

# Katrina in the Fifth Dimension: Hurricane Katrina Cases in the Fifth Circuit Court of Appeals

by

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## I. INTRODUCTION

Hurricane Katrina was actually three storms — the real one, the insurance litigation that resulted from it, and the media and political hoopla over the litigation. This article is about the aftermath of these storms — “aftermath” in a loose sense of the word, because intense and bitterly fought Katrina litigation is still ongoing in trial courts as of this writing, but aftermath nevertheless, in the sense that the cases that are the most important and far-reaching in their effect on the interpretation of policy language have already gone through trial courts and been reviewed on appeal by the U.S. Fifth Circuit Court of Appeals.

In a large chunk of the remaining cases, the issues are not strictly those of policy interpretation. Instead, those cases have descended into a sort of trench warfare between State Farm and a group of policyholder firms known first as the Scruggs Katrina Group, and then as the Katrina Litigation Group, following the withdrawal from Katrina litigation of famed plaintiff’s attorney Dickie Scruggs after he, his attorney son and another member of the Scruggs Law Firm were indicted on federal conspiracy charges relating to an alleged attempt to bribe a state court judge in a case against a firm that had been booted out of the SKG. The case, in one of the many ironies of Katrina litigation, was over the division of attorney fees paid by State Farm in a settlement of 640 Katrina cases. These events, which I have chronicled daily for many months on my legal blog, make for a fascinating study on the uses and abuses of the legal process in insurance litigation. When these events have played themselves to a conclusion, the story of the Scruggs offensive against State Farm, the insurer’s

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## § I

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counter-offensive and the bribery charges will provide an abundance of riches for another article. But for now, let us stick to insurance issues in the more traditional sense and examine the Fifth Circuit's Katrina jurisprudence.

In the last issue of Critical Issues,<sup>1</sup> I examined these “three storms” through the lens of the anti-concurrent cause provisions of homeowners policies. As I said then, and it is even more true now than it was then — the great irony of Katrina litigation is that, in large part, it came to be dominated by debates over anti-concurrent cause language — in court, yes, but especially in the media, political and public perception. This is ironic, because anti-concurrent cause language was, in reality, not a necessary part of any Katrina case I have examined. It may be that such a case is out there, one where wind and water actually caused damage that is concurrent within the meaning of that word in insurance policies, but I have not seen one, nor has anyone been able to show me such a case.

The irony continued with the appeal of trial court rulings to the U.S. Fifth Circuit Court of Appeals.<sup>2</sup> After initial losses at the trial court level on some key policy provisions — anti-concurrent cause language in two major cases, the flood exclusion in another — insurers not only reversed these losses, but also ran up the score in *Tuepker v. State*<sup>3</sup> and especially in *Leonard v. Nationwide*<sup>4</sup> in doing so.

The Fifth Circuit's rulings on anti-concurrent cause language extended the interpretation of such language even beyond that advocated by insurers at the trial court level and suggested a much broader application of anti-concurrent language than insurers had actually employed in adjusting Katrina claims. In yet another irony connected with anti-concurrent cause language, while policyholders mounted a full-scale charge against it in trial courts, in the end the Fifth Circuit not only rebuffed these assaults but gave insurers an interpretation they had not really asked for and had little right to expect. Anti-concurrent cause language was not rendered null, as policyholders had hoped, but instead validated and pumped up with steroids, emerging stronger than ever.

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<sup>1</sup> See David P. Rossmiller, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina and Beyond*, New Appleman on Insurance: Current Critical Issues in Insurance Law 43 (Oct. 2007).

<sup>2</sup> One is tempted to call the Fifth Circuit one of the more conservative circuit courts of appeal, and therefore an auspicious venue for insurers' Katrina appeals, but although this is a label that is fairly regularly pinned on the Fifth Circuit in the media, it seems to me the measure of what is “conservative,” “moderate” or “liberal” is difficult to state with precision and unreliably subject to the bias of the beholder. For an example of a news treatment of the court as conservative, in the Washington Post, see <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/18/AR2005071801251.html>. Media impressions are one thing, but what of scholarly studies? Even those who perform attempts at more scientific categorization of ideology in jurisprudence admit that the criteria selected are based on “very simple stereotypes.” See [http://www.law.uchicago.edu/news/sunstein\\_judges2.html](http://www.law.uchicago.edu/news/sunstein_judges2.html). In that it seems doubtful those stereotypes say much about whether a given decision on insurance law can feasibly be categorized as liberal or conservative, it is perhaps best to eschew an ideological label and simply look at the tenor and analysis of the particular opinions discussed in this article.

<sup>3</sup> 507 F.3d 346 (5th Cir. 2007).

<sup>4</sup> 499 F.3d 419 (5th Cir. 2007).

In a third major case, *In Re Katrina Canal Breaches*,<sup>5</sup> the Fifth Circuit reversed the district court's ruling that the flood exclusions of several insurers were ambiguous and unenforceable. A fourth important case, *Broussard v. State Farm*, was not yet decided by the Fifth Circuit as of the writing of this article, but both policyholder attorneys and insurer-side lawyers sensed the wind was blowing strongly the insurer's way during oral argument before the three-judge panel, to the degree it will be a great surprise if the Fifth Circuit rules against State Farm.<sup>6</sup> *Broussard* is about neither anti-concurrent cause language nor the flood exclusion — instead its central issue is one that received far less attention in Katrina litigation, the allocation of the burden of proof of damages. This horribly dull sounding phrase is, unlike anti-concurrent cause language, the real key to the most controversial Katrina cases — those where homes were eradicated by hurricane damage, making it difficult to say whether covered wind or uncovered storm surge was the agent of destruction. With losses such as these so-called “slab” cases, the evidence is scattered or gone, and which side has the burden of proving what damage occurred, what caused it and what that damage is worth usually will determine which side wins. This statement is all the more true because insurers uniformly faced hostile juries in Katrina cases that had little patience for insurers' arguments and hammered them with a vengeance at any opportunity over perceived foot-dragging and improper treatment of homeowners.<sup>7</sup>

In private and candid interviews with me, some Katrina policyholder lawyers admitted that the outlook for their side was bleak if the Fifth Circuit returned a decision as favorable to insurers as they expected. Not only was the burden of who had to prove damages at stake, but State Farm had also appealed the denial of its motion for change of venue from the Katrina devastated jury pool of southern Mississippi, where almost everyone on the jury either suffered Katrina destruction or knew someone who did, to northern Mississippi. Not only was the north of the state much less hard-hit by Katrina, but, as Mississippi residents explained to me, there are cultural differences between the two areas that would lead many in the north to be more skeptical of the claims of Gulf Coast residents. In addition, the logistics of trying cases in the north would be difficult at best — Mississippi is made up of small and medium-sized cities that are not readily accessible by commercial airlines, the northern part of the state is a long way from the Coast by car, and the practical reality is that firms not already located in that part of the state would have to open temporary offices

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<sup>5</sup> 495 F.3d 191 (5th Cir. 2007).

<sup>6</sup> I have written a great deal about the *Broussard* case on my legal blog, perhaps more than any other of the Katrina cases I have analyzed. See <http://www.insurancecoverageblog.com/archives/first-party-insurance-fifth-circuit-hears-oral-arguments-heard-in-broussard-v-state-farm.html> for analysis of oral arguments in the case. Well-known policyholder attorney Chip Merlin, who was involved in numerous Katrina cases but not *Broussard*, although he did attend oral arguments, posted a comment to the analysis regretfully agreeing that it appeared the court was telegraphing a decision for State Farm.

<sup>7</sup> For a good example of juror sentiment, read my interview with one of the jurors in *Kodrin v. State Farm*, a case in federal court in Louisiana. See <http://www.insurancecoverageblog.com/archives/first-party-insurance-juror-in-kodrin-v-state-farm-we-all-agreed-that-the-insurer-didnt-do-right-by-the-insureds-and-they-were-treated-very-poorly.html>.

near the courthouse, offices that would be inconvenient to procure and expensive to staff.

Before taking a closer look at the Fifth Circuit's Katrina cases, it may be helpful to first examine the chief bone of contention in the cases — the issue of ambiguity of policy language. The issue of ambiguity is seldom very far from the playing field of insurance litigation. If it is not on the field itself, being chased about like a football running back, it is on the sideline with its helmet on and chinstrap tightened, ready to be thrown into the action at any moment. Yet ambiguity in insurance litigation is a concept so ubiquitous, and a word so frequently tossed around, that it often is merely a buzz phrase, shorthand for a conclusion rather than a tool of analysis. What is ambiguity? Is it like pornography, hard to define but you know it when you see it? And considering the tension that always exists between simplicity and precision, how should an insurance contract read so as to be unambiguous? In fact, one might even ask whether an insurance contract can be written simply yet precisely, and if it was, would consumers even know or care? We will first explore these questions as the precursor to a closer look at the Katrina cases.

## II. SAY WHAT? THE AMBIGUOUS ISSUE OF AMBIGUITY

### A. Insurance Policy Language: When Does Complexity of Expression Equal Ambiguity?

One of the arguments used repeatedly in Katrina litigation against anti-concurrent cause language — among other policy language — is that it is incomprehensible: confusing, and if not outright self-contradictory, and so full of specialized jargon that no reasonable person could hope to understand it. Under this reasoning, anti-concurrent cause language is either outright inherently ambiguous — a sort of befuddled mishmash of incoherent legal mumbling — or is supercharged with the qualities of ambiguity by sneakily and impermissibly attempting to change the allocation of the burden of proof as to damages.

Here it may be best to provide an example of this language through the most well-known and most debated anti-concurrent cause language in Katrina litigation, State Farm's anti-concurrent clause. The word "best" is used guardedly and with reservation, because quoting insurance policy provisions is an almost sure narrative stopper, a prose-killer of the first order, a disruption akin to an over-martinied boor at a dinner party, which some might say is yet further proof that insurance language is not merely deadly boring but worse, incompatible with a state of comprehension. Yet one can hardly discuss insurance language without actually setting forth insurance language, and so at whatever risk to page-turning value, it must be done, and this is perhaps as good as any place to start. State Farm's anti-concurrent cause lead-in language, followed by the water damage exclusion, reads as follows:

We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (1) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event

occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

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c. Water Damage, meaning:

- (1) flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not[.]<sup>8</sup>

Now, more will be said about this language, its origins, intent and meaning later in this article, but at this point, let's settle for considering the attacks on the anti-concurrent cause clause. A good example of this type of argument came in an amicus brief by the organization United Policyholders in the *Tuepker* appeal.

Far from a model of clarity, the lead-in language State Farm chose to use in its LOSSES NOT INSURED section is replete with double negatives and circular reasoning which is indecipherable to a skilled wordsmith, much less the ordinary policyholder.<sup>9</sup>

This is one of the more intriguing and appealing arguments against anti-concurrent cause language, because, as a basic proposition, who is against simpler, more understandable writing? It is difficult to find those willing to self-identify as principled opponents of clarity. But coming out in favor of more comprehensible prose is much like saying you are in favor of more health, beauty or money. Who isn't, really? The real questions are: can this be achieved? Why is the policy language the way it is? Is there is a better way to express this concept? And if so, what would such language look like?

These questions have no easy answers, but we must try to find the answers nonetheless because the questions are important to insurance litigation. I analyzed this State Farm language and its origin extensively, along with property insurance causation theory in general, in the October 2007 edition of *New Appleman on Insurance: Current Critical Issues in Insurance Law*.<sup>10</sup> That article is available as a lengthy reference, but it is vital for the reader's understanding of what will come later in these pages to repeat and summarize some of the analysis here.

