HURRICANE AND FLOOD INSURANCE AFTER KATRINA

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I. Introduction

Hurricane and flood insurance are typically excluded from property or homeowners' policies. Therefore, the insured must look elsewhere for coverage.

We start with a review of the basic homeowner's policy. We then turn to the process of acquiring coverage for flood and hurricane. Finally, we review several Fifth Circuit cases which address coverage for wind and flood damage caused by Hurricane Katrina.

II. Basic Homeowner's Policy

A homeowner's policy is a type of property policy whereby the insurer promises to pay money to the insured upon the happening of the risk insured against. *See Sentinel Ins. Co. v. First Ins. Co. of Hawaii*, 76 Hawai`i 277, 289, 875 P.2d 894, 906 (1994). Prior to the mid-1950's, a homeowner had to purchase several different policies to adequately insure a dwelling. To secure comprehensive coverage, a homeowner would purchase separate policies to cover fire, theft, windstorm, etc.

The insurance industry eventually developed the homeowner's policy to combine various property coverages, additional living expenses, comprehensive personal liability, and replacement-cost coverage on the dwelling and contents. 1 ERIC M. HOLMES, HOLMES' APPLEMAN ON INSURANCE, 2D (1996) at §1.11 ("APPLEMAN"). Variations of the homeowner's policy provide basic coverage, additional coverage for specifically named perils, "all-risk" coverage, and other types of coverage tailored to the needs of various homeowners. *Id.*

A. Perils of Wind and Water

A typical homeowner's policy provides coverage for damage to real property, including dwelling (Coverage A) and other structures (Coverage B). Damage to personal property (Coverage C) is also covered. Coverage for a dwelling or other structures is stated as follows: "We insure against risk of direct physical loss to property described in Coverages A and B." The policy then lists various exclusions.

A variation of the homeowner's policies is to list the perils insured against and then list exclusions to coverage: "We insure for direct physical loss to the property described in Coverages A, B and C caused by any of the following perils unless the loss is excluded under Section I - Exclusions."

Wind damage is insured against in a typical homeowner's policy. The policy will state,

> We cover accidental direct physical loss to property caused by the following perils except for losses excluded under Section I – Property Exclusions:
>
> . . . .
>
> 2. windstorm or hail.
>
> Direct loss caused by rain . . . driven through roof or wall openings made by direct action of wind, hail, or other insured peril is covered. . . .

Leonard v. Nationwide Mutual Ins. Co., 499 F.3d 419, 424 (5th Cir. 2007)(quoting Nationwide Homeowner's Policy). Therefore, wind-related damage, such as a blown-off roof or a window damaged by a wind-propelled projectile, is covered. Similarly, the policy expressly covers losses caused by wind-driven rain blown through a hole in a roof, wall, or window. *Leonard,* 499 F.3d at 424.

Another, slightly different version of wind coverage is stated in some policies as follows:

> We insure for accidental direct physical loss to property . . . caused by the following perils . . .
>
> 2. Windstorm or Hail. This peril does not include loss to property contained in a building caused by rain, snow, sleet, sand or dust. This limitation does not apply when the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

Tuepker v. State Farm Fire & Casualty Co., 507 F.3d 346 (5th Cir. 2007)(quoting State Farm's Homeowner's Policy). Therefore, water damage to property within a building is covered if rain enters an opening caused by wind.

Otherwise, water damage is typically excluded under the homeowner's policy as follows:

> **EXCLUSIONS**
>
> We do not insure for loss cased directly or indirectly by and of the following . . .
>
> **Water Damage**
>
> c. Water Damage means:
>
> (1) Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind . . . .

United States Fire Insurance Company Homeowner's Policy. Therefore, the policy specifically excludes damage caused by water, including flooding.

Finally, in a hurricane zone such as Hawaii, the homeowner's policy will undoubtedly have an endorsement which specifically excludes damage from hurricanes. The endorsement will cry out in bold letters: "THIS POLICY EXCLUDES LOSS DUE TO HURRICANE." The endorsement will then state:

> The following is added to the **Section I - Exclusions:**
>
> 1. i. **Hurricane.** We do not insure for loss caused directly or indirectly by a hurricane meaning:
>
> A storm or storm system that has been declared and defined by the Central Pacific Hurricane Center of the National Weather Service to be a hurricane which includes the time period in each island in the state of Hawaii . . . .

United States Fire Insurance Company Homeowner's Policy.

