upon whether the dominant cause of loss is covered or excluded by the policy in question.[4]

The application of this standard is demonstrated by the Connecticut Supreme Court case of *Frontis v. Milwaukee Ins. Co.,* 242 A.2d 749 (Conn. 1968). In *Frontis,* the insured's building was structurally compromised by a violent fire, which occurred at a neighboring building that was located flush against the insured building. As a result of the incident, the city's building inspector ordered Frontis (the plaintiff) to remove the third and fourth floors of its building, because they lacked sufficient lateral support. Frontis sought recovery under its property insurance policy for the cost of removing the two floors, but the claim was denied on the basis that it was excluded as "loss caused directly or indirectly by order of any civil authority." The case thus focused upon whether the primary cause of loss was the fire or the city ordinance. Ultimately, the court determined that fire (a covered cause of loss) was the dominant cause.

> In the instant case, although the party wall was not burned or damaged, the lateral support which the party wall had previously received from the [insured] building was impaired by the fire, as a result of which the [neighboring] building was structurally unsafe and presented a hazard to life and property. The damage to the plaintiff's building was not caused by the order of the building inspector. His action in the interest of public safety was in recognition of a condition already in existence. The conclusion of the trial court that the active, efficient cause which led to the damage to the plaintiffs' building was the fire which destroyed the upper stories of the [insured] building cannot be disturbed. (*Id.* at 498–500.)

Diverging Interpretations of the Efficient Proximate Cause Rule

The efficient proximate cause standard has been widely recognized as the appropriate method to resolve insurance disputes involving sequential causes of loss, yet the understanding of the meaning of "efficient proximate cause" is not entirely uniform. For example, in the *Frontis* case discussed above, the court focused on the *first* event which set the other events in motion; i.e., the fire. In contrast, in *Album Realty Corp. v. American Home Assurance Co.,* 607 N.E.2d 804 (N.Y. 1992), the New York Court of Appeals was asked to decide whether a

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[3] *See Crete-Monee Sch. Dist. 201-U v. Indiana Ins. Co.,* No. 96C0275, 2000 U.S. Dist. LEXIS 12629 at *27 (N.D. Ill. 2000):

> The doctrine attempts to strike a balance between, on the one hand, the temptation to convert an all-risk policy into an "all-loss" policy by allowing recovery anytime an insured can point to a covered circumstance that contributed to the loss and, on the other hand, the temptation to convert an all-risk policy into a "no-risk" policy by excluding coverage anytime an insurer can point to an excluded risk as a contributing factor in the chain of causation.

[4] *See McDonald v. State Farm Fire & Cas. Co.,* 837 P.2d 1000, 1004 (Wash. 1992):

> By its own terms, the efficient proximate cause rule operates when an "insured risk" or covered peril sets into motion a chain of causation which leads to an uncovered loss. If the efficient proximate cause of the final loss is a covered peril, then the loss is covered under the policy. In chain of causation cases, the efficient proximate cause rule is properly applied after (1) a determination of which single act or event is the efficient proximate cause of the loss and (2) a determination that the efficient proximate cause of the loss is a covered peril. (Internal citations omitted.)

builders risk policy covered water damage to mechanical and electrical equipment located in a sub-basement of a construction project. The damage occurred when freezing temperatures caused a sprinkler head to rupture. The policy excluded damage caused by freezing but covered damage caused by water. The *Album Realty* court concluded that water leakage—the *last* event in the chain of causation—was the most dominant cause, as summarized below:

> Manifestly, the property damage would not have occurred in the absence of the freezing, as the Appellate Division concluded. However, we do not accept that Court's determination that the freezing was the proximate, efficient and dominant cause of the flooding and water damage within the meaning of the exclusionary clause. As read by the ordinary and reasonable business person, a loss caused by freezing could not be found to incorporate a loss visibly occasioned by water damage by virtue of the mere fact that the presence of water can best be explained by the rupturing of a sprinkler head which had frozen. A reasonable business person would conclude in this case that plaintiff's loss was caused by water damage and would look no further for alternate causes. (*Id.* at 805. Internal citations omitted.)

Some jurisdictions, such as Washington and Nevada, strictly hold that the efficient proximate, or dominant, cause is the act or event which sets the other causes in motion. In *Krempl v. Unigard Sec. Ins. Co.,* 850 P.2d 533 (Wash. App. 1993), for example, the Washington Court of Appeals noted as follows:

> The efficient proximate cause rule states that "where a peril specifically insured against sets other causes into motion which, in an unbroken sequence, produce the result for which recovery is sought, the loss is covered, even though other events within the chain of causation are excluded from coverage." … Here, by contrast, the excepted risk, set into motion what [plaintiff] contends is a covered risk … Accordingly, applying the well-established definition, the "efficient proximate cause" analysis does not apply.[5]

Other courts, such as the Appellate Division of the New Jersey Superior Court, have held that the particular cause which determines the outcome of coverage is not necessarily the first act in the series of events nor, conversely, the last act. In *Franklin Packaging Co. v. California Union Ins. Co.,* 408 A.2d 448 (N.J. Super. Ct. App. Div. 1979), *citing Appleman on Insurance* § 3083, the court stated:

> Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. It is not necessarily the last act in a chain of events which is, therefore, regarded as the proximate cause, but the efficient or predominant cause which sets into motion the chain of events producing the loss. … In other words, it has been held that recovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk itself set into operation a chain of causation in which

[5] *See also Schroeder v. State Farm Fire and Cas. Co.,* 770 F. Supp. 558, 561 (D. Nev. 1991).

> the last step may have been an excepted risk. (*Franklin Packaging,* at 449.)