### **B. Causation Theory as Reflected in Insurance Policies: Just Dropped in to See What Condition My Causation Was in**

Causation theory is one of the more elusive and challenging concepts in the human philosophical taxonomy, and causation relating to property insurance — although a much more limited inquiry — can and does likewise pose difficulties.

Causation is the most consistently misunderstood and misanalyzed issue to arise in

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<sup>8</sup> *Tuepke*, 507 F.3d at 351.

<sup>9</sup> *Tuepker v. State Farm*, Amicus Curiae Brief of United Policyholders in Support of Appellees/Cross-Appellants John and Clair Tuepker, page 21 (filed April 10, 2007).

<sup>10</sup> David P. Rossmiller, *Interpretation an Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina and Beyond*, *New Appleman on Insurance: Current Critical Issues in Insurance Law* 43 (Oct. 2007).

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Katrina litigation, certainly by the public, media and politicians, but also by lawyers and judges. While I believe the Fifth Circuit got the causation analysis more right than wrong in the major Katrina appeals, the causation analysis of each of these cases is flawed to some extent. Some of these flaws are relatively minor, but others are not, and will cause lawyers and parties unnecessary grief for years to come.

Again, more on that later, but as introductory material we should note a few things about property insurance causation and anti-concurrent cause language — what it is and why it is.

- The current forms of anti-concurrent cause language in first-party property insurance coverage have existed since about the mid- to late 1980s. Anti-concurrent cause language, as could be said with just about every clause in an insurance policy, was developed in response to court rulings. The motivation to come up with new and tighter anti-concurrent cause language was adverse case law, most significantly but certainly not exclusively in California state courts, that expanded the concept of causation of property insurance losses.
- The default common law rule for analysis of multiple causes of property loss has long been what is most often referred to as the Efficient Proximate Cause Rule. Except in a few states, such as California where courts interpret an insurance statute as mandating this rule, efficient proximate cause is considered a default rule only — in other words, it is an implied contract term developed through the common law that falls short of being enshrined as public policy, and will be employed only if the contract fails to specify some other form of causation analysis, such as an anti-concurrent cause provision.
- Efficient proximate cause calls for a search for the efficient, dominant or moving cause — other terms are also used, but they all express the same idea — among multiple causes of the same loss.
- This notion — multiple causes of the same loss — is absolutely essential to understand thoroughly, or a causation analysis is likely to go off the rails at an early stage of the trip. Single cause loss presents no causation analysis problems. A debate might exist over the meaning of terms of coverage or the language of exclusions, but the analysis of the cause itself is as simple as it can get — there is one cause and that is it. Efficient proximate cause was developed to deal with circumstances where one can say a specific physical loss to specific physical property was due to two or more forces: multiple causes.
- The fact that two or more forces cause damage to property covered under one policy held by one person does not mean the loss is due to multiple causes. For example, covered hurricane wind damage that causes \$50,000 in damage to a house is due to one cause. If uncovered hurricane storm surge destroys the house utterly, that is separate damage from a separate force. Two losses, each stemming from a single cause. What the policy covered is physical loss to property, not the house per se as a structure. In single causation, damage that

is due to a covered force is not eradicated by a later uncovered cause — the uncovered force does not supersede the covered one.

- Multiple causation exists only where two or more forces — occurring either concurrently or in sequence — combine to cause the precise same damage. The word “concurrent” as used in this way bears very little resemblance to the way the word is used in common parlance or even in other legal contexts. The word as used here does not connote a temporal element — the proximity in time (and I show this through examination of the case law in the prior article) of causes has nothing to do with whether they are considered concurrent. In the strictest sense, concurrent means that two causes that are independent of each other combine and lead to one result, and the result would not have occurred in the absence of each cause. If this cannot be said, the cause is not concurrent. Sequential causes are those that are dependent on each other and follow from one another like dominoes toppling — for example, a water pipe break discharging water that leads to a mudslide that destroys a house.

Again, all that and more is explained in the earlier article,<sup>11</sup> and that is probably enough about causation and concurrent causation theory for now, except to note two more things.

First, this language was developed in response to court decisions that were rapidly altering the concept of what was and was not a cause, primarily including the expansion of concurrent cause analyses that, in insurers’ eyes, circumvented exclusions by defining new things as causes and saying that as long as any concurrent cause was covered, the loss was covered.

Second, the State Farm language was developed after a great deal of internal debate that included efforts to express anti-concurrent cause language in terms ordinary people could readily understand. These efforts were deemed unsuccessful and insufficiently precise — another way of saying that “plain English” was considered inadequate to encompass key words, phrases and terms of art from the holdings of prior court cases and expressly counter the analyses of these courts and the results they handed down. Remember this factor, because it will be discussed at length later in examining why anti-concurrent language is worded as it is, and in analyzing whom the drafters of anti-concurrent language are addressing.

### **C. Everyone’s a Critic: Are Criticisms of State Farm’s Anti-Concurrent Cause Language Justified, and If So, Can Anyone Understand Any Insurance Policy at All?**

As we have seen, the State Farm anti-concurrent cause language has been attacked as hopelessly convoluted to the point ordinary consumers have no more hope of understanding it than they do of picking up a work on mathematical theory and holding a scintillating conversation about it with a stranger in an airport lounge.

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<sup>11</sup> *Id.*

It is worthwhile to consider the big picture of criticisms of insurance policy drafting to better inform and give context to analysis of *Tuepker* and the other Fifth Circuit Katrina cases. After all, the question of ambiguity-by-complexity is a fair one to raise and deserves an attempt at an answer.

In truth, the accusing finger of incomprehensibility could be pointed not just at State Farm's anti-concurrent cause clause or anti-concurrent cause language in the policies of other insurers. By the broad standard of the United Policyholders brief paragraph quoted above, many parts of an insurance policy fail to make the grade. Indeed, by the standard of comprehensibility to the average policyholder, it is quite possible that every insurance policy fails, in totality and in every section, for an average reader who picks up the policy without some special knowledge of insurance theory and history.

Although the incomprehensibility of insurance language to the layman is an accepted truth in insurance, it is somewhat surprising that this phenomenon has not been the subject of more scholarly studies than it has. In one study published in 1967 by the *Journal of Risk and Insurance*, the author, Forrest E. Harding, compiled empirical evidence of the ability of American adults to read and understand a standard form auto policy, apparently one of the few such independent studies readily available to the researcher.<sup>12</sup> This study is old by some standards, but in light of continuing legal fistfights over ambiguity and insurance policy opaqueness, there is little reason to discount its findings and conclusions based on age discrimination.

In the study, the readability of two auto insurance policies and one life insurance policy was compared to other forms of writing, including: the Bible (Standard Revised Version); *The Meaning of Relativity*, by Albert Einstein; *Baseball Is a Funny Game*, by Joe Garagiola; Time magazine; and the Wall Street Journal. The comparison was made with the Flesch readability formula — sometimes called the Flesch Reading Ease test — after Rudolf Flesch, whose post-World War II works on plain, comprehensible writing have been extremely influential. The test measures the number of syllables per 100 words (this is called syllable density) and the length of sentences.

Not surprisingly, the principle behind the test is that long sentences with big words are harder to understand.<sup>13</sup> A score of 90 to 100 means the material is very easy, and should be able to be understood by a fifth grader. A score of zero to 30 means it is very difficult and at the level of a college graduate. (With a much higher percentage of people attending college these days than when Flesch began writing after World War II, one can wonder whether that means a higher percentage can understand complex

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<sup>12</sup> The Standard Automobile Insurance Policy: A Study of Its Readability, *Journal of Risk and Insurance*, Vol. 34, No. 1 (March 1967), pp. 39–45. The article is difficult to find online except by purchase from the *Journal of Risk and Insurance* at [www.jstor.org](http://www.jstor.org). Harding, at the time of the study, was a marketing instructor at Northern Illinois University and a Ph.D. candidate at Arizona State University. Before that, he worked his way up the ladder with the Farmers Insurance Group in Los Angeles, where his last position was a Regional Sales Administration Supervisor.

<sup>13</sup> Just in case anyone is interested, the formula is expressed as follows:

writing or whether the assumptions about the knowledge or reading ability that college graduates possess need to be revisited).<sup>14</sup>

*Baseball Is a Funny Game* was found to be the easiest to read, with a score of 80.17, or what at the time, in 1967, was considered fifth-grade level. The Bible received a score of 66.97, Time got a 52.30, and the Wall Street Journal a 43.30. Interestingly, a Northwestern Mutual Life Insurance policy was scored at 34.56, but an Allstate auto policy received a score of 18.44, just slightly less difficult than Einstein's book, which received a 17.72. A specimen standard auto policy prepared by the Health Insurance Institute and the Insurance Information Institute received a score of 10.31, making it substantially more difficult to understand than Einstein's explanation of his theory of relativity.<sup>15</sup>

The Garagiola book had an average sentence length of 20 words. Time, the Wall Street Journal and the life insurance policy had average sentences of 23 words, while the Bible and *The Meaning of Relativity* had 33. The Allstate policy had an average 34 words to the sentence, and the standard form specimen policy 38.<sup>16</sup>

As for number of syllables per 100 words, the Garagiola book was again the easiest, along with the Bible, both with 125. Time had 154 syllables per 100 words, the Wall Street Journal 166, the life insurance policy 176, and the Allstate policy 183. Einstein

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<sup>14</sup> Rudolf Flesch, 1911-1986, was an Austrian-born author and reading and writing expert and consultant came to the United States in 1938, the year Hitler forced a union between Germany and Austria. He became a noted advocate of clear writing — his most famous book *Why Johnny Can't Read*, published in 1955, has become a stock phrase in American English. Flesch was a critic of the then-popular “look-say” method of memorizing words by sight, and successfully advocated for a return to the study of phonics, or sounding new words out. He was for simple language and against allowing “proper” language or usage to be arbitrated by elites — probably not as great a concern as it once was, as American society has continued to demonstrate dynamism and fluidity that undercuts the permanency of elites.

<sup>15</sup> For those who want to test their comprehension of Einstein against their understanding of an insurance policy, here is how page 1 of Einstein's book begins:

The theory of relativity is intimately connected with the theory of time and space. I shall therefore begin with a brief investigation of the origin of our ideas of space and time, although in doing so I know I introduce a controversial subject. The object of all science, whether natural or psychology, is to coordinate our experiences and bring them into a logical system. How are our customary ideas of space and time related to the character of our experiences?

The experiences of an individual appear to us arranged in a series of events; in this series the single events which we remember appear to be ordered according to the criteria of “earlier” and “later,” which cannot be analyzed further. There exists, therefore, for the individual, an I-time, or subjective time. This is not in itself measurable. I can, indeed, associate numbers with the events, in such a way that there is a greater number associated with the later event than with an earlier one; but the nature of this association may be quite arbitrary. This association I can define by means of a clock comparing the order of events furnished by the clock with the given series of events. We understand by a clock something which provides a series of events which can be counted, and which has other properties of which we shall speak later.

The Meaning of Relativity, Princeton Science Library (1922).

<sup>16</sup> *Id.* at 42.

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barely nosed out the standard form auto policy, with 192 and 190 syllables respectively.<sup>17</sup>

The study's conclusion was that nine out of 10 U.S. adults cannot be expected to understand the standard form auto policy. This percentage was based, of course, on assumptions at that time about the percentage of college graduates in the American population, but there is little reason to think the conclusion would be different if replicated today, despite higher numbers of college graduates and even though the industry largely has made attempts to carry out many of the recommendations listed in the study:

- Simplification of the physical arrangement of the policy, such as grouping conditions, exclusions and definitions into their own sections;
- Making policy provisions apply to the entire policy rather than individual coverages when possible; and
- Standard definitions that apply to the whole policy.

