WATERED DOWN: ARE INSURANCE COMPANIES GETTING HOSED IN THE WIND VS. WATER CONTROVERSY?

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In the aftermath of Hurricane Katrina, many Gulf Coast residents whose homes were damaged or destroyed turned to their insurance companies to provide compensation for their loss, only to find that their homeowners' policy explicitly excluded losses due to flooding. Such policies often cover damage caused by wind and rain, but not from water; for many of the homes affected by Katrina, the damage was caused by a combination of wind and flooding. The author examines the so-called wind vs. water debate by focusing on two recent decisions from the Southern District of Mississippi in which insureds and insurance companies litigated the fact-intensive question of whether wind or water caused the damage to the insureds' home. The author identifies three approaches to concurrent causation—the efficient proximate cause approach, the liberal approach, and the conservative approach—identifying the positive and negative aspects of each. Ultimately, the author concludes that the conservative approach should govern and the policies should be enforced as written. Otherwise, the author asserts that insurance companies will be forced to either raise premiums or to discontinue offering insurance in the Gulf Coast region.

I. INTRODUCTION

"I lost everything. That's all I had. That's all I had."[1] On August 29, 2005, a natural disaster stormed into the Gulf Coast with a ferocity and pestilence never before witnessed in the United States. Hurricane Katrina's violent winds and raging waters left a devastating collection of destroyed homes, ruined businesses, and decimated lives in their wake. It is estimated that 9.7 million people in Alabama, Louisiana and Mississippi experienced hurricane force winds.[2] The magnitude of the storm, "the most destructive—and costly—natural disaster in U.S. history," is

1. FoxNews.com, This Is Our Tsunami, http://www.foxnews.com/story/0,2933,167633,00.html (last visited Dec. 15, 2007).

2. Press Release, U.S. Census Bureau, Census Bureau Estimates Nearly 10 Million Residents Along Gulf Coast Hit by Hurricane Katrina (Sept. 2, 2005), *available at* http://www.census.gov/Press-Release/www/releases/archives/hurricanes_tropical_storms/005673.html.

remembered by an unprecedented death toll and a relief effort that continues to this day.[3] The devastation shocked the world, leaving victims and onlookers with unanswered questions and pointing fingers.[4] The stories of woe dominated media outlets worldwide and the endless images of a once proud city reduced to a floating cesspool will forever be remembered by all who witnessed this incredible tragedy. Louisiana Governor Kathleen Blanco proclaimed that "[t]he devastation is greater than our worst fears. It's just totally overwhelming."[5]

The sheer numbers that resulted from Hurricane Katrina's destruction are staggering. One year after the disaster, a total of 1720 people were dead and 202 more were still missing.[6] An astonishing 57,535 square miles of Alabama, Louisiana and Mississippi were declared eligible for federal disaster assistance.[7] The damage to the area was so great that approximately 711,000 people were displaced from their homes and forced to live in shelters in various cities throughout the country.[8] The city of New Orleans, a focal point of the destruction, is still suffering economically from high unemployment, a dwindled workforce, and painfully low tourism levels.[9]

The devastation was most clearly evident in the tremendous piles of timber and wreckage that replaced the homes and other structures of the Gulf Coast region. One year after Katrina, the Federal Emergency Management Agency (FEMA) reported that more than ninety-nine million cubic yards of debris had been removed from Alabama, Louisiana, and Mississippi since the hurricane struck.[10] Approximately 352,000 housing units were completely destroyed.[11] The victims of the housing demolition were left in dire straits, largely dependent on their homeown-

3. *See* Press Release, FEMA, Hurricane Katrina, One-Year Later (Aug. 22, 2006), *available at* http://www.fema.gov/news/newsrelease.fema?id=29108.

4. For example, musician Kanye West attributed the delay in federal assistance to President George W. Bush, who West asserted "doesn't care about black people." Lisa de Moraes, *Kanye West's Torrent of Criticism, Live on NBC*, WASH. POST, Sept. 3, 2005, at C01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090300165.html.

5. FoxNews.com, *supra* note 1.

6. Time.com, Katrina by the Numbers, http://www.time.com/time/nation/article/0,8599,1449266,00.html (last visited Oct. 2, 2007).