The diverging interpretations reveal the importance of understanding how the particular jurisdictions interpret the meaning of the efficient proximate cause doctrine as applied to insurance claims involving sequential causes of loss.[6]

Distinguishing Cause of Loss from Loss Itself

When analyzing sequential losses under the efficient proximate cause standard, how the loss is characterized will be critical in determining whether coverage applies. Insurance policies may exclude certain acts or events as a "cause of loss" but not as a loss itself, or vice-versa. Whether or not a particular policy affords coverage can hinge upon this distinction.

To illustrate, suppose a property loss involves mold that develops from water infiltration. The covered causes of loss under the applicable insurance policy include mold but not water. In that case, if the damage is defined as "mold," the loss would likely be excluded because it was *caused by* water. However, if the damage is determined to be the necessary removal of the sheetrock, ceiling tiles, etc., and mold is deemed the efficient proximate cause of loss, the loss would be covered.

A variation of this type of situation occurred in the case of *Simonetti v. Selective Ins. Co.,* 859 A.2d 694 (N.J. Super. Ct. App. Div. 2004). In *Simonetti,* rain water infiltrated the insured's home which led to mold growth. The insured's homeowner's policy issued by the defendant excluded coverage for damage caused by mold. However, the policy made no specific reference to mold damage itself. Concluding that the damage was mold, as opposed to damage resulting from mold, the *Simonetti* court held that the property damage was covered.

Similarly, in *Montee v. State Farm Fire & Cas. Co.* 782 P. 2d 435 (Ore. Ct. App. 1988), the insured property sustained damage when water from a burst pipe located on an adjacent property spilled over, causing the insured's foundation to crack. The policy in question contained the following exclusion:

> loss to the property described in Coverage A either ***consisting of, or*** directly and immediately ***caused by,*** one or more of the following: … (i) settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundation, walls, floors, roofs, or ceilings. (*Id.* at 436.)

The insured contended that the efficient proximate cause of the loss was the burst water pipe, which was not excluded under the policy and, therefore, that the exclusion for damage "caused by" cracking did not negate coverage. The court, however, concluded that although the damage was not "caused by" cracking, it "consisted of" cracking, which was also an excluded loss.

> Defendant contends that plaintiffs' losses consisted entirely of cracking and bulging of walls and settlement of the foundation and are therefore excluded. Plaintiffs argue that the exclusion does not apply to settling and cracking caused by "some external force rather than * * * normal or gradual * * * settling or cracking." Consequently, they contend, it does

[6]The two opinions, both of which determined the respective loss was insured, also implicitly demonstrate the general premise that insurance is to be examined with a view towards finding coverage.

> not apply to their losses, which were caused by water from the neighboring house.... Defendant responds that the external or natural cause of the damage is not a relevant issue, because the policy excludes losses consisting of settling and cracking, regardless of their cause.... We agree with defendant. The cause of the losses has no bearing on whether they consist of the excluded kinds of damage. (*Id.* at 436–437.)

Had the *Montee* Court found, instead, that the loss did not "consist of" cracking but rather was "caused by" cracking, it likely would have undertaken an efficient proximate cause analysis to determine which of the two causes of loss—cracking (excluded) or burst water pipe (covered)—was the dominant factor.

Ensuing Loss Provisions

Ensuing loss provisions, which afford coverage in instances where a covered cause of loss results (i.e., ensues) from a particular excluded peril, can also impact the analysis of coverage for claims involving sequential causes of loss. A standard ensuing loss provision contains language such as the following:

> We will not pay for loss caused by or resulting from the following, except as provided under coverage extensions. *But if loss from a Covered cause of Loss results, we will pay for the resulting loss.*

Under such provisions, coverage need not hinge upon the well-recognized and adopted efficient proximate cause standard. Rather, this language simply requires that a distinct covered cause of loss result from the excluded cause of loss; the covered cause of loss can be, but is not required to be, the dominant efficient cause of damage.[7]

Establishing coverage under an ensuing loss provision requires adequate showing that there is, in fact, a distinct covered cause of loss that flows from the excluded cause. Absent this distinction, coverage will not likely be afforded. As noted by one court: "Where a property insurance policy contains an exclusion with an exception for ensuing loss, courts have sought to assure that the exception does not supersede the exclusion by disallowing coverage for ensuing loss directly related to the original excluded risk." *Narob Dev. Corp. v. Insurance Co. of N. Am.,* 219 A.D.2d 454 (N.Y. App. Div. 1st Dep't 1995).

In this way, the courts prevent insureds from manufacturing an intervening cause of loss in order to escape the breadth of an applicable exclusion. *See Acme Galvanizing Co. v. Fireman's Fund Ins. Co.,* 221 Cal. App. 3d 170, 179–180 (1990) ("We interpret the ensuing loss provision to apply to the situation where there is a "peril," i.e., a hazard or occurrence which causes a loss or injury, separate and independent but resulting from the original excluded peril, and this new peril is not an excluded one, from which loss ensues.").

Thus, for example, if cracking (a commonly precluded cause of loss) were to cause a pipe to burst, the cost to repair that pipe would be excluded. However, if water from

[7] As previously discussed, certain jurisdictions, such as Washington and Nevada, consider the dominant cause of loss to be the first act or event that eventually leads to the property damage. An ensuing cause of loss by definition is not the first act or event which causes property damage, but rather flows from another cause of loss. Thus an ensuing loss provision can afford coverage for losses that would otherwise be excluded in these jurisdictions.

the burst pipe causes damage to other property, the separate and distinct damage caused by the water would be covered as an ensuing loss, even though the dominant cause of such loss is arguably the cracked pipe (assuming, of course, that water was also not an excluded cause of loss).[8] In contrast, if defective work (excluded) such as improperly poured concrete necessitated removal of other property in order to repair or replace the defective concrete, the cost of removing the other property would not be covered as an ensuing loss because the cause of the removal is the excluded defective work; i.e., there is no separate and distinct cause which requires the removal of nondamaged property.[9] Accordingly, ensuing loss provisions can impact the analysis of sequential cause of loss claims, but it is pertinent to establish *distinct* causes of loss in order for such provisions to apply.