The Harding study shows that the debate about policy readability has not changed much in 40 years. Read these excerpts from the Harding study about the conclusions of insurance lawyers, claims specialists and insurance marketing people, and you will see this is so.

There was a sharp difference of opinion among insurance lawyers toward the over-all concept of policy simplification. Some strongly supported a simplified policy, citing a need and even an economic necessity to have a more readable automobile insurance contract. However, other attorneys rejected the possibilities of a revised policy, calling attention to possible ambiguous situations that might result. They maintained that the average reader would not take time to read even a simplified policy.

. . .

The views of the claims specialists also did not coincide. Some of these individuals endorsed the concept of simplification as an aid in the settlement of claims, while others rejected it as a hindrance to claims adjustment. Another group approved of the idea in general but added serious reservations and conditions.

. . .

Of the three fields surveyed, the field of insurance sales and marketing seemed most receptive to the concept of policy simplification. In addition to citing many advantages of a more readable policy to both agents and policyholders, sales and marketing people took issue with the attorneys and claims representatives who favored retaining the present contract. Advantages of simplification mentioned by individuals in this group ranged from helping the agent do a better job of selling to a saving in postage and printing costs of over \$700,000 a year.

. . .

Arguments against revision of the standard automobile insurance policy have centered around simplification of the specific language used in the contract. The alteration of this wording, it is argued, could expose insurers to risks not contemplated in their rate structure; moreover, any legal certainty that has been achieved through repeated interpretation by the courts would be impaired.

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<sup>17</sup> *Id.*

I quote from the study at length in part because I know from experience very few people will go to the trouble and expense of ordering the article from its publisher, but also because these points in the study are more than a road sign pointing in the direction we need to go to examine the question of ambiguity, they are the core questions.<sup>18</sup>

#### D. Plainly Ambiguous: Has the Plain English Movement Made Any Difference in Consumers' Understanding of Policy Language?

As a result of tireless work by advocates of clear legal writing like Rudolf Flesch and law professors like David Mellinkof, Fred Rodell and Joseph Kimble, plain English laws for insurance policies and others consumer contracts have been enacted in most states.<sup>19</sup> Although the strength and specificity of these laws vary, the intent is the same — to bring contracts into the realm of the understanding of the ordinary person.<sup>20</sup>

There can be no doubt that the Plain English movement confronted real problems of a massive, even pervasive scale. Nor can there be any doubt that the enactment of plain English laws — as well as insurers' voluntary decisions to make policies more readable in response to urging by academics and consumer groups — have made insurance policies at least somewhat easier to read.

But that begs the question. Forget about how easy or hard it is to read. Are the guts of a policy any easier *to understand* than they once were? When you get to the real heart of the matter, is it still all so much hot air to the average person, about as easy to understand as an unannotated book of Shakespeare's plays for someone who is not familiar with the storyline of any of the plays?

If the success of the Plain English movement is measured not by the number of

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<sup>18</sup> We would also do well to remember some limitations of the Harding study — it measured only theoretical readability not actual comprehension by real readers, nor did it explore the differences in intent or use between, say, *The Meaning of Relatively*, and an insurance policy. No one has a contract with Einstein over the theory of relativity — one may understand what he said, have half a clue, or no clue at all, and unless you are an astrophysicist and mathematician, the effect on your life cannot be measured in practical terms. An insurance policy, however, *is* a contract between the policyholder and the insurer, and legal agreements express rights and obligations that require someone to figure out exactly what these are. But who is that someone, and who are policies written to be read by? In the Harding study, insurance lawyers observed that it is no use to try to simplify policies because policyholders won't read them anyway. This is something that is borne out by what studies have been conducted, but the best evidence is the evidence of our own eyes and our own behavior — even insurance lawyers don't read their own policies. Ask 25 people you work with if they read their insurance policies, and 25 will say no.

<sup>19</sup> J. Christopher Rideout and Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 40 (n.14) (Jan. 1994).

<sup>20</sup> Oregon's Plain English law, Or. Rev. Stat. § 180.545, is an example of a fairly weak law, with general dictates such as that a contract must use "primarily simple sentences," present tense and active voice whenever possible, "words that convey meaning clearly and directly," adequate margins for ease of reading, and frequent section headings. On the other hand, Mich. Comp. Laws § 500.2236, Michigan's Plain English law for insurance contracts, contains readability requirements based on the Flesch formula as well as other specific writing criteria.

states with plain English laws, or by marginal gains in readability, but instead by the amount of insurance litigation over the ambiguity of terms, it is difficult to say plain English has made a real difference. In fact, although scholarly studies on the issue seem to be relatively rare, there is little evidence that insurance consumers can better understand policies than they could at the time of the Harding study, or even that they read them at all.<sup>21</sup>

This raises important questions: why is policy language written the way it is? Is it legal laziness? Do lawyers and scribes rely on their secret language as a security blanket or pacifier in that torn-up, mud-filled no-man's-land of expression where the mind fights and crawls forward inch by inch, foot by foot and yard by yard, trying to get a grasp on fleeting concepts that flicker close at hand, then vanish when you reach out to grab them, only to appear again half a mile away? Do they find when the going gets really tough in draftsmanship that it's best to string together some legal-looking paragraphs, declare victory and take a nap?

Is it an insurance company trick? Are policies made intentionally vague, with the knowledge that most people will not sue to define or enforce their rights, and when they do, there is enough wiggle room and a sufficient fuzz factor to the language to let insurers bring their superior legal resources into play and claim the language means virtually anything they want?

Let's turn back for a moment to think what Rudolf Flesch might say about this. Among his many books — his first was published just after World War II and the last in 1983 — is *How To Write Plain English: A Book for Lawyers and Consumers* (1979). In the book, he said:

Well, it's been my experience that lawyers are apt to use Plain English right up to the point where the going gets tough. Then they'll say, this idea is too complex — it can't be put into Plain English no matter how hard you try. . . . On that theory, you would draft a legal document, and just when the poor layman needed special help in understanding it, you would leave him in the lurch.<sup>22</sup>

Flesch makes a good point here, one that would be even better if the drafters of insurance policies were primarily concerned with communicating with policyholders. In fact, however, they are not.

### **E. Writing for the Audience: To Whom Are Insurance Companies Talking When They Write Policy Language?**

Why do insurance policies continue to be issued that are filled with language a layman cannot understand? This question has been analyzed with great insight by Prof.

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<sup>21</sup> Although academic literature on the subject is not as frequent as one might expect, industry studies consistently show that people have at best a very imperfect idea of what their policies cover. For example, a 2007 consumer survey conducted by Zogby International for MetLife Auto & Home found widespread misconceptions about homeowners and auto coverage. I wrote about this survey on my legal blog at <http://www.insurancecoverageblog.com/archives/miscellaneous-another-survey-finds-consumer-misperceptions-about-auto-home-insurance.html>.

<sup>22</sup> *How to Write Plain English* at 3.

Michelle Boardman in a 2006 law review article that is destined to become a classic work on insurance policy ambiguity.<sup>23</sup> Recall that the unstated assumption of the Harding study, and the stated assumption of Rudolf Flesch's observations about the hindrance of legalese to the layman, is that the audience of the writing is the ordinary person. Boardman's thesis is that this is not true. Insurance companies do not write to be understood by the people who buy their policies. Instead, they write to be understood by courts. She persuasively writes that:

Bad boilerplate can shake one's faith in evolution; not only does it not die away, it multiplies. The puzzle is why. Much of boilerplate is ambiguous or incomprehensible. This alienates consumers and is increasingly punished by courts construing the language against the drafter. There must, therefore, be some hidden allure to ambiguous boilerplate. The popular theory is trickery: drafters lure consumers in with promising language that comes to nothing in court. But this trick would require consumers to do three things they do not do — read the language, understand it, and take comfort in it.

There is a hidden allure to ambiguous boilerplate, but the trick lies in the courts, not the consumer. The trick is a private conversation between drafters and courts; excused from the table is the consumer, who could have no fair duty to understand, and so has no duty to read. With the consumer out of the room, edits and additions to boilerplate are targeted to courts alone. The new language does not need to make sense to a layman. It does not even need to make sense standing alone; a judge will read the language in the context of precedent, with the aid of briefing.

Boilerplate, used widely, repeatedly, applied uniformly to all, is like a broad statute, or the First Amendment. An innocent first reader is not on notice that the true meaning of the words is found in the case law. Drafters do not use this language to trick consumers, however, because they no longer care what consumers think of the language. Drafters value boilerplate because courts know what it means.<sup>24</sup>

As Boardman implies, despite the efforts of the draftsman, language is like a jar of change spilled in a crowd — it's up for grabs, and whether it will be returned to the jar or wind up in someone else's pocket is entirely in the hands of the voting and deciding audience. With something like a script for a television series, the ones who vote on meaning and quality are the viewers, the critics and the advertisers. They say whether the purpose has been achieved, and if the purpose is worthy.

But with policy language, the only vote that counts is that of the court. As she states, because the overwhelming majority of policies that are sold are standard form policies, the consumer does not have much of a choice of policy language, so insurers must compete on price and efficiencies of service (as well as some distinctions in coverage). This also reduces the incentive or need for the consumer to read the contract.

Nor is there any value to insurers to deviate markedly from the way policies are written and expressed — any change in language decreases the value of the insurer's past actuarial and litigation experience and means another run through the gauntlet of precedent in multiple jurisdictions. Even if the current language means the insurer takes a hit in some cases, as Hamlet said, fear of the unknown "Makes us rather bear

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<sup>23</sup> Michelle Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 Mich. L. Rev. 1105 (March 2006). Boardman is an assistant professor at George Mason University School of Law.

<sup>24</sup> Boardman, 104 Mich. L. Rev. at 1105.

those ills we have, Than fly to others we know not of.”<sup>25</sup>

Taking from these and other sources, and from common sense and logic, let’s assume the following for discussion in this article:

- People don’t read insurance policies.
- One reason they don’t read them is they can’t understand them.
- Another reason is they wouldn’t care to read them no matter how simply they were written — insurance policies are boring, will involve difficult and intricate concepts no matter how “simple” you make them read and in any event, almost all of them are standard forms, you don’t even see the policy until after you buy it and the language will be the same whether you read the policy or not.
- Difficult concepts are difficult to explain. Good writing principles can make them easier to understand, but there are limits on communication imposed by factors outside the control of the author. Could Einstein have written his book the same way Joe Garagiola wrote his? Could an insurance policy be written the in the same style, manner and tone I am using to write this article?
- Insurance contracts involve difficult concepts, and when they don’t involve difficult concepts, they involve difficult distinctions.
- While English is an extraordinarily flexible and rich language capable of expressing almost any thought, its very richness means almost any expression is subject to debate about meaning, particularly when differing or opposing interests collide. Think of relatively “plain English” statements such as the First, Second or Fourth amendments to the U.S. Constitution.
- The cleverness, ingenuity and creativity of a person’s interpretation of language is especially noticeable when that interpretation directly affects the person. In the absence of controlling court precedent, or in a non-legal context, settled opinion by elites or merely by the *Zeitgeist*, human nature and the course of human affairs will guarantee that different interpretations of any phrase will be offered, and that these interpretations will range from nonsensical to improbable to reasonable to persuasive to convincing.
- Even with settled language, time marches on, and questions will arise over how to apply settled language to different and new facts.
- Drafters of language will write only to those who read the language and vote on its meaning.<sup>26</sup>

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<sup>25</sup> William Shakespeare, *Hamlet*, III.i.83–84.