7. *Id.* This area was home to six million people. *Id.*

8. *Id.* 144,000 of the displaced people had incomes below the poverty line, 183,000 were children, and 88,000 were elderly. *Id.*

9. *See id.* As of August 29, 2006, unemployment in New Orleans increased from 5.8% to 7.2%, the labor force decreased from 633,759 to 444,153, and the number of monthly passengers arriving at the New Orleans Louis Armstrong International Airport decreased from 716,362 to 580,539. *Id.* The lack of tourism in New Orleans is especially difficult because the city relies heavily on tourism to drive the economy. *See* Sophia Banay, *New Orleans' Tourism Blues*, FORBES, Sept. 2, 2005, *available at* http://www.forbes.com/travel/2005/09/01/neworleans-travel-conventions-cx_sb_0901tourism.html (indicating that tourists spend $5 billion per year in New Orleans).

10. FEMA, FREQUENTLY REQUESTED NATIONAL STATISTICS HURRICANE KATRINA—ONE YEAR LATER (2006), http://www.fema.gov/hazard/hurricane/2005katrina/anniversary_factsheet.shtm (last visited Dec. 17, 2007).

11. Time.com, *supra* note 6. Specifically, "160,000 homes were destroyed or suffered major damage in New Orleans," and "65,380 homes were destroyed in Mississippi." *Id.*

ers' insurance policies as well as federal aid to cover their losses and help resurrect their lives. Much to the surprise and dismay of many of the policy holders, however, the payouts have not been as prevalent or substantial as they had expected.[12]

These low payouts have been the result of a controversial clause found in many victims' insurance contracts. The clause, which strictly limits the liability of the insurance providers, has led to a deluge of lawsuits over the meager payouts for the damage caused by Hurricane Katrina. A typical homeowners' policy in the disaster-ravaged region contains the following exclusionary clause: "We do not cover loss to any property resulting directly or indirectly from . . . flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind."[13] The resulting controversy has even developed a catchy moniker: "*Wind vs. water* is hurricane coverage-speak for the fact that a homeowners' policy typically covers damage caused by wind and rain, but not flooding."[14] As the name suggests, the controversy centers on situations in which damage was caused by a combination of wind and water. "[F]iguring out which [peril caused the damage]—especially when both may be the cause—can be a complex and hotly contested factual issue."[15]

This note analyzes the "Wind vs. Water" controversy by examining the conflict between the right of the insurance companies to withhold payouts for damage that is explicitly excluded from homeowners' insurance contracts and the right of the homeowners to recover the finances necessary to rebuild their homes and lives. Part II lays the groundwork for understanding the wind vs. water controversy by tracing the background of exclusionary clauses in the context of property insurance. This Part also examines the purpose of the National Flood Insurance Program (NFIP) and introduces the current state of the conflict, focusing primarily on the important recent decisions in *Leonard v. Nationwide Mutual Insurance Co.*[16] and *Broussard v. State Farm Fire & Casualty Co*.[17] Part III analyzes the varying viewpoints of causation in insurance litigation cases and explores how those viewpoints directly impact the fairness of the exclusionary clauses. In doing so, Part III assesses arguments for and against the enforcement of contractual anti-concurrent causation clauses. Finally, Part IV suggests that the clauses should be enforced as written. Such an interpretation is preferable to forcing insurance companies to pay out for hazards that were not considered at the conception of the

12. *See* Randy J. Maniloff, *How Do You Catch a Cloud and Pin It Down?: Solving the Problem of Insurance Coverage for Hurricane Katrina*, MEALEY'S LITIG. REP., Sept. 12, 2006, at 3, *available at* http://www.whiteandwilliams.com/CM/NewsAlertsPDF/How-Do-You-Catch-a-Cloud.pdf.

13. Leonard v. Nationwide Mut. Ins. Co., 438 F. Supp. 2d 684, 689 (S.D. Miss. 2006).

14. Maniloff, *supra* note 12, at 2.

15. *Id.*

16. 438 F. Supp. 2d 684 (S.D. Miss. 2006).

17. No. 1:06cv6-LTS-RAW, 2007 WL 268344 (S.D. Miss. Jan. 31, 2007).

contract. Furthermore, a more pervasive mandatory use of the federal flood insurance program would eliminate the propensity to hold private insurance companies accountable for coverage that they did not voluntarily provide.