Analyzing Concurrent Causes of Loss

As stated above, concurrent causes of loss differ from sequential causes of loss in that one cause of loss is not a result of the other. Rather, multiple causes of loss occur independently and simultaneously. Disputes involving concurrent causes of loss have been examined by the courts under varying standards. In general, three approaches have been applied to these situations: (1) the pro-policyholder standard; (2) the doctrine of concurrent causes standard; and (3) the efficient proximate cause standard. Each of these approaches is discussed below.

[8]Cf. *Allstate Ins. Co. v. Smith,* 450 S.W.2d 957, 959 (Tex. App. 1970) (addressing similar facts under a homeowners policy).

[9]Cf. *Laquila Constr., Inc. v. Travelers Indem. Co.,* 66 F. Supp. 2d 543 (S.D.N.Y. 1999).

The Pro-Policyholder Standard

Under one interpretation of concurrent causes of loss, described herein as the pro-policyholder standard, coverage is afforded under the policy as long as the loss can be attributed to at least one covered cause of loss. This standard, in keeping with the commonly understood notion that insurance should be viewed with an eye towards coverage, resolves the uncertainty created by concurrent causes of loss in favor of the policyholder.

Application of the pro-policyholder standard is well-demonstrated by the case of *Wallach v. Rosenberg,* 527 So. 2d 1386 (Fla. Dist. Ct. App. 1988). *Wallach* involved the collapse of the insured's seawall, caused by the combination of (1) a violent storm and (2) an adjacent landowner's failure to maintain his portion of the wall. The storm caused the improperly maintained segment of the seawall to topple, which by virtue of a domino-effect caused the insured's wall to likewise collapse. The policy excluded damage resulting from earth movement and water damage (elements of the storm), but damage caused by the adjacent landowner's negligence (i.e., improper maintenance) was covered under the insured's all risk policy. Each cause of loss was equally to blame for the resulting damage—that is, if either the neighbor's portion of the seawall had been properly maintained, or the storm had not occurred, there would have been no damage. The *Wallach* court deemed the loss to be covered because there was at least one cause of loss covered by the policy: "Where weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage." *Id.* at 1388.

In reaching its conclusion, the *Wallach* court adopted a rule of law established by the seminal California Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Partridge,* 514 P.2d 123 (Cal. 1973), which affords coverage "whenever an insured risk constitutes simply a concurrent proximate cause of the injuries. That multiple causes may have effectuated the loss does not negate any single cause; that multiple acts concurred in the infliction of injury does not nullify any single contributory act." *Id.* at 130–31. The philosophy of this "*Partridge* rule" is that damage from a covered cause of loss should not be undermined by the fact that an exclusion may also be associated with that same loss.[10]

Questionable Applicability to First-Party Insurance

Although the pro-policyholder *Partridge* rule was established in California, a subsequent California court determined that this rule does not apply to first-party insurance policies, such as builders risk. In *Garvey v. State Farm Cas. Co.,* 770 P.2d 704 (Cal. 1989), the court stated:

> [I]t is important to separate the causation analysis necessary in a first party property loss case from that which must be undertaken in a third party tort liability case.... [T]he 'cause' of loss in the context of a property insurance contract is totally different from that in a liability policy.... [T]he right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty. This liability analysis differs substantially from the coverage analysis in the property insurance context, which draws on the relationship between perils that are either covered or excluded in the contract. In liability insurance, by insuring for personal liability, and agreeing to cover the insured for his own negligence, the insurer agrees to cover the insured for a broader spectrum of risks.... In the property insurance context, the insurer and the insured can tailor the policy according to the selection of insured and excluded risks and, in the process, determine the corresponding premium to meet the economic needs of the insured. On the other hand, if the insurer is expected to cover claims that are outside the scope of the first party property loss policy, an "all risk" policy would become an "all loss" policy. (*Id.* at 710.)

In so holding, the *Garvey* court limited the prior California Supreme Court ruling in *Partridge* to cases involving third-party insurance disputes. *See also Port Auth. v. Affiliated FM Ins. Co.,* 245 F. Supp. 2d 563, 578 (D.N.J. 2001) ("New Jersey courts have declined to apply broader, third-party principles to resolve questions of coverage arising under first-party property agreements,

[10] See also *Matis v. State Farm Fire & Cas. Co.,* 454 N.E.2d 1156 (Ill. App. Ct. 1983) (holding that a collapsed basement caused by the combination of earth movement (excluded) and improper design (covered) was covered by the policy, and stating that "[w]here a policy expressly insured 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."). *Id.* at 1161. (Internal citations omitted.); *Crete-Monee Sch. Dist. v. Indiana Ins. Co., supra,* (finding coverage for a loss from the shattering of the insured school's vinyl roof-tops caused by a combination of the excluded cause of roof deterioration and the covered cause of extreme cold temperatures.); *Kraemer Bros. v. Fire Ins. Co.,* 278 N.W.2d 857 (Wis. 1979) (summary judgment denied in builder's risk dispute involving collapse of retaining wall because insured sufficiently alleged that the collapse was not solely attributable to the excluded peril of faulty workmanship but was also caused by other nonexcluded factors.).

at the same time embracing the fundamental distinctions between these two types of coverage and acknowledging their disparate public policy underpinnings.").