<sup>26</sup> Professor Boardman makes a similar point about who the drafter is writing for in a somewhat different way in her article at 104 Mich. L. Rev. at 1119, but the thrust of her analysis is substantially the same as this statement, and it is an analysis with which I not only agree, but think makes intuitive sense once it is explained thoroughly.

Some of these assumptions may be rejected by some, but the majority are probably acceptable to most people. If so, the next stage of the examination is this — under the realities of the insurance litigation system, the Great Workshop of the Common Law, can insurance policies be written any better than they are, and should they be?

A number of factors impose limits on the ability and desirability of attempting to make insurance policy definitions more precise and inclusive. Among these are cognitive dissonance, the immensely flexible nature of the English language, incentives for various readers to read what they want to see, the fact that even insurance language that seems clear has no real meaning until courts have interpreted it and given it legal significance, and the tendency of simple language to acquire its own forms of ambiguity through loss of precision. In other forms of prose, clarity is achieved not merely through attempts at description, but by the writer's other tools — allegory, metaphor, simile, foreshadowing, humor. None of these literary devices have ever been employed as devices in insurance contracts nor will they be, for obvious reasons. So if one is stuck with the method and denied the means, what is an insurance drafter to do?

In a 1985 article on concurrent causation and the drafting of State Farm's anti-concurrent cause language, Michael E. Bragg, then an in-house counsel for State Farm, addressed this question:

The difficulty, of course, is usually not one of intention, but one of language. We humbly acknowledge the inherent artificiality, inadequacy, and imprecision of our language. Yet we ask the policy drafter to forge the magic words that are at once easy for the lay reader to comprehend and at the same time legally sufficient for the court to sanction. It is this challenge of writing for a dual audience (laymen and judge), and the often contrary demands of each, that leaves fertile ground for litigation.

Public and regulatory pressures to develop "easy to read" policies had earlier resulted in eliminating the litany of specific events in favor of the single term "earth movement." Gains in brevity, however, are almost always accomplished through a loss in precision. In light of judicial demands on insurers to say precisely that they mean, most carriers have returned to describing a dozen or more kinds of excluded activity.<sup>27</sup>

What does all this mean? It means policy drafting is caught in a feedback loop, courts complain about language and strike it down, insurers make some countermove in response, and the whole thing comes full circle again and again. It means policy draftsmanship is like a game of chess played by insurers and courts, while the crowd only knows how to play checkers. The players move their pieces back and forth across the board, with no thought to whether the "audience" would approve, because the audience members don't get it, they never have and they never will. This may be a discouraging or disheartening statement to some, but acceptance of it at least allows for the realization that the expression of complex concepts with limited tools of

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<sup>27</sup> Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 Forum 385 (Spring 1985). The Bragg article, as it appears online in the LexisNexis database, does not contain page numbers. The quoted material is, if the article is printed out in a Word format, on pages 6 and 7.

expression — while the pieces keep moving across the board, no less — does not necessarily mean that complexity is equal to ambiguity.

### III. FIFTH CIRCUIT CASES: KATRINA'S WINDS BLOW INSURERS' WAY

#### A. The *Leonard* Decision

##### 1. Ambiguity in a Vacuum

One of the relatively few tenets of insurance coverage law that everyone can agree on is that policy language is not ambiguous in a vacuum. Negligence that causes no harm is not actionable negligence, a tree that falls in the forest makes no sound unless someone is there to hear it, and language can be ambiguous only as applied to the facts of the case before the court.

Noticeably absent from the Fifth Circuit's Katrina decisions — or from the decisions of the underlying district court — has been a focused analysis of whether the facts indicate a loss with multiple causes. This must always be the first step when one considers whether anti-concurrent cause language is implicated, because if specific property loss does not have two or more causes, there is obviously only one cause and one cause cannot be concurrent or in sequence with itself.

The *Leonard* case was different from many of the most contentious Katrina cases — the so-called “slab” cases where homes were completely swept away by flood surge, or destroyed by tornadoes or other high winds, depending on which side's evidence was believed. Although the home of Paul and Julie Leonard was only 12 feet above sea level in Pascagoula, Mississippi, and fewer than 200 yards from the Mississippi Sound, it was not completely destroyed — a phrase that is both relative and redundant-sounding. Relative because a home does not necessarily need to be knocked utterly to pieces to be destroyed as habitable quarters, or to incur damage that would cost more to fix than the home is worth, and redundant-sounding because normally the word “destroyed” would be considered sufficient unto itself without an accelerating adverb. But “completely destroyed” came to be somewhat of a term of art in Katrina litigation, differentiating homes that were reduced to rubble from those that were instead damaged beyond hope of salvage.

These slab cases were so contentious because the cause of destruction could be and almost always was disputed, with the insurer claiming storm surge wrecked the house, and policyholders claiming Katrina's ferocious winds, including numerous locally spawned tornadoes, tore apart the structure. But the Leonard home stood up through the storm. The evidence at the Leonard trial showed the home received only modest wind damage. Shingles on the roof were broken and otherwise damaged, the non-load-bearing walls of the garage and the garage door were severely damaged, doors in the house were blown open and a wind-blown projectile made a hole in a

ground-floor window.<sup>28</sup>

Water damage, however, was much greater. A 17-foot storm surge had hit the Leonards' neighborhood, inundating the ground floor of their home with five feet of sea water. The second floor was not damaged.<sup>29</sup>

At a bench trial before Senior Judge L.T. Senter, Jr., who at one point in Katrina litigation was saddled with a case docket of more than 1,000 cases because other judges in the Southern District of Mississippi were conflicted out because of their own involvement in Katrina insurance litigation, the Leonards offered expert testimony that the total damages exceeded \$130,000, but the figure did not specifically apportion damages between wind and water. Their claim was for some \$47,000 in wind damage. After applying the Leonards' \$500 deductible, Nationwide had paid the Leonards \$1,661.17, based on its adjuster's evaluation of the causes of the damage.<sup>30</sup> No matter which evidence you believe, this damage presents a fairly simple causation analysis: wind caused some damage to certain parts of the house and garage as a single, independent force, and water caused substantially more damage to other parts of the property.

The indications of property damaged by both forces under these facts appears limited perhaps to the first-floor doors or portions of the first floor — rain could have entered through doors blown open, and the doors themselves, when they were blown open, probably were damaged, and then further damaged when soaked with water. Still, the forces of wind and water would have caused separate, discrete damage even to this property. For example, think of an \$800 couch damaged by rain water when a branch crashes through a window. If rain caused \$100 in damage to the couch, say, the cost of cleaning it, and then storm surge ruined it by covering it in mud, debris and sea water, the couch is destroyed, but by two separate forces that caused separate, independent damage. The two forces were not concurrent as in terms of property loss causation — although they meet the criteria of being independent and both causing damage to the couch, they did not cause the same damage. The rain, a covered loss, caused \$100 in damage, and uncovered flood caused the remaining \$700 loss. There is multiple causation, therefore, but no justification for applying multiple causation analysis to the damage, neither an efficient proximate cause analysis nor an anti-concurrent cause analysis.

In the warm-up to its analysis, the Fifth Circuit made it plain, however, that its analysis would not follow these lines, when the court summarized Nationwide's position this way: "Nationwide informed the Leonards that damages caused by water and the storm surge's concurrent wind-water action were barred, respectively, by the water-damages exclusion and the [anti-concurrent cause] clause."<sup>31</sup>

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<sup>28</sup> Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 426 (5th Cir. 2007).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

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This did not need to be. In its trial brief in the underlying case,<sup>32</sup> Nationwide stated that “the Court will likely not need to address” the anti-concurrent cause provision of the Nationwide policy, but the reason given was “[b]ecause the evidence will show that plaintiffs’ damage was due to water and not wind.” The explanation of multiple-force damage and concurrent causation in the Nationwide brief is quoted at some length below, because the framing of the issue is one key reason the causation analyses of both the trial court and the Fifth Circuit are off-base. The trial brief said:

[T]here simply is no evidence of any wind damage for which Nationwide has not already tendered payment — no damage to the roof, no strikes on the house, and no evidence wind breached the house. To the contrary, the damage is all consistent with water, not wind. . . . However, even assuming, *arguendo* that wind contributed to, but was not the exclusive cause of, plaintiffs’ loss, the plain language of the policy excludes coverage for such a loss and is fully enforceable.

Plaintiffs’ homeowner’s policy plainly and clearly states that a “loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.” . . .

Concurrent causation is a term applied when two or more perils cause and/or contribute to a loss. The issue is important in the context of hurricane damage where many losses are the result of flood waters, and, thus, insureds and their attorneys look for additional factors that may have possibly contributed to the loss. However, where there is an anti-concurrent causation clause in place, it makes clear that a loss will not be covered if it was caused by an uninsured event, regardless of whether an insured event also occurred (which, standing alone, might have been covered). . . .

[The brief then gave several examples of case law discussing damage from multiple forces]. To be sure, where wind (and rain) cause identifiable damage to plaintiffs’ property and water was not a contributing cause of the damage then, **that** damage is a covered loss. However, where the most that can be said is that wind contributed to what would otherwise be a loss due to water damage, the plain language of Nationwide’s homeowner’s policy clearly excludes that loss. It makes no difference whether the wind damage occurred before or after the water damage occurred . . . . To now interpret Nationwide’s policy as covering damage caused by water, merely because some other event incidentally contributed to the same loss, would grant policyholders a windfall and would leave Nationwide no choice but to join those other insurance companies who simply decline to offer coverage for wind damage altogether.<sup>33</sup>

This was neither the clearest, most precise nor simplest explanation possible of the analytical task before Judge Senter, nor of the concept of concurrent or sequential damage. This, and the examples given from case law, can be interpreted as saying that subsequent flood damage wipes out the requirement to pay for prior wind damage. One could say the fact that Nationwide had in fact paid for some wind damage shows that this is not a valid interpretation of the trial brief’s explanation. On the other hand, the payment could be explained as merely payment for damage in which water obviously could not have played a part, still leaving open the interpretation that, if the Leonards’ home had been swept away by flood, no payment at all would have been owed for prior wind damage.

The trial brief’s explanation also suffers from a lack of specificity and nuance about

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<sup>32</sup> Document 160 on the court docket, Leonard v. Nationwide, Case 1:05-cv-00475, U.S. District Court for the District of Southern Mississippi. This document is available on PACER, the federal court electronic filing and access system. See pages 3 and 30–33 of the trial brief.

<sup>33</sup> *Id.* at 30–33.

what the “loss” is when multiple forces each cause damage to a structure. Again, one could read the brief to say that the insurer believes that when the structure or a portion of it is damaged by wind, and then later further damaged by water, anti-concurrent cause language precludes coverage: “where the most that can be said is that wind contributed to what would otherwise be a loss due to water damage . . .” The examples and the explanation are strikingly fuzzy about exactly when wind would be seen as contributing to a “loss” and when the loss would “otherwise be due” to water.

## 2. Anti-Concurrent Cause: Correct Analysis Removes Ambiguity

It would have been far easier and better, particularly given the facts of this case and the Nationwide payment of wind damage, to analyze the damage as separate, discrete losses to property that each were due to single causes. Under that analysis, it would have been clear why Judge Senter was “not likely” to need to address the policy’s anti-concurrent cause provision — because it was irrelevant in light of any possible interpretation of the evidence. With individual losses caused only by single forces, no form of multiple cause analysis is needed because neither the policy’s anti-concurrent cause language nor efficient proximate cause is implicated.