II. BACKGROUND

"In all of Anglo-American law, there is no concept that has been . . . so pervasive—and yet so elusive—as the causation requirement [that] has resisted all efforts to reduce it to a useful, understandable, and comprehensive formula regarding its underlying nature, content, scope, and significance."[18]

The causation requirement in insurance law has necessarily evolved from the traditional context of tort law.[19] Insurance is essentially a contract by which an insurer receives consideration and in return promises to pay for any damage to, or loss of, something of interest to the insured, as long as the cause of the damage was some risk covered by the insurance contract.[20] A wide array of persons and entities, from single families to enormous multinational corporate conglomerates, purchase insurance coverage as a method of transferring risk that cannot be sufficiently managed through preventative measures, receiving peace of mind in exchange for an upfront or annual insurance premium.[21] Fundamentally, risk-averse persons pay insurance companies to assume the risk of a loss.[22] However, insurance contracts may explicitly exclude coverage for certain specified perils for which indemnification may not be economically feasible. It is the nature and legitimacy of these contracted exclusions that is often litigated in insurance coverage disputes.[23]

In order to understand the current insurance coverage dispute, one must explore the background of the water damage exclusion and the relevant concurrent causation cases. Such exploration requires a close examination of both the history of the water damage exclusion and of the most recent and influential cases in the still developing wind vs. water debate. The focus of this note is necessarily limited to the two cases that

18. Peter Nash Swisher, *Insurance Causation Issues: The Legacy of* Bird v. St. Paul Fire & Marine Ins. Co., 2 NEV. L.J. 351, 351 (2002).

19. *See id.* at 352 (referring to insurance law as a hybrid between tort and contract). In tort law, a plaintiff in an injury case will have the burden of proof, which means that he must establish that it was more probable than not that the defendant was culpable and that the defendant's culpability caused the injury to the plaintiff. MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW ¶ 43.02 (2003).

20. Julie A. Passa, Case Comment, *Insurance Law—Property Insurance: Adopting the Efficient Proximate Cause Doctrine, But Saying No To Contracting out of It*, 79 N.D. L. Rev. 561, 563 (2003).

21. *See* ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 14–15 (3d ed. 2002). In theory, the amount of the insurance premiums should equate to the insured's expected loss in addition to administrative costs. *See id.* at 18.

22. *See id.* at 16. "An individual's attitude toward risk is influenced by several factors, including the probability of loss, the potential magnitude of the loss, and the person's ability to absorb the loss." *Id.* at 15.

23. *See id.* at 424–50.

are the most prominent and noteworthy as of the time of its writing: *Leonard v. Nationwide Mutual Insurance Co.* and *Broussard v. State Farm Fire & Casualty Co*.

A. The Water Damage Exclusion

This section examines the history and purpose of the water damage exclusion in homeowners' insurance policies. In order to fully appreciate the water damage exclusion, one must look at the background of exclusionary clauses of insurance contracts in general, the availability of flood insurance, and the specific language of the water damage exclusion clauses.

1. Insurance Contract Exclusions

One of the most important facets of an insurance contract is defining and clarifying with particularity what risks and perils are insured. Consequently, the authors of insurance contracts are extremely precise in their descriptions of who is covered and to what extent the covered parties' interests are protected.[24] By extension, the explicit limitations crafted into the contracts play an undeniably crucial role in the determination of the scope of the insurance provider's obligations.[25] Such exclusions act to effectively "carve out areas in the affirmative grant of coverage where no coverage will be provided."[26] There are three primary reasons for the use of such exclusions: (1) the excluded cause would be more properly insured under a different source of coverage, (2) insurance is not a suitable method to transfer the risk of loss, or (3) it is not financially viable for the insurer to provide indemnification for the particular risk of loss.[27] As this note will demonstrate, the water damage exclusion is a product of the first and third reasons.

The source of the exclusions or exceptions to indemnification is the contract itself.[28] Judge L. T. Senter, a key figure in the relevant Katrina cases, has stated that "[t]he terms of an insurance policy are to be interpreted under the rules of construction generally applicable to written contracts; and, where the terms of an insurance policy are clear and unambiguous, they are to be enforced as written."[29] This rule is derived from the "four corners rule" of contract law, which states that if "provi-

24. By negative inference certain people and interests are denied coverage. *See id.* at 424.

25. *See id.* at 409 (explaining that *all-risk* insurance provides coverage for all causes except for the specific exemptions in the contract whereas *specified-risk* coverage only insures against specified risks).