Therefore, if a homeowner desires coverage for flood or hurricane damage, additional coverage must be purchased.

III. Flood Policies

A. The National Flood Insurance Program

Private insurers do not offer flood insurance because floods are too costly to insure and the public would be unable to buy coverage. Consequently, in 1968, Congress established the National Flood Insurance Program ("NFIP") to address not only the need for flood insurance, but also to lessen the devastating consequences of flooding. *See* 42 U.S.C. §§4001 *et seq*. Congress expanded flood protection in 1973 to include any "collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels." 42 U.S.C. §4121 (c). The NFIP requires all homeowners in a flood

plain (defined as an area with a one percent chance of flooding each year) to purchase flood insurance.

The history of the NFIP has not always had favorable results. First, the flood program creates an incentive for insurance companies to try and shift losses to the NFIP by attributing them to flooding even if the losses were actually caused by wind. Second, the program has not reduced flood losses, but has created uncertainty for both homeowners and insurers because of slow recovery efforts after disastrous floods. Moreover, the NFIP has left taxpayers with the responsibility of paying for losses when the program is inadequately funded.

In average years, the NFIP is self-sufficient. The amount taken in from premiums roughly equals the amount paid in claims and spent on operating expenses. The NFIP normally collects approximately $2 billion in premiums and fees per year. Between 1994 and 2004, it paid out around $867 million annually. The program is also allowed to borrow up to $3.5 billion from the Treasury Department in the event of a major disaster. David C. John and Stephen Keen, *Keep Wind Coverage out of Flood Insurance Conference Report*, Web Memo, July 8, 2008, at http://www.heritage.org/Research/ Regulation/wm 1982.cfm.

B. Understanding Flood Insurance

A useful source for understanding flood insurance can be found at Floodsmart.gov. This website explains the NFIP, establishing premiums, flood zones, etc. One can type in a home address and learn the property's flood risk. Premiums are based on geographic areas that the Federal Emergency Management Agency ("FEMA") defines based on studies of flood risk.

Homeowners can purchase dwelling coverage of up to only $250,000. Maximum coverage for contents is $100,000 for homeowners. Once a policy is purchased, it is not effective for thirty (30) days, which effectively prevents the purchase of a policy shortly before the onset of a major storm.

FEMA flood zones range from low risk to high-risk. There are two broad classifications of special flood hazard areas: (1) "A" zones; and (2) "V" zones. "V" zones are generally located near areas subject to hazardous tidal flows (waves) such as the ocean. "A" zones are those areas simply subject to inundation by overflow of rivers, low-lying areas subject to ponding, etc.

Non-Special flood hazard areas are historically delineated using "B," "C" or "X." These are considered areas of moderate or minimal hazard generally only expected to flood in times of severe storms or when drainage problems exist. However, twenty-five to thirty percent of all flood insurance claims are paid for damage in these "less hazardous" areas. Accordingly, homeowners should not ignore flood insurance just because they are not in areas considered "hazardous." Christopher J. Boggs, *Flood*

Damage Not Limited to "Flood Zones," Insurance Journal, July 2, 2008, at http://www.insurancejournal.com/ news/national/ 2008/07/91073.

Flood areas designated as Zone D have an undetermined risk. The website Floodsmart.gov explains a Zone D location has possible but undetermined flood risk. Consequently, the relatively high premiums for Zone D, which are the third highest premium rate, reflect the uncertainty of the flood risk.

Terms such as "100-year flood" create false sense of security. These terms have practical consequences, including setting insurance requirements for residents living in flood-prone areas. A 100-year flood is defined as a flood that has only a one percent chance of happening in any given year. A 500-year flood is one with a 1-in-500 chance of happening in a given year. Therefore, once a major flood occurs, residents may be lulled into believing there will not be a similar event during their lifetimes. In reality, however, there is an equal chance flood waters will submerge a special flood hazard area every year for five straight years, or not for 200 years. In a low risk area, there is simply a one percent statistical possibility every year. Homes located in special flood hazard, or high-risk areas, have a twenty-six percent chance of suffering flood damage over the normal 30-year life of a loan according to FEMA. *Id.*

IV. Hurricane Policies

A. Iniki's Impact on Hurricane Coverage in Hawaii

Damage caused by Hurricane Iniki was extensive, resulting in $1.6 billion in insurance losses. As a result, insurance companies stopped writing hurricane coverage in Hawaii. Forty thousand insurance policies were canceled, and for several months new

property insurance policies were only available from a single carrier. Michael P. Hamnet and Kristine G. Davidson Oh, *Hawaii Hurricane Relief Fund: Its History, Viability, and Role in Disaster Mitigation,* August 1996, at http://www.mothernature-hawaii.com/county hawaii/hurricane hhfr2-hawaii.htm.