The distinction applied by *Garvey* between first-party and third-party losses is not universally accepted, and as the *Wallach* decision discussed above demonstrates, the principle set forth in *Partridge* has been adopted in some jurisdictions as the logical method to assess coverage for concurrent causes of loss in first-party claims, including builders risk claims. For example, in *Paulucci v. Liberty Mut. Fire Ins. Co.,* 190 F. Supp. 2d 1312, 1319 (M.D. FL. 2002), the court held that the pro-policyholder standard applied to first-party insurance in Florida:

> California's allegiance to the efficient proximate cause doctrine in first party insurance actions is rooted in a state statutory scheme that has been thoroughly interpreted by California courts. Without a comparable statutory scheme in Florida and without Florida authority applying the efficient proximate cause doctrine to first party insurance contracts when relevant perils are independent, I must find the concurrent cause [pro-policyholder] doctrine is the prevailing default standard in Florida.

Moreover, as noted by the *Garvey* dissent, applying this rule to the first-party context comports with the idea the insured is entitled to the benefit of the bargain when a covered cause of loss is established:

> *Partridge* would not frustrate the reasonable expectation of the insurer and insured in a first-party policy. The majority imply that it would be inappropriate to allow coverage when included and excluded risks concur as independent proximate causes of loss. I strongly disagree. In my opinion, it is altogether appropriate to find the insurer liable when an *included* risk—i.e., a risk the insured has paid the insurer a premium, to assume—is a proximate cause of the loss: in such a situation the insurer merely gives the insured the benefit of the protection he has purchased. (*Garvey,* 770 P.2d at 717.)

The Doctrine of Concurrent Causes Standard

The doctrine of concurrent causes standard is conceptually the polar opposite of the pro-policy holder rule in resolving concurrent cause of loss of claims. Under this standard, the insured bears the burden of distinguishing damage attributable to covered causes of loss from damage related to noncovered causes of loss. If the insured cannot isolate the covered damages, insurance coverage will not be awarded. For example, in *Fiess v. State Farm Lloyds,* 392 F.3d 802, 807 (5th Cir. Tex. 2004), the Fifth Circuit Court of Appeals, applying Texas law, held that the insured must identify its mold damage resulting from the covered cause of plumbing and HVAC leakage that was separate and distinct from mold damage caused by the excluded cause of flood water. The court stated:

> Under Texas law, an insured bears the burden of proving that a loss is covered under the terms of an insurance policy. Once the insurer has established that an exclusion applies, the insured has the burden of proving the application of an exception to the exclusion. If covered and non-covered perils combine to create a loss, the insured may only recover the amount caused by the covered peril. This principle is commonly known as the "doctrine of concurrent causes." *Because*

> *the insured may only recover for damage caused by covered perils, the insured bears the burden of presenting evidence that will allow the trier of fact to segregate covered losses from non-covered losses.* (*Id.* at 807. Emphasis added.)

The doctrine of concurrent causes standard leads to a draconian result of negating coverage for losses covered by the policy simply because the insured cannot isolate its damages from those caused by an excluded peril. Accordingly, the doctrine of concurrent causes renders the exclusions broader than the risks insured and runs contrary to the widely adopted maxim that insurance is to be viewed with an eye towards coverage. Not surprisingly, this standard is a minority view. Texas and, arguably, Michigan[11] are the primary, if not only, jurisdictions adopting such standard.

The Efficient Proximate Cause Standard

The third method of resolving concurrent cause of loss issues is the previously discussed "dominant-efficient" or "efficient proximate" cause rule. Under this standard, the cause of loss deemed to be the primary cause of damage will determine the outcome of coverage. The West Virginia case *Murray v. State Farm Fire and Cas. Co.,* 509 S.E.2d 1 (W. Va. 1998), highlights the application of this rule as it concerns concurrent (as opposed to sequential) causes of loss. *Murray* involved damage to insureds' homes caused by tumbling rocks from a nearby quarry. The falling rocks appeared to be caused by the combination of erosion and the negligent construction of the high wall located behind the insured homes. The insurer argued that the rocks were caused to tumble because of "landslide" and "erosion" which were excluded under the relevant policies. Naturally, the plaintiffs countered that the cause of the loss to each home was the improper creation and maintenance of the quarry high wall, which were covered causes under the policies. The West Virginia Supreme Court acknowledged the efficient proximate cause standard as the means by which to resolve the case and remanded the case back to the lower court to discern which of the proffered concurrent causes of loss was the dominant cause:

> We hold that, when examining whether coverage exists for a loss under a first party insurance policy when the loss is caused by a combination of covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss. No coverage exists for a loss if the covered risk was only a remote cause of the loss, or conversely, if the excluded risk was the efficient proximate cause of the loss.... After reviewing the record, we conclude that substantial questions of material fact remain for jury resolution. The earth movement exclusions apply to exclude naturally occurring risks. The plaintiffs argue that the evidence currently in the record suggests that the rocks fell from the quarry high wall due to its negligent vertical construction ... Conversely, the defendants argue that the plaintiffs' losses are the result of the excluded event of a landslide caused by another excluded event, erosion. We believe that whichever of these events was the efficient

[11] *See, e.g., Iroquois on the Beach, Inc. v. General Star Indem. Co.,* 550 F.3d 585, 588 (6th Cir. 2008) ("the default rule under Michigan law is that a loss is not covered when it is concurrently caused by a combination of a covered cause and an excluded cause.").

> proximate cause of the plaintiff's losses is a question for the finder of fact. (*Id.* at 488.)