Once again, the key to understanding this is to step back from the view that it is the house that is insured. Although in common parlance this is true, it is not true in a causation analysis, and only confusion can come of such a view. Instead of the house being insured, what is insured in the Nationwide policy is “accidental direct physical loss to property.”<sup>34</sup> Under this definition, a house is not one property, but many properties, each of which can suffer “loss” within the policy. This can be seen by an example.

Say that a wandering group of uninsured hippie free spirits have a brand new boomerang that they want to try out. The reason is not important, perhaps they envision using it to knock apples out of trees, or they desire to practice hard and advance into the ranks of competitive boomerang throwing and earn some extra walking-around money. Unfortunately, in this scenario, they are novices, and when one of the group lets the boomerang go, it crashes through a window of your house and smashes a very expensive antique chandelier to bits. Let’s just suppose that you got a great value on the chandelier at a yard sale, where you bought it for 10 cents but later found out it is worth more than the whole physical structure of the house.

Then suppose that, several seconds later, as you look out through the shattered pane, you see the hippies fleeing at high velocity and suppose they mean to dodge responsibility. Although that may be one explanation, you see another possibility — a towering wall of water is rushing toward your house and you hear the cry go up, “Run for your life, the dam has broken.” As you rush for the back door, you knock over an open 50-gallon drum of gasoline you had carelessly left in your kitchen when a deliveryman brought it to the wrong address that morning, and as you by force of habit reach to turn out the lights on your way out the door, you instead mistakenly flip on

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<sup>34</sup> Leonard, 499 F.3d at 424.

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the burner of your gas stove. As you run down the alley you see the house explode into flames, which just two minutes later, as you can see from your place atop a fortunately located nearby hill, are extinguished by the wall of water, which unfortunately also completely destroys the house.

In this example, three forces caused damage — negligent hippies, fire and water. Assume the first two are covered, but the third is not. Is it not clear that, even though all these forces caused “accidental direct physical loss to property,” both the loss and the property are distinct, and that each loss to property was caused by a separate single force? With this example, we can see that proximity in time does not determine whether causation is multiple. Should the damage to the chandelier not be paid merely because a dam burst just after the chandelier was destroyed, and would have destroyed it anyway? Should the fire damage to the home (although admittedly somewhat difficult to calculate) not be paid for the same reason? What if the hippies broke the chandelier a day before, or two weeks before? Doesn’t that make it even more clear? Why then, if you substitute wind for hippies, is it not equally clear?

In my earlier Current Critical Issues<sup>35</sup> article explaining the origin of the current version of anti-concurrent cause language, including examination of the case law that led insurers to develop it and a look at actual instances of concurrent and sequential causes, it can be seen that the above is in fact the proper causation analysis. An example of a real *concurrent* cause is a garage weakened by uncovered dry rot that is blown down by covered high winds — neither was sufficient unto itself to cause the single loss to property, but together they acted to create the result. An example of a real *sequential* cause is a covered lightning strike on a hillside that causes an uncovered mudslide. Neither the hippie-fire-water scenario above, nor the damage to the Leonard home, are examples of either concurrent or sequential damage.

If adjusters, lawyers and judges would employ the causation analysis above, claims analysis, briefing and case law would be much more focused. While it appears that, in many Katrina cases, the right analysis or something very close to it was used by adjusters and lawyers (again, the prior article gives specific examples), unfortunately the case law arising out of Katrina is confused and confusing on this subject. The Fifth Circuit’s *Leonard* decision is a prime example.

### 3. Where the *Leonard* Court Went Right and Where It Went Wrong

The Nationwide water damage exclusion, and the anti-concurrent cause language that prefaces that exclusion as well as 12 others, reads as follows:

1. 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 . . .
  - b) Water or damage caused by water-borne material. Loss resulting from

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<sup>35</sup> David P. Rossmiller, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina and Beyond*, New Appleman on Insurance: Current Critical Issues in Insurance Law 43 (Oct. 2007).

water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly to cause the loss. Water and water-borne material damage means:

- (1) Flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind.<sup>36</sup>

In what amounted to a stretching exercise while the Fifth Circuit panel got the preliminary policy language and facts of the case summarized, before getting a work out on the real analysis, the court signaled problems to come in its causation analysis. The court quoted the anti-concurrent lead-in above, italicizing the second sentence, and you can see where the court is headed — as Bob Dylan said, you don't need a weatherman to know which way the wind blows. The court summed up anti-concurrent language this way — “this prefatory language denies coverage whenever an excluded peril and a covered peril combine to damage a dwelling or personal property,” which as we have discussed above sounds more or less right if you are half-listening while trying to watch TV, but is actually flat-out wrong.

Also, immediately above the anti-concurrent provision was the explanation that this language “addresses situations in which damage arises from the synergistic action of a covered peril, e.g., wind, and an excluded peril, e.g., water . . . .” Note the soft focus, lack of clarity, passive tone and general sogginess of this sentence. The language “addresses situations” where “damage arises.” Forces do not cause damage here, damages merely arise. What does the damage arise from? In this explanation, not from single causes or single forces, or from multiple causes or multiple forces, but from “synergistic action,” perhaps an unfortunate choice of words. “Synergy,” that great 1990s buzzword of business schools and motivational self-help seminars, meaning the interaction of discrete agents or conditions such that the total effect is greater than the sum of the individual effects.<sup>37</sup>

The word actually has fairly long history, and was originally associated with the 1657 theological doctrine that human beings will achieve spiritual regeneration by working with Divine Grace. Somewhere around the beginning of the 20th Century the word at first was used to refer to toxicology and drug interactions,<sup>38</sup> and now has acquired various shades of meaning, all revolving around the central idea of an entire system working in ways that could not be forecast by examining the behavior of the separate parts. Just one word in the opinion, yes, but unfortunate on two grounds — first, because the word has connotations far broader than the concepts of concurrent and sequential cause; and second, because it is a presage that precision in causation analysis will not be the court's long suit.

It doesn't take long for this prophecy to be fulfilled, as the court in the next

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<sup>36</sup> Nationwide policy issued to Paul and Julie Leonard, attached as Exhibit 1 to the memorandum in support of the Leonard's motion for summary judgment, item 21 on the case docket on PACER. This language can be found on page D-1 of the policy and page 29 of the exhibit.

<sup>37</sup> Merriam-Webster Online, at [www.m-w.com](http://www.m-w.com).

<sup>38</sup> See entry “Synergy” at [www.wikipedia.org](http://www.wikipedia.org).

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paragraph claims that “[t]he inundation of the Leonards’ home was caused by a concurrently caused peril” — storm surge and wind. Sigh. Having gone through the analysis and the examples above, it is not necessary to note again all the reasons why this is incorrect. However, it does bear repeating that this conclusion is not only wrong but what’s more, is contrary to the public and litigation stance of almost every insurance company in Katrina litigation. It also flies in the face of the fact of Nationwide’s wind payment to the Leonards.

This is not to say the entire case is wrong — the conclusion that the anti-concurrent cause language is not ambiguous is one I agree in principle with, at least under the facts of this case and the type of damages Hurricane Katrina caused. The court’s analysis of the Leonards’ misrepresentation claims against their insurance agent — essentially agreeing with the lower court that no actionable misrepresentation occurred — seemed correct, as did the court’s response to an attempt by Dickie Scruggs, the Leonards’ attorney, to prevent the circuit court from ruling on the anti-concurrent cause question by dismissing the Leonards’ cross-appeal.

But the Fifth Circuit’s anti-concurrent cause analysis, while taking a jab at Judge Senter for his supposed “non-textual” interpretation of the policy, is as far off the mark in its own way as Senter’s analysis, arguably even more so.

The opinion, written by Chief Judge Edith Jones, comes up with “three discrete categories of damage at issue in this litigation” — damage caused solely by wind, damage caused solely by water, and damage caused by wind acting “concurrently or in any sequence” with water.<sup>39</sup> Nowhere in the opinion, however, does she specify what damage, or loss, was due to concurrent causes, nor what damage was due to sequential causes. In fact, one gets the sense the court was throwing these terms around almost colloquially.

An example is the court’s correction of Judge Senter’s hypothetical hurricane damage in the underlying case. He said the anti-concurrent cause provision was ambiguous because the terms contradicted the policy’s coverage — “an insured whose dwelling lost its roof in high winds and at the same time suffered an incursion of even an inch of water could recover nothing.” As the Fifth Circuit pointed out, Judge Senter’s analysis is incorrect. However, it is incorrect not because the reasons given by the Fifth Circuit, but because the scenario hypothesized by Senter is not one involving concurrent cause of loss to the exact same property, it is an example of single forces causes separate damage.

In the Fifth Circuit’s opinion, however, Senter’s analogy is said to be “unfounded” because of “the policy’s wind-coverage clause, which clearly preempts the court’s scenario.” The wind-coverage clause listed by the Fifth Circuit does indeed say the policy covers “accidental direct physical loss to property . . . caused by the following perils,” including “windstorm or hail” and “[d]irect loss caused by rain . . . driven

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<sup>39</sup> *Leonard*, 499 F.3d at 430.

through roof or wall openings made by direct action of wind . . .”<sup>40</sup> This wind clause, however, is in Coverage C of the policy, which encompasses personal property, not components of the insured structure. The home is insured under Coverage A and other structures under Coverage B, which do not contain the same clause.<sup>41</sup>

The fact that an express wind coverage clause is absent from Coverages A and B does not mean, of course, that wind damage or loss from rain entering through a breach in the structure is uncovered. To the contrary. But the court’s reliance on language from Coverage C to analyze loss that would fall under another section of the policy is not an encouraging sign of comprehension of the nuances of coverage.

The court’s explanation of Judge Senter’s error continued with this statement, which is almost astounding in its scope, because it grants the anti-concurrent cause provision a broad interpretation not claimed even by insurance companies in Katrina litigation:<sup>42</sup>

If, for example, a policyholder’s roof is blown off in a storm, and rain enters through the opening, the damage is covered. Only if storm-surge flooding — an excluded peril — then inundates the *same* area that the rain damages is the ensuing loss excluded because the loss was caused concurrently or in sequence by the action of a covered and an excluded peril. The district court’s unsupported conclusions that the [anti-concurrent cause] clause is ambiguous and that the policyholder can parse out the portion of the concurrently caused damage that is attributable to wind contradict the policy language.<sup>43</sup>

The court makes no effort at all to support this statement either through case law or analysis or what the words “concurrent” or “in sequence” mean in this context, which cannot be done without some sort of reference to the historical development of anti-concurrent cause language.

It seems as if the court uses the words as one would use them in common parlance — if you and I are in the same room, we’re concurrent occupants, if I walk into the room after you do, we entered the room sequentially. In reality, the Fifth Circuit’s example, contrary to the way Judge Jones characterized the damage, once again provides a scenario involving single causes of loss, as in the example I gave earlier about damage to a couch. Just because two forces cause damage to the same object does not make them either concurrent or sequential forces — to qualify as these, the forces must combine to cause the exact same damage. Although Judge Jones

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<sup>40</sup> *Leonard*, 499 F.3d at 431.

<sup>41</sup> See Nationwide policy, page C-1.