In response, the State Legislature created the Hawaii Hurricane Relief Fund (HHRF) in 1993 to provide standard windstorm coverage for hurricane-force winds. A hurricane reserve trust fund was established. HHRF premiums, fees on mortgages recorded in the state, and annual insurance company assessments were deposited to cover the cost of operating HHRF and to pay reinsurance premiums. Most private insurance carriers eliminated hurricane coverage from their policies and agreed to participate in the HHRF. Premiums for many property policies offered by private insurance companies remained near pre-Iniki levels even though hurricane coverage was dropped. *Id.* At its peak, the HHRF provided hurricane insurance for 160,000 homeowners in Hawaii.

B. Re-emergence of Private Hurricane Coverage in Hawaii

The HHRF was envisioned as a temporary solution for homeowners when insurers left the hurricane market. The HHRF was eventually phased out in the early part of the decade when insurance companies again began issuing their own coverage instead of participating in the HHRF.

Currently, many insurance companies have re-entered the market to offer hurricane coverage in Hawaii, including State Farm, Zephyr, First Insurance, United

Services Auto Association, and Royal Insurance.[1] Several mortgage companies require the homeowner to purchase hurricane insurance. Rates have risen the past couple of years, especially in the Gulf States, as a result of Hurricane Katrina and other storms.[2] Hawaii rates have also been impacted by the catastrophic storms on the mainland. The increased rates are a result of insurers having to pay higher rates to their reinsurers, the companies that insure the insurance companies, and then passing on the increase to policy holders.

C. The Hurricane Policy

A sample hurricane policy is the Residential Windstorm-Hurricane policy currently issued by Zephyr. The policy covers only the peril of "windstorm" during a hurricane.

Zephyr's policy defines "hurricane" as a storm or storm system declared by the Central Pacific Hurricane Center to be a hurricane. The time period for coverage begins when a hurricane "watch" or "warning" is issued and ends 72 hours following the cancellation of the "watch" or "warning."

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[1] In September 2008, a Florida-based insurer, Universal North America Insurance Company, started offering in Hawaii homeowners' policies covering dwelling, flood and hurricane options. Pacific Business News, *Florida insurance company enters Hawaii market* (Sept. 8, 2008), *available at* http://www.bizjournals.com/pacific/stories/2008/09/09/daily15.html.

[2] In the wake of Katrina, major insurance companies reduced their exposure to hurricanes by sharply raising premiums, adjusting the insured valued of homes, and declining to insure some coastal properties. New York Times, *Storm's Toll on Insurers Not on Scale of Katrina* (Sept. 1, 2008), *available at* http://www.nytimes.com/2008/09/02/business/02insure.html.

"Windstorm" is defined in the policy as wind or hail during a hurricane, which results in direct physical loss or damage to property. The policy explains,

> [A]ny ensuing damage to the interior of a building, or to property inside a building caused by rain, snow, sleet, sand or dust will be considered covered damage only if the direct force of the windstorm first damages the building, causing an opening by which rain, snow, sleet, sand or dust enters and causes damages.

Zephyr Specimen Residential Windstorm-Hurricane Insurance Policy ("Zephyr Hurricane Policy").

Similar to a homeowner's policy, the Hurricane Policy excludes water damage as follows:

> We do not insure for loss or damage 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.
> . . . .
> 3. **Water Damage**, meaning.
>
> a. Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind . . . .

Zephyr Hurricane Policy.

Covered property includes dwelling, other structures at the insured location set apart from the dwelling, and personal property owned or used by an insured while it is contained within an enclosed building. The policy does not cover various items of personal property, including works of art, jewelry, animals, trees, plants, shrubs, motor vehicles, etc.

Loss of use is also covered by the Hurricane Policy. This includes additional living expenses, meaning any reasonable and necessary increase in living expenses incurred so that the insured's household can maintain its normal standard of living.