In *Metric Constr. Co. Inc. v. Allianz Global Risks U.S. Ins. Co.,* No. B183628, 2006 Cal. App., LEXIS 9560 (Cal. App. 2d Dist. 2006), the California Appellate Court applied this standard under a builders risk policy.[12] The loss in question involved roof damage to a warehouse construction project caused by a combination of faulty workmanship and deficient (warped) steel. Upon conducting an efficient proximate cause analysis, the court affirmed the finding of the lower court that the excluded cause of faulty workmanship was the predominant factor associated with the roof damage, and further stated that the contractor's failure to remedy the deficient steel was part of its faulty workmanship:

> [T]here was evidence that the damage to the roof had multiple causes, and the critical issue before the trial court was the determination of which cause constituted the efficient proximate cause.... We conclude, based on the statement of decision as a whole, that the trial court found defective workmanship in the construction of the roof to be the single efficient proximate cause of the loss.... The critical factual dispute presented by the evidence at trial concerned the relative importance of defective roof workmanship and uneven steel framing, and the statement of decision focuses its attention almost exclusively on roof construction. The court made extensive findings of fact regarding defects in the workmanship and construction of the roof, including a specific finding that the expansion and contraction of roof panels causing damage "was due to the anticipated thermal cycles action upon long metal strips exposed to heat and cold and because these strips were installed with faulty workmanship, the roof tore itself apart." (*Id.* at *8.[13])

Difficulties in Applying Standard to Certain Concurrent Cause of Loss Scenarios

Because the efficient proximate cause standard is premised upon the existence of a single, identifiable primary cause of loss, its application is not well-suited to situations in which multiple causes of loss are equally significant. In such cases, the efficient proximate cause standard is likely to be abandoned. In *Crete-Monee Sch. Dist., supra,* for example, the court noted that a dominant cause of loss was not present because none of the identified causes was sufficient, on its own, to create the subject damage:

> The efficient-proximate cause doctrine does not apply to a case involving more than one cause where none of the causes is sufficient by itself to cause the loss. The doctrine applies to instances where several causes relate to one another in a chain of causation but where, individually, each cause would have been sufficient to cause the damage in question. (*Id.* at *30.)

[12]The application of this standard has been applied to first-party coverage in California, pursuant to the *Garvey* decision.

[13]As with sequential losses, determination of coverage under this standard depends upon the particular court's assessment of what it deems to be the most significant of the factors causing the loss.

The *Garvey* court also envisioned the break-down of the efficient proximate cause standard, in a first-party insurance context, when a primary cause cannot be determined:

> As we explained above, *Partridge,* [ ] should be limited to the third party tort liability context. In the unusual event that … separate excluded and covered causes simultaneously join together to produce damage—a situation we have yet to address—we may then consider developing an appropriate doctrine of concurrent causation to apply in the property loss context. 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 … which cause was the efficient proximate cause of the loss. In that "novel" case, we might consider developing a doctrine similar to the present Court of Appeal's independent concurrent causation standard in analyzing coverage under the policy. (*Garvey,* 770 P.2d at 713, n.9.)

Notably, *Crete* indicates that the efficient proximate cause standard is not useful to concurrent cause of loss scenarios, where no particular event is sufficient to cause the damage on its own because in such cases no own loss can be considered dominant. *Garvey,* alternatively, foresees the dilemma with applying this standard to those concurrent causes of loss which result in equal devastation. These cases reveal that the dominant-efficient standard is not always an ideal method by which to examine coverage for claims involving concurrent causes of loss.

Anti-Concurrent/Anti-Sequential Loss Provisions

Anti-concurrent and anti-sequential loss provisions (often referred to as "ACC" provisions) alter the analysis under which coverage for losses involving concurrent and sequential causes are determined. ACC provisions are designed to exclude coverage whenever a particular cause of loss is involved, regardless of whether such cause is the efficient proximate cause or merely a lesser contributing cause. The following language is typically found within a standard ACC provision:

> We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss….

Insurers have asserted that the intent of ACC provisions is to eliminate the overexpansive application of coverage that has resulted from certain courts' liberal construction of the efficient proximate cause and/or pro-policyholder rules, affording coverage that is much broader than what was originally intended. In cases in which ACC clauses have been found to be both applicable and enforceable, the well-recognized application of the efficient proximate cause and pro-policyholder standards have been superseded.

The implications of anti-concurrent/anti-sequential policy provisions were vividly demonstrated in the aftermath of Hurricane Katrina. Many of the policies providing coverage on properties damaged by this monumental storm contained ACC provisions governing losses caused by flood and storm surge. While policyholders have argued that their losses were equally or primarily attributable to a covered

cause of damage (typically wind), a number of courts have declined to apply an efficient proximate cause or pro-policyholder standard, instead concluding that the policy language precludes coverage for any loss involving flood or rain.

Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419 (5th Cir. 2007), illustrates the typical restriction of coverage created by ACC provisions. In this case, the Fifth Circuit, interpreting Mississippi law, held that an anti-concurrent clause unambiguously precluded damage from the combination of such perils:

> The default causation rule in Mississippi regarding damages caused concurrently by a covered and an excluded peril under an insurance policy is that the insured may recover if the covered peril was the dominant and efficient cause of the loss.... The Mississippi Supreme Court frequently employed this default rule in the welter of insurance coverage cases that surfaced in the aftermath of Hurricane Camille.... Whatever the effect of the efficient proximate cause doctrine in the Hurricane Camille cases, those decisions do not control the current case because none of the policies they involve contain ACC clauses similar to the one at issue here. (*Id.* at 432–33. Internal citations omitted.)