<sup>42</sup> See, for example, a blog post by policyholder attorney Chip Merlin about the *Leonard* case, available at <http://merlinlawgroup.wordpress.com/2007/09/05/fifth-circuit-got-it-wrong/>. About Judge Jones’ example of concurrent causation, Merlin wrote: “Where did that come from? Virtually every adjuster and claims manager I have ever deposed with that similar hypothetical situation in a Katrina loss has said coverage would be granted under the all-risk policy for the full amount of the loss. Maybe Judge Jones and her colleagues know more about how to deny insurance claims than the people that could profit from doing so.” I assume by “full amount of the loss,” he means that adjusters would agree that all damage that is provable as being due to wind and rain coming in through the breach in the home would be paid, but that separate flood damage is a different loss and would not be paid because flood damage is excluded.

<sup>43</sup> *Leonard*, 499 F.3d at 431.

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apparently believed she was writing an example of forces causing the exact same damage, analysis of her hypothetical shows this is not true.

Remember Judge Jones' scenario — if storm surge “inundates the *same* area that the rain damaged.” That, however, is not the same thing as saying that the same exact loss occurred because of a combination of forces.

Say that I break into your house and steal \$1,000 from a safe, thinking you will not notice it is missing from a stash of \$100,000 in cash inside, and I happen to do this just an hour before a criminal mastermind pulls off a planned job where he empties the entire safe. Say that for some reason my theft would be a covered loss but the master criminal's theft would be uncovered. Is there any reason to see my theft as wiped out or expunged by the fortuity of a later theft? Although one might, in the common sense of the words, say these losses were sequential or possibly even concurrent, they are neither concurrent nor sequential under a proper analysis of anti-concurrent cause language. Each theft caused unique loss. The fact that the second thief would have taken all the money that was in the safe, including the \$1,000 I had already removed, does not eradicate my prior theft of \$1,000. Why, then, would another analysis be proper when applied to rain damage, say to a hardwood floor, that was augmented by a later flood. The rain damage occurred without the necessity of flood contributing to it in any way. Flood therefore cannot be a multiple cause of the loss, either concurrent or sequential. Instead it is merely a second single cause.

If the Fifth Circuit had used the proper analysis, it would have been possible for the court to say the anti-concurrent cause language was not ambiguous in this case because it was not relevant to the facts of the case. That alone would serve as justification to reverse the district court's determination of ambiguity, and would have immensely clarified the issue for future litigants. There was no need to speculate as to when wind and water might produce a concurrent or sequential loss — again, I have seen no such instance in Katrina litigation where they appear to do so, so such an example is not easy to imagine. It would have been enough to say such a loss did not occur under the facts of *Leonard*.

One more point about *Leonard* is in order. Judge Jones' analysis of the efficient proximate cause doctrine and its place in this case was lengthy, quite good and also correct. The court said efficient proximate cause, a rule developed by courts, was superseded by a differing causation standard in the contract.<sup>44</sup> Because anti-concurrent cause language was instituted by insurers precisely to overturn efficient proximate cause and provide a more predictable causation analysis, efficient proximate cause analysis of the moving or dominant cause is not warranted, unless for some reason public policy or state statute mandates that it must be used. As I stated in the earlier Critical Issues article, almost all courts that have considered this issue have found that efficient proximate cause is merely a common law default rule — an analysis to use if the insurance contract does not specify another — and does not rise to the level of

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<sup>44</sup> *Leonard*, 499 F.3d at 431–436.

public policy. Ironically, however, the court's analysis of anti-concurrent cause does not further the goal of providing a predictable causation analysis, it further confuses the picture.

One more aspect of the case should be mentioned — the Fifth Circuit's affirming of the lower court's holding that the Nationwide flood exclusion was unambiguous. The argument of the policyholders was that the flood exclusion was ambiguous because Katrina storm surge was not a flood, it was instead a different manifestation of wind as a direct force of loss. The Fifth Circuit did not buy it. The court focused on the part of the flood exclusion that said damages from "waves" was uncovered "whether or not driven by wind," and said it is clear the language applied to Katrina storm surge.<sup>45</sup>

#### A. The *Tuepker* Case: a Shorter, Simpler Analysis

The Fifth Circuit's decision in *Tuepker v. State Farm*<sup>46</sup> followed *Leonard*, and like *Leonard*, also considered whether anti-concurrent cause language was enforceable. The State Farm anti-concurrent cause language is worded quite differently from the same type of clause in the Nationwide policy in *Leonard*, but the court found no distinction in this context in how they worked.

As I explained in the October 2007 article in Critical Issues, the final form of the State Farm clause included language that was intended to specify that a concurrent or sequential cause, to qualify as such, must be a "but for" cause of the loss.<sup>47</sup> Again, the key to comprehending the significance of this qualifier is to understand what the "loss" is to which the causation analysis must be applied.

The district court's analysis of the State Farm policy language, however, focused on the damage to the entire structure of the Tuepker house and failed to take into account that cumulative damage to the totality of insured property is not the same thing as concurrent or sequential loss to elements of that property.

Here is what Judge Senter wrote:

If the evidence were to indicate that part of the plaintiffs' losses were attributable to wind and rain (making them covered losses under the applicable provisions of the policy), and part of the loss were attributable to flooding (which is excluded from coverage), the determination of which was the proximate cause of the damage to the insured dwelling or to any given item of property (or the determination of the proportion of the damage to the insured dwelling or to any given item of property was proximately caused by each phenomenon) would be a question of fact under applicable Mississippi law. *Grace v. Lititz Mutual Insurance Co.*, 257 So.2d 217 (Miss. 1972). Likewise, if the evidence shows that the damage occurred over time so that wind damage preceded damage from a "storm surge," the wind damage would be a covered loss, even if subsequent damage from the "storm surge" that exacerbated the loss were properly excluded from coverage. *Lititz Mutual Insurance Co. v. Boatner*, 254 So.2d 765 (Miss. 1971).<sup>48</sup>

<sup>45</sup> *Leonard*, 499 F.3d at 438–439.

<sup>46</sup> 507 F.3d 346 (5th Cir. 2007).

<sup>47</sup> Rossmiller at 63, *Bragg* at 8.

<sup>48</sup> *Tuepker v. State Farm Fire & Cas. Co.*, Civil Action No. 1:05CV 559 LTS-JMR, 2006 U.S. Dist. LEXIS 34710, at \*6 (S.D. Miss. May 24, 2006).

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This explanation is fairly close to going in the right direction — it recognizes that, under the circumstances presented by the case, wind damage and water damage are inherently separate agents of damage and therefore separate causes of loss. The terms used in this analysis, however, suggest that Judge Senter was looking to the efficient proximate cause model of causation analysis, and that he assumed the anti-concurrent cause analysis would — in the court’s view — impermissibly eradicate the separateness of damage by individual forces. There are at least two things wrong with this analysis.

First, it does not address why a contractually mandated causation analysis could not replace the default rule of efficient proximate cause. Second, it makes a wrong assumption about the way anti-concurrent cause language works, appearing to suppose that it requires the aggregating of all loss and therefore the exclusion of major elements of covered loss even if a tiny fraction of the damage to a home is uncovered. If the court had correctly analyzed the anti-concurrent cause language, it would have seen that it did not apply at all and there was no need to rule on its ambiguity.

To test this conclusion, we can look at the court’s statement of the facts to be decided. Remember that the *Tuepker* decision in the district court was rendered on State Farm’s motion to dismiss on the pleadings, which requires that all facts well-pleaded in the complaint must be accepted as true, and that any reasonable inferences that can derive from those facts must be interpreted in favor of the plaintiff. The district court, for example, granted the Tuepkers the favorable inference “that the destruction of their property was attributable in part to wind, in part to rain, and in part to storm surge.”<sup>49</sup>

Remember also that the district court ruled that the State Farm water damage exclusion itself, distinct from its anti-concurrent lead-in language, was unambiguous and enforceable.<sup>50</sup> Given that the court apparently recognized that damage due to multiple causes does not necessarily equal multiple causes of the same loss, and given the court’s summary of the facts presented in the complaint, the court was only a few short steps from the correct analysis. The court rightly said that the exact proportion of covered and uncovered damage could not be resolved in the motion based on the allegations of the complaint, but that the proper interpretation of the anti-concurrent cause provision would have left that question open and able to be decided later in the case. The most favorable inference to the plaintiffs, therefore, would still have resulted in the motion to dismiss being denied, but without the extraneous ruling on anti-concurrent cause.

An incorrect understanding of what anti-concurrent language does and does not do also led the court to another justification for a finding of ambiguity — the anti-concurrent cause and an exclusion for “weather conditions” conflicted with the policy’s Hurricane Deductible Endorsement. As Judge Senter saw it, the fact that the

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<sup>49</sup> *Tuepker*, 2006 U.S. Dist. LEXIS 34710, at \*9.

<sup>50</sup> *Tuepker*, 2006 U.S. Dist. LEXIS 34710, at \*9–10

policy contained a \$500 deductible for hurricane damage meant that it was intended to cover certain hurricane damage, any exclusion of wind damage as a “weather condition” would be self-contradictory.<sup>51</sup>

This is a non-sequitur for two reasons. First, the policy plainly says that any resulting loss from weather conditions that is not otherwise excluded — wind, for example — is covered. Only a misunderstanding of anti-concurrent cause language would obscure the clarity of that statement. Second, the hurricane deductible is not a term of coverage at all. Instead, it specifies under what circumstances a deductible would apply to covered damage.

Lastly, Judge Senter disapproved of the anti-concurrent cause language “[t]o the extent” it conflicts with the “settled rule of Mississippi law” that when there is damage from wind and from water, “the amount payable under the insurance policy becomes a question of which is the proximate cause of the loss.”<sup>52</sup> This statement could be interpreted three ways — that policy language conflicts with the efficient proximate cause rule is invalid; that there must be an analysis of causation of loss, not a blanket exclusion of damage because one element of it was caused by an uncovered cause; or some sort of blending of these concepts. The first reason is probably wrong — although the Mississippi Supreme Court has yet to rule on anti-concurrent language, the state Court of Appeals has upheld the State Farm anti-concurrent lead-in language another context, and by doing so suggested it would pre-empt the efficient proximate cause rule.<sup>53</sup> The second reason assumes a conclusion about the effect of anti-concurrent cause language analysis on a causal analysis. The third blended reason therefore would also be incorrect.

That sets the table for discussion of the Fifth Circuit’s decision on State Farm’s interlocutory appeal of the *Tuepker* case. The Fifth Circuit’s *Tuepker* opinion came after its *Leonard* decision by several months, which is unfortunate, because the *Tuepker* panel — the three-judge panels for each case had no judges in common — appeared to have a better handle on causation analysis. The *Tuepker* opinion is not only more nearly correct in its causation analysis, it was a more limited opinion that didn’t charge into areas where it didn’t need to go.

The key part of the court’s analysis of anti-concurrent cause is this paragraph:

As the *Leonard* opinion directs, any damage caused exclusively by a non-excluded 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. Thus, the ACC Clause in combination with the Water Damage Exclusion clearly provides that indivisible damage caused by both excluded perils and covered perils or other causes is not covered.

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<sup>51</sup> *Tuepker*, 2006 U.S. Dist. LEXIS 34710, at \*12.

<sup>52</sup> *Id.*

<sup>53</sup> *Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067, 1070 (Miss. Ct. App. 2004). This case cited with approval an earlier case in the district of Southern Mississippi, *Rhoden v. State Farm Fire & Casualty Co.*, 32 F. Supp. 2d 907 (S.D. Miss. 1998) that upheld State Farm’s anti-concurrent cause language in making an Erie guess as to what the Mississippi Supreme Court would decide.