V. What if Damage is Caused By Covered and Non-Covered Perils?

Much of the post-Katrina litigation involved whether homeowner's policies covered property damage resulting from both wind and flood. For example, the hurricane force winds would damage the house, to be followed by a storm surge, causing flooding. The public perception, fueled largely by the media, was that insurers denied all coverage for wind damage if there was also flood damage caused by a storm surge.

To understand why the public perception was incorrect, we initially look at the common law doctrine of efficient proximate cause. We then study the policies' anti-concurrent causation clause.

A. The Doctrine of Efficient Proximate Cause

The default, common law rule for analysis of multiple causes of property loss is the efficient proximate cause doctrine. In other words, if the insurance policy does not address what happens if there are multiple causes of property loss (some of them covered and some of them not), the court uses the common law rule of efficient proximate cause.

Under the doctrine, where a loss is caused by a combination of a covered risk and an excluded risk, the policy covers the loss if the covered risk was the efficient proximate cause of the loss. *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 222

(5th Cir. 2007). *See also* 7 COUCH ON INSURANCE, §101:45 (2008)("The efficient proximate cause doctrine has been applied under those circumstances in which two or more identifiable causes, at least one of which is covered under the policy and at least one of which is excluded thereunder, contribute to a single loss.") The efficient proximate cause of the loss is either: (1) the dominant, fundamental cause; or (2) the cause that set the chain of events in motion. *In re Katrina Canal Breaches Litigation*, 495 F.3d at 222.

Therefore, the efficient proximate cause applies only where there are several causes of loss in a chain of causation and each cause could independently cause the loss. *Amherst Country Club, Inc. v. Harleysville Worcester Ins. Co.*, 2008 U.S. Dist. LEXIS 48481, at *31 (D. N.H. June 24, 2008)(quoting 4 D Leitner, et al., "Law and Practice of Insurance Coverage Litigation," §52:33 (2008)). For example, if damage is caused to a structure by both wind (a covered peril) and flood (a non-covered peril), there are two independent causes of loss. If wind is the dominant cause, or the cause setting the chain of events into motion, it is the proximate efficient cause of the loss. Because damage caused by wind is covered under the policy, application of the efficient proximate cause doctrine would mandate coverage despite simultaneous damage caused by the flood.

B. The Anti-Concurrent Causation Clause

Insurance companies do not like the efficient proximate cause doctrine because it may force them to cover damage created by an uncovered peril. Courts have held, however, that insurance companies can "contract out" of the efficient proximate cause doctrine by re-writing their policies. In fact, the anti-concurrent causation clause in most property policies today is the insurer's intent to contract around the operation of the efficient proximate cause rule. *In re Katrina Canal Breaches*, 495 F.3d at 222 .[3]

A policy's anti-concurrent causation clause typically precedes the list of exclusions and reads:

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[3] A few jurisdictions do not allow an insurance policy to eliminate the efficient proximate cause doctrine *See Murray v. State Farm Fire & Cas. Co.*, 509 S.E. 2d 1, 12 (W. Va. 1998)(refusing to allow insurance contract to circumvent the efficient proximate cause rule); *Safeco Ins. Co. of Am. v. Hirschmann*, 773 P.2d 413, 416-17 (Wash. 1989)(same); *Western Nat'l Mut. Ins. Co. v. Univ. of N.D.*, 643 N.W. 2d 4, 13 (N.D. 2002)(concurrent cause language not enforceable by statute); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 904 (Cal. 2005)("the efficient proximate cause rule . . . override[s] contrary [contract] language").

The Ninth Circuit recently decided that a flood exclusion barred coverage for water damage caused to shipyards by Hurricane Katrina, but remanded the case for consideration of whether California's efficient proximate case doctrine demanded coverage despite the exclusion. *Northrop Grumman Corp. v. Factory Mutual Ins. Co.*, 2008 U.S. App. LEXIS 17270, at *21 (9th Cir. Aug. 14, 2008).

> 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.
>
> [listing exclusions]
> . . .

In re Katrina Canal Breaches Litigation, 495 F.3d 191, 197 (5th Cir. 2007)(quoting policies issued by three carriers involved in litigation)(emphasis added).

Similar to the efficient proximate cause doctrine, the anti-concurrent causation clause applies where there is "multiple causation," *i.e.,* there are two or more forces combining to cause the exact same damage. "Concurrent" means two or more causes that arise independently and combine their effects, such that a loss would not have happened if one cause was missing. An example would be a rot-weakened shed blown down in a strong wind. The shed would not collapse if only one of the causes was present. The "concurrent" forces of both the strong wind and rotted condition of the shed working together, however, cause the loss.