26. *Id.* at 424.

27. RAWLE O. KING, CRS REPORT FOR CONGRESS, POST-KATRINA INSURANCE ISSUES SURROUNDING WATER DAMAGE EXCLUSIONS IN HOMEOWNERS' INSURANCE POLICIES 1 (2007), *available at* http://www.opencrs.com/rpts/RL33892_20070227.pdf.

28. *See* JERRY, *supra* note 21, at 425.

29. Buente v. Allstate Ins. Co., 422 F. Supp. 2d 690, 695 (S.D. Miss. 2006) (citation omitted).

sions are clear and unambiguous, our examination is confined to the 'four corners' of the document."[30] In other words, barring vagaries, the wording of insurance contracts should generally be left to speak for itself. Also, as is typically the case in contract law, insurance contract limitations are always strictly construed by courts in favor of the insured and against the drafting party.[31]

2. Flood Insurance

The exclusionary language of the homeowners' policies in the Gulf Coast region was designed to eliminate coverage for property damage caused primarily by flooding and flood-related perils. Private insurers were first permitted to make such exclusions when Congress enacted the National Flood Insurance Program (NFIP) on August 1, 1968 as part of the National Flood Insurance Act of 1968.[32] Congress created the NFIP in response to a study that found it "uneconomical for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions."[33] In other words, before the passage of the NFIP, it was not financially viable for private insurance companies to offer flood insurance to consumers at an affordable rate. As a result, very few people were able to afford flood insurance prior to the establishment of the NFIP.[34] The lack of sufficient flood coverage resulted in drastically rising costs of disaster relief for general taxpayers because federal disaster assistance was often the sole source of financial recovery for flood damage.[35] Thus, the passage of the NFIP was intended to curtail the future costs of flood damage by providing a practicable insurance alternative to the disaster assistance.[36] The NFIP is governed by the Federal Emergency Management Agency (FEMA), part of the U.S. Department of Homeland Security.[37]

In an effort to ensure broad compliance with the NFIP, Congress passed the Flood Disaster Protection Act of 1973 mandating that homes

30. II E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 309 n.13 (3d ed. 2004) (quoting Treemont, Inc. v. Hawley, 886 P.2d 589, 592 (Wyo. 1994)).

31. *See id.* at 286. *See, e.g.*, Vargas v. Ins. Co. of N. Am., 651 F.2d 838, 839–40 (2d Cir. 1981) ("Under New York law. . .an ambiguous provision in an insurance policy is construed most favorably to the insured and most strictly against the insurer.").

32. FEMA, Answers to Questions About the NFIP, http://www.fema.gov/business/nfip/qanda.shtm (last visited Oct. 2, 2007).

33. 43 AM. JUR. 2D *Insurance* § 486 (2003). NFIP defines a "flood" as follows:

> A general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (at least one of which is your property) from overflow of inland or tidal waters, from unusual and rapid accumulation or runoff of surface waters from any source, or from mudflow.

FEMA, *supra* note 32.

34. FEMA, *supra* note 32.

35. *See id.*

36. *Id.* The program also requires participating communities to adopt "floodplain management ordinances" to reduce the flood risks. *Id.*

37. *Id.*

in particular danger of flood damage have appropriate insurance coverage.[38] This Act "require[d] federally insured or regulated lenders to require flood insurance as a condition of granting or continuing a loan when the building and improvements securing it are in the Special Flood Hazard Area (SFHA) of a community participating in the NFIP."[39]

Despite the federal requirement for flood insurance, a recent study concluded that only about half of single family homes in SFHAs nationwide actually have flood insurance.[40] The study suggests that basic economic theory is the primary rationale behind the pervasive lack of universal flood coverage:

> Economic theory suggests that over time, homeowners in SFHAs will adjust the amount of flood insurance purchased to the price charged, the accessibility of the insurance, and how strictly the mandatory purchase requirement is enforced. . . . In those areas where a larger share of homeowners believe that price (which does not vary by location, all else being equal) is high relative to their perception of the probability distribution for losses or where enforcement of the mandatory purchase requirement is lax, market penetration rates will be lower than in areas where the price is thought to be lower relative to the probability distribution of losses or enforcement is strict.[41]

Under this theory, therefore, there is a significant portion of the nationwide population that has decided that it is economically preferable to resist the purchase of flood insurance, even when faced with mandatory requirements.