In another Hurricane Katrina case, *Tuepker v. State Farm Fire & Cas. Co.,* 507 F.3d 346, 354 (5th Cir. Miss. 2007), the Fifth Circuit explicitly held that only such losses that could solely be attributed to wind were covered:

> [A]ny damage caused exclusively by a nonexcluded peril or event such as wind, not concurrently or sequentially with water damage, is covered by the policy, while all damage caused by water or by wind acting concurrently or sequentially with water, is excluded....
>
> [However] the ACC Clause by its terms applies only to "any loss which would not have occurred in the absence of one or more of the below listed excluded events", and thus, for example, if wind blows off the roof of the house, the loss of the roof is not excluded merely because a subsequent storm surge later completely destroys the entire remainder of the structure; such roof loss did occur in the absence of any listed excluded peril.[14] (Emphasis omitted.)

In spite of the conclusions reached in *Leonard* and *Tuepker,* the Mississippi Supreme Court subsequently applied a much narrower interpretation of an ACC provision. In *Corban v. United Servs. Auto. Ass'n,* 20 So. 3d 601 (Miss. 2009), the court deconstructed the language of the ACC provision, which stated as follows.

> 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. (Emphasis added.)

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[14] *See also Bilbe v. Belsom,* No. 07–30869, 2008 U.S. App. LEXIS 10230 (5th Cir. La., May 12, 2008):

> The contract states that the Water Damage Exclusion applies regardless of "whether other causes acted concurrently or in any sequence with the excluded event to produce the loss." As noted, in the joint pre-trial order, it was uncontested that "[t]he force of water would have been sufficient to destroy petitioner's family dwelling even if it was undamaged at the time the water impacted it," and Bilbe conceded that a storm surge "struck" the home. Therefore, even if her proximate cause argument is considered, summary judgment was appropriate.

In its analysis of the ACC provision, the *Corban* court focused upon the terms "loss," "in any sequence," and "concurrently." It first pointed out that a "loss" is incurred at the point in time where there is deprivation or destruction of property. Turning its attention to the phrase *in any sequence,* the court concluded that the ACC provision could not act to negate a covered loss that occurs prior to an excluded one, because such an interpretation would be inconsistent with policy provisions stating that the insurance coverage obligation arises at the time of the loss:

> No reasonable person can seriously dispute that if a loss occurs, caused by either a covered peril (wind) or an excluded peril (water), that particular loss is not changed by any subsequent cause or event. Nor can the loss be excluded after it has been suffered, as the right to be indemnified for a loss caused by a covered peril attaches at that point in time when the insured suffers deprivation of, physical damage to, or destruction of the property insured.... The term "in any sequence" is contained within an exclusionary clause for "water damage" losses.... [T]his term cannot be used to divest an insured's right of indemnity for a covered loss, as such an interpretation conflicts with other provisions of the USAA policy. For instance, "Section I – Conditions" regarding "Insurable Interest and Limit of Liability" provides that, "in any one loss," USAA will not be liable "for more than the amount of the *insured's interest at the time of the loss*...." (*Id.* at *25, *32–33.[15])

The *Corban* court also determined that the term "concurrently" meant that the covered and uncovered events must occur at exactly at the same time in order for the exclusion to apply. Moreover it determined that the burden of establishing a concurrent loss rested with the insurer.

> [T]he exclusion applies only in the event that the perils act in conjunction, as an indivisible force, occurring at the same time, to cause direct physical damage resulting in loss.... Only if it can be proven that the perils (wind and flood) contemporaneously converged, operating in conjunction to cause the loss, that the "concurrent" provision will apply.... [Moreover] USAA assumes the burden to prove, by a preponderance of the evidence, that the causes of the losses are excluded by the policy, in this case "[flood] damage."[16] (*Id.* at 614–615, 619.)

Thus, while the ACC clause was considered to be a valid clause, the *Corban* court believed that its application was narrow and that the criteria were not met in that particular case.

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[15]Notably, the *Corban* court did not assess true sequential causes loss, as we have discussed elsewhere in this article. In other words, it was not examining what it considered to be dependent-related causes of loss (one enabling another to occur). Rather its discussion treated wind-related damage and storm surge-related damage as separate events. It so stated: "[b]ased upon the record as it now stands ... *the subject perils acted in sequence ... at different times, causing different damage, resulting in separate losses. Id.* at 614 (Emphasis added.) Thus it does not address the application of the ACC clause under the scenario where there are sequential causes to a single loss.

[16]The policy at issue in *Corban* was an "all risk" policy, meaning that all causes of loss are covered unless specifically excluded. Under an all risk policy, the policyholder bears the burden of establishing a loss, and thereafter the burden shifts to the insurer to prove that an exclusion applies. See *Corban,* 20 So. 3d at 618. In contrast, for example, under a "specified peril" policy the insured would have the burden of establishing that a loss was caused by one of the specific causes enumerated under the policy.

As evidenced by the above cases, ACC provisions have been interpreted by some courts to exclude coverage for losses caused by both covered and uncovered perils, even when the covered cause is the primary factor. When such clauses are broadly interpreted, coverage will be afforded only when the damage from the covered cause can be isolated from the excluded cause as explained in *Arctic Slope Reg'l Corp. v. Affiliated FM Ins. Co.,* 564 F.3d 707, 712 (5th Cir. La. 2009):

> The ACC clause is unequivocal and unyielding. It excludes insurance against loss or damage caused by or resulting from any of the listed causes, including flood (as defined by the policy). It then repeats that loss or damage is excluded "regardless of any other cause or event whether or not insured under this policy that contributes concurrently or in any sequence to the loss or damage." The storm surge flood occasioned by Hurricane Rita "whether driven by wind or not" is not covered by this policy. Consequently, the ACC clause precludes coverage of the loss or damage under the wind/hail provision as water "carried, blown, driven or otherwise transported by wind onto or into said location." In this situation, the ACC clause operates exactly as it was intended, and it is not ambiguous. The clause eliminates application of an efficient proximate cause rule … by excluding coverage altogether.