The phrase "in any sequence," on the other hand, means that multiple causes which are dependent on one another follow each other like dominoes toppling. An example would be a water pipe rupturing, discharging water that causes a mudslide that destroys a house. If the mudslide is an excluded peril, the loss would be excluded by the anti-concurrent causation clause.

Here is another way to think of the anti-concurrent causation clause. If two or more forces cause different, distinct, divisible damage, only single causation exists. The forces are not working concurrently but separately; therefore, the anti-concurrent causation

clause is not implicated. For example, it is possible for one house to suffer numerous losses, with each damaged location caused by a single, distinct force. Where wind and water both act upon a house, they can be separate forces that cause separate damage. The wind might blow shingles off the roof. Elsewhere, flood waters may enter through a door. Under this scenario, the anti-concurrent causation clause would not come into play. Even though damage caused by flood would not be covered, wind damage to the roof would be covered.

As we will see, the efficient proximate cause doctrine and the anti-concurrent causation clause received a great deal of attention in the Katrina cases.

VI. Block-Buster Katrina Cases from the Fifth Circuit

Subsequent to Hurricane Katrina, hundreds of lawsuits were filed against insurers based on the denial or partial denial of claims due to flood damage. In virtually all of the major Katrina cases, the district court found the anti-concurrent causation clause and/or flood exclusion to be ambiguous, and determined there was coverage under a homeowner's policy.

Nevertheless, despite the media demonizing the anti-concurrent causation clause as the basis for the insurers' denial of coverage, in most cases the anti-concurrent causation clause was not used by the insurance companies to deny claims. Consequently, the Fifth Circuit reversed rulings by the district courts and issued opinions finding that neither the anti-concurrent causation clause nor the flood exclusion was ambiguous.

A. *In re Katrina Canal Breaches Litigation*, 495 F.3d 191 (5th Cir. 2007)

Numerous insurance companies were sued in New Orleans when coverage was denied to property owners based on flood damage. The property owners argued massive inundation of water into the city was the result of the negligent design, construction, and maintenance of the levees. Further, the insureds argued the policies' flood exclusions were ambiguous because they did not clearly exclude coverage for inundation of water induced by negligence. The district court agreed that the flood exclusions were ambiguous because the term "flood" was susceptible to two reasonable definitions: one that relates to floods resulting from natural causes only and another that relates to floods resulting from both natural causes and negligent or intentional acts. *Katrina Canal Breaches Litigation*, 495 F.3d at 198.

The Fifth Circuit reversed, determining the flood exclusion in the homeowners' policies was not ambiguous. In the midst of the hurricane, three canals in the City of New Orleans overflowed. The levees that man had put in place to prevent flood waters from inundating the City had failed. The result was an enormous "flood," causing damage to plaintiffs' property. A flood of this nature was unambiguously excluded from coverage by the policies. *In re Katrina Cana Breaches*, 495 F.3d at 221.[4]

[4] A similar was reached in the Louisiana courts. Although the Louisiana Court of Appeal initially found the flood exclusion was ambiguous because it did not expressly exclude man-made floods, s*ee Sher v. Lafayette Ins. Co.*, 973 So.2d 39 (La. Ct. App. 2007), the Louisiana Supreme Court reversed. *Sher v. Lafayette Ins. Co.*, 2008 La. LEXIS 796, at *9-10 (La. April 8, 2008). The Louisiana Supreme Court determined,

> The plain, ordinary and generally prevailing meaning of the word "flood" is the overflow of water causing a large amount of water to cover an area that is

B. *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007)

The Leonards' lived twelve feet above sea level along the Mississippi Gulf Coast, less than two hundred yards from the Mississippi Sound. Hurricane Katrine drove ashore a formidable tidal wave or tidal surge that flooded the ground floor of the Leonards' two-story house.

In the Leonards' case, there was modest wind damage to their home, but extensive flood damage. Nationwide paid $1,600 for damage to the roof which was attributable to wind damage only. The Homeowner's policy covered losses caused by rain blown through a hole in a roof, wall or window. Further, exclusively wind-related damage, such as a blown-off roof or a window damaged by a wind-propelled projectile, was covered under the policy. Nationwide, however, denied coverage for damages caused by water and by the storm surge's concurrent wind and water.