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However, as State Farm has conceded in its briefs here and below, 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.<sup>54</sup>

This is essentially right, but it is worth pondering the use of the word “subsequent” here to consider when wind and water might act concurrently or sequentially in a hurricane, even if they did not here. If a roof came off in high winds at the exact moment storm surge hit, the timing is a subsidiary element — the question is whether the water’s impact on the structure was a necessary event to the roof’s destruction. Perhaps the impact of the storm surge’s impact might loosen the connection of the rafters or trusses to the frame, and allow the wind to succeed in removing the roof, which it would not have otherwise been able to do. It is hard to picture another scenario that involves concurrent wind-water loss.

This, of course, is predicated on the assumption that wind and water will be considered separate forces — whether they are in a philosophical sense is a debatable question, but the standard homeowners water exclusion that includes damage from waves and surface water “whether or not driven by wind,” which makes it extremely difficult to frame an argument that storm surge is merely an extension or different manifestation of wind. As for wind and water acting sequentially — remember that sequential forces are those that are dependent on one another, one giving rise to the next — it is even more difficult to imagine circumstances in which wind and water as found in Katrina-type damage could be said to act in this manner. Merely because wind toppled a house damaged and weakened by water would not necessarily mean the wind damage was excluded, simply because the excluded water damage happened first. Strictly speaking, and staying true to the definition of sequential forces as dependent on one another to produce the same exact damage, wind and water would not seem to be sequential in this hypothetical, but rather would seem to be single forces producing separate damage, just as they would be if the wind preceded the water. Instead, the question would seem to be how much damage did the excluded water cause, and what remaining value was there to the structure, if any, that would comprise compensation due to covered wind.

In any event, the Fifth Circuit thankfully refrained from speculations of this sort, and although it did not expressly delineate the distinction between single- and multiple-force causation and loss, the opinion showed implicit recognition of the distinction, and its conclusion was the same as it would have been had it gone through a more lengthy and specific causation analysis. On the basis of its causation analysis,

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<sup>54</sup> Tuepker v. State Farm, 507 F.3d 346, 354 (5th Cir. 2007). In a post on my blog analyzing this case shortly after the opinion was delivered, I originally faulted the court for, in the first sentence of the quoted material, not quite correctly stating the analysis. However, in looking back, I think I was too nitpicky and somewhat unfair to the court, and on further thought I see the way the court explained this as accurate. The post is available at <http://www.insurancecoverageblog.com/archives/first-party-insurance-commentary-on-fifth-circuits-decision-in-tuepker-v-state-farm.html>.

and the court's view that the hurricane deductible altered only the payment for covered damage and did not alter or impact the policy's coverage itself, the Fifth Circuit reversed the district court and found the anti-concurrent cause provision unambiguous.<sup>55</sup> Arguably, the appellate court could have reversed by finding that the district court should not have ruled on the anti-concurrent language in the first place, but that route probably was foreclosed by the prior *Leonard* decision, and perhaps also by practical considerations of settling the matter then and there. The *Tuepker* court also followed *Leonard* in affirming the district court's upholding of the flood exclusion itself, as well as *Leonard's* analysis that efficient proximate cause is merely a default rule for causation analysis that can be overturned by contract.<sup>56</sup>

One key issue that arose from this case and was briefed on appeal, however — the proper assignment of the burdens of proof — was left hanging because of the parties' decision to enter in a "High-Low Agreement" on payment of damages.<sup>57</sup> Under such an agreement, some payment will be owed — the higher amount if the insurer loses on the coverage issues, the lower if the policyholder prevails. The question of allocation of who has the burden of proving damage is actually much more of a key to Katrina litigation than anti-concurrent cause language. Does the policyholder merely need to show only that a loss occurred to property, and then the insured is required to prove specifically how much of the loss was caused by excluded forces? Or is the policyholder required to produce specific proof of the amount of covered loss, and when he does, the burden only then shifts to the insurer to counter that evidence?

A number of Katrina policyholder lawyers have told me they see the second formulation as not merely incorrect, but also as a backdoor way of using anti-concurrent cause language wrongly by sneakily applying it to single force causation — in essence, saying all damage is uncovered whenever any evidence exists that some of the damage was or may have been due to an uncovered cause. The insurers' view is that in the context of an "open peril" policy like homeowners insurance, "if the insured meets his threshold burden of proving an accidental direct physical loss to insured property, the burden shifts to the insurer to prove the applicability of any exclusion asserted as an affirmative defense."<sup>58</sup> In this view, however, when the insurer produces evidence that the loss was due to an excluded cause, the policyholder then must provide specific evidence that of a covered cause and the amount of loss it created.<sup>59</sup> The court, however, did not resolve this dispute because the High-Low Agreement made it a moot point.<sup>60</sup>

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<sup>55</sup> *Tuepker*, 507 F.3d at 355.

<sup>56</sup> *Tuepker*, 507 F.3d at 356.

<sup>57</sup> *Tuepker*, 507 F.3d at 356–57.

<sup>58</sup> Brief of State Farm Fire and Casualty Co., page 35, to the Fifth Circuit in the *Tuepker* appeal.

<sup>59</sup> *Id.*, at 35–36.

<sup>60</sup> A related issue was also not reached in the Fifth Circuit's *Tuepker* decision: burden of proof when it comes to loss of personal property in a home, rather than damage to the structure itself. Personal property coverage is not open peril, it is named coverage — only losses stemming from enumerated

That issue, as of the writing of this article, has yet to be taken up by the Fifth Circuit in Katrina litigation, but is the central controversy in the next case we will consider — *Broussard v. State Farm*.

**C. The *Broussard* case: the real heart of the matter in Katrina litigation.**

*Broussard* is different than the other major Fifth Circuit Katrina cases. Its primary issue is not the validity of a flood exclusion or anti-concurrent cause language, but rather who has to prove what — the allocation of the burden of proof of damages. This, as I've mentioned, is what I believe is the real heart of the dispute in Katrina litigation.

The absence of concurrent or sequential forces in Katrina makes the initial causation analysis simpler, but the issue of which forces were at work and whether they caused the same loss is only the beginning of sorting out the damage. Once it is determined that single forces each caused damage — presuming at least one force is covered and one is uncovered, if all the forces are covered or all uncovered, the analysis is simple, pay or don't pay — the next step is to try to allocate the damage between them. Not surprisingly, this was the flash point for most Katrina lawsuits in Mississippi, the center of the most intense and contentious Katrina litigation.

Katrina damage in Mississippi involved about 1,200 slab cases, and with houses demolished and scattered, the evidence was open to interpretation to a much greater degree than when the structure remained standing. Although in every slab case there was proof that a strong storm surge had reached the home's location, policyholders provided evidence through expert witnesses that high winds or hurricane-spawned tornadoes extensively damaged or destroyed the homes.

In the January 2007 trial in *Broussard*, State Farm acknowledged that wind and water were separate causes of loss and said that wind damage that was proven by the homeowners, the Broussards, was not excluded by the anti-concurrent language and would be covered. However, State Farm said the Broussards had not proven wind damage.

In his opinion giving his reasons for directing a bad faith verdict against State Farm, Judge Senter explained the issue this way: the Katrina storm surge would have destroyed the house, but the key issue was whether wind damage had occurred, and if so how much, in the hours before the storm surge hit. Judge Senter said that State Farm had improperly forced the plaintiffs to prove wind damage, when State Farm's own expert testified there was a 75 percent chance that between zero and 35 percent of the shingles on the Broussards' roof were damaged by wind. This was improper, he said, because the burden was on State Farm to prove excluded water damage caused 100 percent of the damage — State Farm had paid nothing for wind damage. He said no reasonable juror could find for State Farm, and directed a verdict of bad faith against the insurer. The jury awarded some \$2.5 million in bad faith damages, but Judge Senter

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causes will be covered. This provides for a strong argument that the burden initially falls on and remains on the policyholder to show covered damage and allocate loss between covered and uncovered causes.

later, on his own motion, reduced it to \$1 million.<sup>61</sup>

One can argue about whether a 75 percent chance of zero to 35 percent damage to a roof means an insurer must pay for that possibility of wind damage, but that issue — allocation of damages, some of which are admitted to be covered if proven — is far different from use of the anti-concurrent cause language to deny coverage.<sup>62</sup>

Because both sides provided evidence, then, the real question in allocating the burden of proof of damages was not between some evidence and no evidence, rather the real issue was how good did each side's evidence had to be. On appeal, the Broussards have argued that the burden of proof with an "open peril" homeowner's policy — where direct accidental physical loss is covered unless excluded — always remains with the insurer. State Farm has argued that the initial burden of showing excluded loss is on the insurer, but once it produces evidence that shows the total damage or some specific element of loss was excluded, the burden shifts back to the policyholder to prove the amount of damage caused by a covered force. This formula sounds suspiciously overprecise, like some sort of Constitutional balancing test. Another way of saying it is it comes down to whether the insurer has credible evidence of excluded loss, and if so, does the policyholder have better evidence of covered loss.

Although Judge Senter said no reasonable juror could believe State Farm's proof, this Associated Press account of the *Broussard* oral argument in December 2006 indicated the Fifth Circuit panel — again including Edith Jones, the author of the *Leonard* decision — saw things State Farm's way:

State Farm claims Senter erred when he ruled the company had to prove that the Broussards' home didn't sustain any wind damage or that it had to segregate wind and water damage to the residence.

Jones, the 5th Circuit's chief judge, questioned why Senter didn't let a jury decide whether Katrina's wind or water was responsible for destroying the Broussards' home.

"All (State Farm) had to prove is that storm surge was a cause, and then a jury had to prove how much was storm surge and how much was wind," Jones said while questioning Walker.

The exchange between Jones and Walker grew testy, as the judge accused the lawyer of "playing with words."

When Walker punctuated one of his points by saying, "I don't mean to be flip," Jones responded by saying, "Most of your argument has been flip."

"Thank you, ma'am," Walker said. "I hope it was sincere."

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<sup>61</sup> Opinion on Rule 50 Motions for Judgment as a Matter of Law, January 11, 2007. Because State Farm did not prove the percentage of damage that was excluded by the flood exclusion, Judge Senter said, it must pay the entire value of the house, or about \$211,000. For further commentary and analysis, including a PDF of the rough draft of Judge Senter's ruling, see <http://www.insurancecoverageblog.com/archives/first-party-insurance-further-analysis-of-broussard-v-state-farm.html>

<sup>62</sup> Although State Farm made no wind payment to the Broussards, it has paid wind damage in other Katrina slab cases, including *Palmer v. State Farm*, Civil Action No. 1:07CV039, 2007 U.S. Dist. LEXIS 36021 (S.D. Miss. May 16, 2007) and *Williams v. State Farm*, Case No. 1:06 cv 00055, Southern District of Mississippi. For additional information and commentary on the *Williams* case, see <http://www.insurancecoverageblog.com/archives/first-party-insurance-state-farm-mississippi-couple-settle-case-during-trial-after-judge-rules-punitive-damages-not-at-issue.html>.

“It was sincere,” the judge said.

State Farm also argues that Senter shouldn’t have allowed jurors to consider punitive damages and that he abused his discretion in refusing to transfer the case from Gulfport, Miss., to northern Mississippi.<sup>63</sup>

#### **D. *In Re Katrina Canal Breaches Litigation: Fifth Circuit Finds No Ambiguity in Flood Exclusions***

Because the Fifth Circuit delivered its opinion in this case as my previous article<sup>64</sup> was going to the printer, a cursory analysis of it was included there, along with a more lengthy discussion of the underlying district court opinion. Because this was the first of the Fifth Circuit’s Katrina cases to be decided, and because it’s central theme was the validity of flood exclusions, it allowed for a shorter analysis of flood exclusions in the court’s later decisions like *Leonard* and *Tuepker*.