This interpretation is tantamount to the "concurrent cause" standard adopted by Texas. A more restrictive view of the ACC clause, such as that reached in *Corban,* could possibly be applied in jurisdictions that have not yet subscribed to the broad interpretation. However, *Corban* thus far is a minority perspective.[17]

Public Policy Implications of Anti-Concurrent Loss Provisions

In the wake of Hurricane Katrina, much debate has ensued over the equitableness of the ACC provisions.[18] Discussions of legislative change have also been initiated to countermand their impact. Insurers on their part have asserted that these provisions are necessary to prevent the expansion of coverage to excluded perils when a covered cause of loss is involved, which was never intended to be covered by their policies.

In the majority of jurisdictions, courts to date have allowed insurance companies to utilize ACC provisions in order to contract around the efficient proximate cause rule, as long as the policy language is clear and unambiguous. (The ACC language quoted above has often been determined to meet that standard.) In such jurisdictions, the courts have generally noted that ACC clauses do not offend public policy.[19] Therefore, as a matter of freedom of

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[17] *See infra,* Footnote 20, identifying jurisdictions addressing the ACC clause. However, the *Corban* decision is extremely recent; therefore its impact may not have been fully met as of the date of this article.

[18] *See,* e.g., Sam Freidman, "Is the Anti-Concurrent Causation Clause Ethical?" *National Underwriter* (Sept. 14, 2007), http://nusamsoapbox.com/2007/09/14/is-the-anti-concurrent-causation-clause-ethical/, (accessed Feb. 15, 2010).

[19] For example, in *Leonard v. Nationwide,* 499 F.3d at 435, the court states:

> A general background principle of Mississippi contract law holds that parties may decline to adopt common law causation rules so long as the contract's provisions do not offend public policy…. As Mississippi has not adopted the efficient proximate cause doctrine as a matter of public policy, there is no bar to Nationwide's use of the ACC clause here. *Id.* (Internal quotations omitted.)

contract, the insurers are permitted to include such terms.[20]

Some jurisdictions, however, have disallowed the use of these provisions, finding them to be contrary to state public policy or statute. In these jurisdictions it has been noted that the anti-concurrent/anti-sequential provisions unfairly preclude coverage where a covered cause of loss is the predominant factor causing the damage in question, thereby creating a situation where the exclusion engulfs the intended coverage. Moreover, such provisions have been considered to be unfair to insureds that otherwise believe that coverage applies to certain causes of loss in all circumstances. In other words, these jurisdictions find that ACC provisions do not reasonably comport with the expectations of the average insured.

In California, ACC provisions have been deemed to be unenforceable because they violate Cal Ins. Code § 530.[21] This outcome is demonstrated in *Howell v. State Farm Fire & Cas. Co.,* 267 Cal. Rptr. 708 (Cal. Ct. App. 1990), in which the Court of Appeal of California determined that the insurer could not rely upon its anti-concurrent policy provision as a basis to exclude coverage for a loss that was attributable to earth movement:

> [T]he important question presented by this case is whether a property insurer may contractually exclude coverage when a covered peril is the efficient proximate cause of the loss, but an excluded peril has contributed or was necessary to the loss. We conclude that a property insurer may not limit its liability in this manner, since the statutory and judicial law of this state make the insurer liable whenever a covered peril is the "efficient proximate cause" of the loss, regardless of other contributing causes. Consequently, the policy exclusions at issue in this case are not enforceable to the extent they conflict with California law. (*Id.* at 711–12.)

In other jurisdictions, including Washington and West Virginia, courts have deemed anti-concurrent/anti-sequential clauses to violate public policy. For example, in *Safeco Ins. Co. v. Hirschmann,* 773 P.2d 413, 415–416 (Wash. 1989), the court noted that "we are presented with the [ ] question in Villella:[22] whether by drafting variations in exclusionary clause language an insurer may circumvent the "efficient proximate cause" rule … and deny coverage when a covered peril sets in motion a causal chain the last link of which is an excluded peril. The lesson of Villella is that the rule may not be circumvented." Likewise, in *Murray v. State Farm Fire & Cas. Co.,* 509 S.E.2d 1,

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[20] *See Kelly v. Farmers Ins. Co., Inc.,* 281 F. Supp. 2d 1290 (W.D. Okla. 2003):

> Among the jurisdictions that have adopted the efficient proximate cause doctrine, most permit parties to "contract around" it. See [*TNT Speed & Sport Center, Inc. v. American States Ins. Co.,* 114 F.3d 731, 733 (8th Cir. 1997)], 114 F.3d at 733; *Preferred Mut. Ins. Co. v. Meggison,* 53 F. Supp. 2d 139, 142 (D. Mass. 1999); *Assurance Co. of Am., Inc. v. Jay-Mar, Inc.,* 38 F. Supp. 2d 349, 354 (D.N.J. 1999); Mold: Another Four-Letter Word [Every Coverage Attorney Needs to Know, 38 TORT TRIAL & INS. PRAC. L.J. 15, 27].

[21] Cal. Ins. Code § 530 states that "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause."

[22] The *Hirschmann* court is referring to the earlier decision of *Villella v. Public Employees Mut. Ins. Co.,* 725 P.2d 957 (Wash. 1986), which held that an insurance provision excluding coverage for damage "contributed to or aggravated by" earth movement could not circumvent the efficient proximate cause rule adopted under Washington law.