The district court agreed the water damage exclusion was enforceable and precluded coverage for any damages caused by water. Significantly, however, the court found the anti-concurrent causation clause ambiguous and unenforceable. Therefore, wind

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> usually dry. . . . This definition does not change or depend on whether the event is a natural disaster or a man-made one - in either case, a large amount of water covers an area that is usually dry. The plain ordinary and generally prevailing meaning is all-inclusive.

Id., slip. op. at 6-7.

More recently, in a Katrina-related case, the Ninth Circuit agreed with the reasoning in *Sher* and held that a shipyard covered in up to ten feet of water unquestionably experienced "an inundation of water over normally dry land," and therefore experienced a flood within the meaning of the policy's exclusion. *Northrop Grumman Corp. v. Factory Mutual Ins. Co.*, 2008 U.S. App. LEXIS 17270, at *10-11 (9th Cir. Aug. 14, 2008).

damage was recoverable even if it occurred concurrently or in sequence with the excluded water damage.

The Fifth Circuit reversed, finding the anti-concurrent causation clause was not ambiguous. *Id.* at 430. The clause unambiguously excluded coverage for water damage "even if another peril" - *e.g.*, wind - "contributed concurrently or in any sequence to cause the loss." The district court failed to recognize three discrete categories of damage at issue: (1) damage caused exclusively by wind; (2) damage caused exclusively by water; and (3) damage caused by wind "concurrently or in any sequence" with water. *Id.* According to the Fifth Circuit, the classic example of a concurrent wind-water peril was storm-surge flooding following on the heels of a hurricane's landfall. The only type of damage covered under the policy was damage caused exclusively by wind. But if wind and water "synergistically" caused the same damage, such damage was excluded. *Id.*

The Leonards also argued the efficient proximate cause doctrine should apply. The Fifth Circuit disagreed because the policy's anti-concurrent causation clause controlled.

The Fifth Circuit's discussion of the anti-concurrent causation clause in *Leonard* has been criticized by some for providing a loose causation analysis. *See, e.g.,* David P. Rossmiller, "Katrina' Still Making Waves: Hurricane Katrina Cases in the Fifth Circuit Court of Appeals," Bloomberg Finance L.P. (2008) ("Rossmiller"). The decision implies that the anti-concurrent cause language actually works like the media stereotype. Under the analysis in *Leonard*, the clause allows the insurer to escape payment for covered wind damage merely because of the fortuitous occurrence of uncovered flood water acting on

the same house. As we have seen, this is an incorrect analysis of the anti-concurrent causation clause unless the two perils work together to cause the same damage.

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

Tuepker featured a more accurate analysis of how the anti-concurrent causation clause is applied.

Tuepker involved another Katrina driven storm surge that completely destroyed the insureds' home on the Mississippi Gulf Coast. The storm was so destructive that only a slab remained. State Farm refused to cover the damage. Relying on the efficient proximate cause doctrine, the district court determined there was coverage. The district court held if the policy was inconsistent with this settled rule of law, it was invalid. The district court also found the anti-concurrent causation clause was ambiguous and ineffective to exclude damage caused by wind or rain.

Once again, the Fifth Circuit reversed. First, it determined the water damage exclusion in State Farm's policy excluded damage from flood, waves, tidal water, and overflow of a body of water "all whether driven by wind or not." This provision accurately described the influx of water into the Tuepkers' home caused by the Katrine storm surge. Consequently, this language unambiguously excluded damage caused by water.

Next, the Court followed *Leonard* in addressing the anti-concurrent causation clause. This clause, in combination with the Water Damage Exclusion, provided that indivisible damage caused by both excluded perils and covered perils was not covered. The Court noted that State Farm conceded that if the wind blew off the roof of a house, the loss of the roof would not be excluded merely because a subsequent storm surge completely

destroyed the entire remainder of the structure. The roof loss occurred in the absence of any excluded peril and was therefore covered. As in *Leonard*, the Fifth Circuit again determined the anti-concurrent causation clause was enforceable under Mississippi law, and that it replaced the efficient proximate cause doctrine.

Tuepker, unlike *Leonard*, stuck to the facts presented in analyzing the anti-concurrent causation clause and did not theorize about how the clause might work in other circumstances. Therefore, the analysis in *Tuepker* has been better received than in *Leonard*.