In the underlying case,<sup>65</sup> Judge Stanwood Duval, of the Eastern District of Louisiana examined distinctions between anti-concurrent language in various policies in a context different from that of *Tuepker* and *Leonard*. Damage in New Orleans did not entail the same destructive storm surge as in those two cases — instead of wind vs. water, the issue was man vs. nature.

Judge Duval found the flood exclusions of several insurers to be ambiguous to the circumstances — they did not specifically exclude flood damage caused by breaches in or overtopping of canals due to human negligence in construction. In these policies, he said, the definition of water damage was ambiguous as to human causes, as opposed to natural ones. Ironically, he upheld the controversial State Farm anti-concurrent cause language because it stated water damage was excluded “regardless of . . . the cause of the excluded event,” which the judge said encompassed human causes. Because the language of the other policies involved is detailed in my earlier article, one can spare the reader further exposure to it here.

Recall that anti-concurrent cause language was developed, in large part, to overturn the courts’ expanding list of causes, which had extended past natural forces to human negligence. It does not take much creativity to see the hand of man in almost any sort of damage or destruction, and if human negligence is considered concurrent with an excluded cause, the loss will be covered.

Insurers appealed and the Fifth Circuit, in an expedited opinion delivered in August 2007, just two months after oral arguments, brushed aside Judge Duval’s result and his

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<sup>63</sup> December 5, 2007 story by Associated Press reporter Michael Kunzelman. See <http://www.insurancecoverageblog.com/archives/first-party-insurance-fifth-circuit-hears-oral-arguments-heard-in-broussard-v-state-farm.html> for a report on the AP story and oral arguments.

<sup>64</sup> David P. Rossmiller, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina and Beyond*, New Appleman on Insurance: Current Critical Issues in Insurance Law 43 (Oct. 2007).

<sup>65</sup> *In re: Katrina Breaches Consol. Litig.*, Civ. Action No. 05-4182, 2007 U.S. Dist. LEXIS 91180 (E.D. La. 2007).

reasoning, and upheld the flood exclusions. As the Fifth Circuit said:

[L]evees are flood-control structures, which by definition means that they interact with floodwaters. Because levees are man-made, one could point to man's influence nearly any time a levee fails. If a levee fails despite not being overtopped by floodwaters, it is because the levee was not adequately designed, constructed, or maintained. If a levee fails due to the floodwaters overtopping it or loosening its footings, it is because the levee was not built high enough or the footings were not established strongly or deeply enough. Even where a levee does not fail, one could find a non-natural flood; where a properly designed and constructed levee causes floodwaters to be diverted downstream to another area of land, the resulting flood downstream occurs because the levee performs as designed. Any time a flooded watercourse encounters a man-made levee, a non-natural component is injected into the flood, but that does not cause the floodwaters to cease being floodwaters.<sup>66</sup>

The Fifth Circuit also, in a promising start to its Katrina jurisprudence, got the causation analysis right: the court said that neither the policies' anti-concurrent cause language nor the efficient proximate cause doctrine were implicated, because only a single causal force was at work:

But here, on these pleadings, there are not two independent causes of the plaintiffs' damages at play; the only force that damaged the plaintiffs' properties was flood. To the extent that negligent design, construction, or maintenance of the levees contributed to the plaintiffs' losses, it was only one factor in bringing about the flood; the peril of negligence did not act, apart from flood, to bring about damage to the insureds' properties . . . . Moreover, to the extent that the plaintiffs do attempt to recharacterize the cause of their losses by focusing on negligence as the cause rather than water damage, their argument fails . . . . If every possible characterization of an action or event were counted an additional peril, the exclusions in all-risk insurance contracts would be largely meaningless.<sup>67</sup>

#### E. *Chauvin v. State Farm*<sup>68</sup>

This opinion in this case was handed down by the Fifth Circuit just a few days after *In re Katrina Canal Breaches*. The case upheld the district court's ruling that Louisiana's Valued Policy Law did not apply to a total loss by flooding, an excluded peril.

Two points from this case are worth remembering. First, the Valued Policy Law is meant to provide disincentive for insurers to underwrite insurance for property for more than it is worth and charging higher resulting premiums, in the view of the Fifth Circuit. Second, the law is also meant to discourage policyholders from intentionally destroying overinsured property and reaping a windfall (in theory, someone is less likely to torch their property if they will merely break even, rather than profit, by the act). The case was appealed to the U.S. Supreme Court, which denied certiorari.<sup>69</sup> The case is also worth noting because it is an *Erie* guess as how the Louisiana Supreme Court would hold. As can be seen in the next section, that court will, as of this writing,

<sup>66</sup> *Vanderbrook v. Uniform Preferred Ins. Co. (In re: Katrina Canal Breaches)*, 495 F.3d 191, 218 (5th Cir. 2007).

<sup>67</sup> *Vanderbrook*, 495 F.3d at 233.

<sup>68</sup> 495 F.3d 232 (5th Cir. 2007).

<sup>69</sup> *Chauvin v. State Farm Fire & Cas. Co.*, No. 07-602, 2008 U.S. LEXIS 1075 (2008).

have the opportunity to consider the proper interpretation of the Valued Policy Law on an appeal from a lower appellate court.

#### IV. NON-FIFTH CIRCUIT CASES OF INTEREST

##### A. *Northrup Grumman Corp. v. Factory Mutual Insurance Co.*<sup>70</sup>

This was one of the few Katrina cases not litigated in Mississippi or Louisiana. Instead, the case was in the district court for the Central District of California. Northrop sued over the insurer's failure to pay for various Katrina-caused damage to the company's shipyards in Mississippi and Louisiana.

Northrop purchased a \$100 million primary policy that basically covered everything — no flood exclusion, no earthquake exclusion. Factory Mutual had 15 percent of the coverage of the primary layer, which was shared by some 30 insurers, and paid under the primary policy. A second layer of Factory Mutual coverage began at \$500 million in losses and continued up to \$19 billion.

The key issue, as explained by Judge Dean Pregerson, was whether the Factory Mutual excess policy clearly excluded Katrina storm surge under its flood exclusion. Pregerson said it did not, and because the exclusion was ambiguous. Here is the language of the excess policy's flood exclusion:

Flood; surface waters; rising waters; waves; tide or tidal water; the release of water, the rising, overflowing or breaking of boundaries of natural or man-made bodies of water; of the spray therefrom; or sewer back-up resulting from any of the foregoing; regardless of any other cause or event contributing concurrently or in any other sequence of loss.<sup>71</sup>

Recall that in other Katrina litigation, flood exclusions in homeowners policies have been upheld, and judges have said that storm surge — ocean water pushed ashore by hurricane winds — is a flood. Those policies, however, have included the phrase “whether driven by wind or not,” a phrase that was in the definition of flood in the Northrop primary policy but is not in the excess policy's definition. (Remember, the flood definition didn't apply to the level of damage under the primary policy because Northrop purchased an endorsement that made the flood exclusion inoperative).

Judge Pregerson therefore saw the difference between the two policies as highly significant, and he also placed great importance on past policies Factory Mutual had sold Northrop that defined flood to include storm surge, and that Factory Mutual has sold other policies including “whether driven by wind or not.” The anti-concurrent cause language at the end of the flood exclusion, therefore appears to have disregarded in the judge's analysis because he considered storm surge — without a better definition labeling it flood — as a manifestation of covered wind damage.<sup>72</sup> Factory Mutual appealed the case to the Ninth Circuit in November 2007.

<sup>70</sup> No. CV 05-08444 DDP (PLAx), 2007 WL 2385134 (C.D. Cal. Aug. 16, 2007).

<sup>71</sup> *Northrup Grumman Corp.*, 2007 WL 2385134, at \*2.

<sup>72</sup> *Northrup Grumman Corp.*, 2007 WL 2385134, at \*5–7.

**B. *Sher v. Lafayette Ins. Co.*<sup>73</sup>**

This case found the following flood exclusion ambiguous under Louisiana law:

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:

**g. Water.** Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, whether driven by wind or not . . .

The court analyzed the exclusion as follows, in a passage that is as incomprehensible as any insurance policy clause, but appears to be saying that man-caused flooding is not excluded:

A review of the Policy reveals that the parties intended to cover and include all risks that were not specifically excluded or limited. Lafayette failed to specifically exclude all floods because of the ambiguity contained within the flood exclusion. While the Policy states that it does not cover damage caused by a “flood,” it also states that it does not cover “waves, tides, tidal waves,” and the “overflow of any body of water . . . whether driven by the [sic] wind or not.” This exclusion includes “flood,” but then continues to list specific natural disasters that cause inundations of water, commonly labeled as “floods.” For example, a varying cause of a flood can be man-made or natural, as documented in La. R.S. 29:762, which states that a “flood” is a “natural disaster.”<sup>74</sup>

**C. *Landry v. Citizens Property Ins. Co.*<sup>75</sup>**

This case is about whether the Louisiana Valued Policy Law requires an insurer to pay the whole value of a house when a covered cause contributes to the total loss of the home, or whether the insurer must pay only the portion of the loss attributable to the covered cause. One hesitates to be too harsh, but the decision’s causation analysis is, at best, somewhat scattered and diffuse.

The opinion starts off badly, in the very first sentence, by posing the question whether the law requires full payment “when concurrent perils (covered and non-covered) combine, during the course of a single climatic event, to render the home a total loss.” Again, this is error because the fact two or more forces destroyed a house does not make the forces concurrent. The opinion also never analyzed or even discussed the policy’s anti-concurrent cause provision, which is somewhat like writing *War and Peace* and forgetting to talk about war. The Louisiana Supreme Court has accepted certiorari on an appeal of the decision.<sup>76</sup> Because this case analyzed the Valued Policy Law as requiring a different result than would have been obtained through the Fifth Circuit’s analysis in *Chauvin*, we will see which is right in its guess, the Fifth Circuit or the Louisiana lower appellate court. Because that decision will be handed down not long after this article appears in print, further discussion of this case is not necessary.

<sup>73</sup> 2007 La. App. LEXIS 2245 (La. Ct. App. 4th Cir. 2007).

<sup>74</sup> *Sher*, 2007 La. App. LEXIS 2245, at \*13.

<sup>75</sup> 964 So. 2d 463 (La. Ct. App. 3d Cir. 2007).

<sup>76</sup> *Landry v. La. Citizens Prop. Ins. Co.*, 969 So. 2d 615 (La. 2007).

## V. CONCLUSION

There you have it. The Fifth Circuit, in these Katrina cases, proved out Prof. Boardman's thesis that those horribly befuddling passages in insurance policies are not written in any way for comprehension by policyholders, but instead are a secret language, hidden communications between insurers and courts. Having now written two articles dominated by the subject of property insurance policy causation, and having struggled at times to do so, I cannot say with any confidence anti-concurrent language, or other policy provisions for that matter, are comprehensible to the layman. In fact, many judges and lawyers don't understand them either. In the final reckoning, however, anti-concurrent cause language was sufficiently communicative for the Fifth Circuit to go the insurers' way, although as mentioned, the court perhaps gave a more expansive interpretation to this language than insurers asked for. This is another irony of Katrina litigation, and probably not the last.