15 (W. Va. 1998), the West Virginia Supreme Court concluded that an insurance clause excluding coverage for earth movement "regardless of: … whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; …" would not be enforced when a covered cause of loss was the proximate cause:

> [W]hen an insurance carrier chooses to insure against a loss proximately caused by a particular peril, it may not rely on the mere concurrence of an excluded peril to deny coverage. The excluded peril must itself be the efficient proximate cause of the loss. Because State Farm's lead-in [anti-concurrent] clause conflicts with the reasonable expectations of the parties, it should be construed to allow coverage for losses proximately caused by a covered risk, and deny coverage only when an excepted risk is the efficient proximate cause of the loss.

The disparity of opinions between the varying jurisdictions reveals that the question of whether these anti-concurrent/anti-sequential clauses comport with general notions of fairness is far from settled. The implication of how these clauses are interpreted, and whether or not they should be enforced, is not insignificant in the context of builders risk insurance given that construction projects have equal, if not greater, exposure than completed structures, because the covered property, in most cases, is not at full storm-resistance capacity.

Other Implications of Anti-Concurrent/ Anti-Sequential Provisions

While ACC provisions have, in large part, successfully limited insurers' liability for damages, insureds can sometimes use their inclusion in the policy to their advantage. For example, the inclusion of an ACC provision with respect to certain perils may provide the basis for an argument supporting coverage for other losses. In other words, the strict limitations created by anti-concurrent/anti-sequential cause of loss provisions as to certain perils can act to highlight the appropriateness of a liberal application of coverage involving other concurrent or sequential causes of loss that are not subject to such provisions. By reading the policy as a whole and interpreting the language so that each provision is given meaning (sometimes referred to by the Latin phrase *in pare materia*), the logical conclusion often reached is that excluded causes of losses not encompassed within the ACC provisions must be given a much narrower/stricter application. To do otherwise would render the anti-concurrent/anti-sequential clauses superfluous.[23]

Further, the ACC provisions demonstrate the fact that the insurers clearly know how to draft restrictive language, and thus a lack of such language regarding a cause of loss outside the scope of the ACC provision must be deemed intentional. This maxim, known as *noscitur a sociis* (the meaning of a phrase can be determined by related phrases), has been successful in arguing for coverage.[24] In *Album Realty,* for example, the court supported its finding of coverage by noting the anti-concurrent/anti-sequential restrictions found in the policy

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[23] *See generally, Taracorp v. NL Indus.,* 73. F.3d 738, 745 (7th Cir. 1996) ("the meaning of separate contractual provisions should be considered in light of one another and the context of the entire agreement.").

[24] Ensuing loss provisions, as previously discussed, especially highlight the distinction between those causes of loss subject to an ACC provision and those excluded causes of loss with a much narrower application.

did not pertain to the particular causes of loss in question:

> That only this most direct and obvious cause should be looked to for purposes of the exclusionary clause at issue becomes even more evident when the limited language of the clause, which excludes damage "caused by" freezing, is compared to the other exclusionary clauses, all of which use broader language, i.e., "caused by or resulting from", "arising directly or indirectly from", "directly or indirectly caused by" or "resulting from", etc. (*Album Realty,* 607 N.E.2d at 805.)

Likewise, in *Simonetti* (cited earlier), the New Jersey Appellate Division noted that the insurer's deliberate decision not to include the particular excluded cause of loss of faulty workmanship within its anti-concurrent/anti-sequential loss provision evidenced an intent to limit the scope of the faulty workmanship exclusion. Accordingly, mold damage, which resulted when rain water entered through leaks in the policyholder's home caused by faulty workmanship, were held to be covered.

> The fact that two or more identifiable causes—one a covered event and one excluded—may contribute to a single property loss does not necessarily bar coverage. In the first place, the Selective policy does not contain an anti-concurrent or anti-sequential clause in Exclusion 2a dealing with faulty design, workmanship and maintenance, which would exclude coverage when a prescribed excluded peril, alongside a covered peril, either simultaneously or sequentially, causes damage to the insured…. *Significantly, however, Selective did include such an anti-sequential and anti-concurrent clause in Exclusion 1 for Earth Movement, etc., evidencing a clear intention to bar coverage in the latter, but not the former.* (*Simonetti,* 859 A.2d at 699–700.) (Emphasis added.)

Therefore, while anti-concurrent/anti-sequential policy provisions may act to negate coverage when they are directly applicable to a cause of loss, their inclusion in the policy may act to support a claim for coverage for other causes of loss that are not subject to such provisions.

Conclusion

Determining coverage under a builders risk policy for losses involving multiple concurrent or sequential causes is often difficult. However, understanding the relevant concepts discussed above is crucial in a potential coverage assessment. Identifying the various causes of the damage in question, determining whether any relevant exclusion applies to each identified cause, and knowing whether such causes are concurrent or sequential will place the policyholder in the best position to determine if coverage applies.

Likewise, understanding the particular standards applied by the court of controlling jurisdiction, including such court's acceptance/rejection of any ACC provisions, is critical. The complexities associated with concurrent and sequential causes of loss, and the fact that the standards applied to address these situations (most notably, the efficient proximate cause standard) are diverging and leave room for subjective interpretation. Naturally, this means that there can be debate over any given claim for coverage. Nevertheless, the better the understanding of the causes of damage, of the relevant policy provisions and of the applicable legal standards of those states whose law may control, the more likely the policyholder will be able to predict whether or not its claim will be accepted by the insurer and/or what the likelihood of success would be should court intervention be necessary.

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