D. *Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618 (5th Cir. 2008)

The Broussards' Biloxi, Mississippi home was completely destroyed by Hurricane Katrina, leaving only a concrete slab. The Broussards had a State Farm homeowner's policy, but no flood insurance. State Farm denied their claim based on evidence that suggested the home was more damaged by flood than wind.

Neither the anti-concurrent causation clause nor the flood exclusion was at issue in *Broussard*. Instead, the case focused on the allocation of the burden of proof in determining whether there is coverage for a total loss to a house caused by both wind (a covered peril) and flood (an excluded peril). Obviously, this is an important consideration in "slab" cases where the evidence is nonexistent. Consequently, rulings regarding which side has the burden of proving what damage occurred, what caused it, and what the damage is worth will determine which side will win.

Because the State Farm expert could not distinguish between the wind and water damage to the Broussards' home, the district court found State Farm failed to meet its burden to establish by a preponderance of the evidence that a portion of the loss was

attributable to the excluded flooding. As a result, the district court granted a Judgment as a Matter of Law in the homeowner's favor. *Broussard*, 523 F.3d at 623.

The Fifth Circuit reversed. Reviewing the trial court record, the Fifth Circuit found that two of State Farm's experts testified that damage to the Broussards' home came from the storm surge. One expert determined it was "75% likely" that wind caused a relatively small amount of damage before the storm surge arrived, but Katrina's winds were not strong enough to cause structural damage to the house. Given the data available regarding the Broussards' home, no wind engineer could state more definitively whether there was wind damage or specify the extent of the damage more precisely. Based on this testimony, State Farm's evidence was more than sufficient to withstand the homeowners' Motion for Judgment as a Matter of Law. *Id.* at 625.

Finally, the court noted that the insured had the basic burden of proving a right to recover under the policy. The insurer then bore the burden of proving that a particular peril fell within a policy exclusion. *Id.* at 625-26. The case was remanded with instructions that the parties must meet their burdens of proof. The ultimate allocation of wind and water damage was a question of fact for the jury.

E. Judge Senter Comes Full Circle in Katrina Cases

Senior Federal District Court Judge L.T. Senter, Jr., of the Southern District of Mississippi, handled many of the Katrina cases at the trial level. Judge Senter authored the initial decisions in *Leonard*, *Tuepker*, and *Broussard*, all of which were eventually reversed by the Fifth Circuit. Nonetheless, Judge Senter has been highly commended for handling a high volume of Katrina coverage cases. Judge Senter has established a website for the more

important Katrina cases decided by the Southern District of Mississippi. The site is at www.mssd. uscourts.gov/insurance, htm.

In a more recent case, Judge Senter offered a cogent analysis while discussing the applicability of the anti-concurrent causation provision. *See Dickinson v. Nationwide Mutual Fire Ins. Co.*, No. 1:06CV198 (S.D. Miss. April 25, 2008). Nationwide argued the policy's anti-concurrent causation provision excluded coverage. Nationwide submitted that because wind damage preceded the damage from storm surge flooding and occurred in a sequence of events, the "in any sequence" language invalidated plaintiff's claim for wind damage.

Judge Senter found this interpretation unreasonable. The anti-concurrent causation clause applied only to damage to a specific item of insured property that was attributable to both the excluded peril of flooding and also another cause, i.e., wind. Any loss in which the excluded peril of flooding had no part did not fall within the anti-concurrent cause provision because it was not part of "the loss" to which the provision referred. Wind and storm surge flooding were separate causes of separate damage to the insured property, and the separate wind damage did not contribute, sequentially or concurrently, to "the loss" caused by storm surge flooding. Accordingly, the wind damage was outside the anti-concurrent cause provision and was a covered loss while the subsequent flood damage was not.

In conclusion, Judge Senter stated, "Wind and flood were separate and not concurrent causes of damage to the insured property, and the wind damage that precedes the storm surge does not contribute, sequentially or concurrently, to 'the [excluded] loss' caused

by storm surge flooding and referred to by the [anti-concurrent causation clause]." The Fifth Circuit could not have stated it better.

VII. Conclusion

A homeowner must carefully consider whether to purchase hurricane and flood insurance. If a mortgage company requires the homeowner to insure for hurricane damage, or if the home is located in a flood zone, the choice is easy. Otherwise, the cost of the premium must be weighed against the potential risk of going without insurance. Typically after a major catastrophe, public officials and the media preach the virtues of having more insurance. The hard choices must be made, however, well in advance of a major storm and perhaps without full knowledge of how much risk is at stake.