In addition to the governmental mandate, statistical evidence appears to suggest that floods are a realistic threat to the entire country,[42] and that the typical flood will result in a staggering amount of subsequent property damage.[43] Predictably, the gap in homeowners' insurance coverage created by those policyholders who neglected to purchase separate flood insurance, but retained a standard homeowners' policy that ex-

38. 42 U.S.C. § 4002 (2000).

39. LLOYD DIXON, NOREEN CLANCY, SETH A. SEABURY & ADRIAN OVERTON, THE NATIONAL FLOOD INSURANCE PROGRAM'S MARKET PENETRATION RATE: ESTIMATES AND POLICY IMPLICATIONS, at xv (2006), *available at* http://www.rand.org/pubs/technical_reports/2006/RAND_TR300.pdf. This requirement was strengthened by the National Flood Insurance Reform Act of 1994. *Id.* An SFHA is an area identified by FEMA as being at high-risk for flood hazards, or "any land that would be inundated by a flood having a 1-percent chance of occurring in any given year." FEMA, *supra* note 32.

40. *See* DIXON ET AL., *supra* note 39, at xvi. This study estimates a mandatory purchase requirement compliance rate in the South and West of 80% to 90%. In the Northeast and Midwest, that rate drops to 45% to 50%. Nationwide, the compliance rate is at about 75% to 80%. *See id.* at xvii.

41. *Id.* at 33.

42. *See* FloodSmart.gov, Fast Facts, http://www.floodsmart.gov/floodsmart/pages/fastfacts.jsp (last visited Oct. 2, 2007) (noting that floods can occur in all fifty states).

43. *See* FloodSmart.gov, Statistics, http://www.floodsmart.gov/floodsmart/pages/statistics.jsp (last visited Oct. 2, 2007) (noting that the average annual flood losses in the United States in the ten year period from 1996 through 2005 was greater than $2.4 billion).

cluded flood damage, leaves the source of coverage for the flood damage unclear.

3. Water Damage Exclusions

As previously discussed, most insurance policies utilize specific exclusions to narrow the scope of coverage.[44] Accordingly, the homeowners' insurance policies of the Gulf Coast Region contained exclusions that expressly eliminated coverage for flood damage.[45] For example, the exclusionary language of the insurance policy at issue in *Leonard v. Nationwide Mutual Insurance Co*. warns that the insurer will not cover any loss resulting from "flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind."[46]

The validity of the exclusionary clauses in the Katrina cases is not in question. According to the court in *Leonard*, the "provisions of the Nationwide policy that exclude coverage for damages caused by water are valid and enforceable terms of the insurance contract."[47] However, "[t]he provisions of the Nationwide policy that purport to exclude coverage entirely for damages caused by a combination of the effects of water (an excluded loss) and damage caused by the effects of wind (a covered loss) are ambiguous."[48] Clearly, it is the anti-concurrent causation language combined with the exclusionary language that creates the controversy.

B. Seminal Cases

Given that the devastation of Hurricane Katrina is still raw in the Gulf Coast Region, case law continues to develop as victims attempt to rebuild their lives. However, the seminal decisions in *Leonard* and *Broussard* provide courts with precedents likely to influence future decisions.

1. Leonard v. Nationwide Mutual Insurance Co.

Leonard v. Nationwide Mutual Insurance Co. was among the earliest cases to funnel through the suddenly burdened Southern District of Mississippi court system. As this note will show, the outcome of this decision was vehemently and legitimately argued to be both a victory as well as a defeat for insurers.

When Paul Leonard purchased a homeowners' policy for his primary residence in Pascagoula, Mississippi, he chose not to buy supple-

44. *See supra* Part II.A.1.
45. KING, *supra* note 27, at 2.
46. Leonard v. Nationwide Mut. Ins. Co., 438 F. Supp. 2d 684, 689 (S.D. Miss. 2006).
47. *Id.* at 693.
48. *Id.*

mental flood insurance.[49] The insurance policy that Mr. Leonard purchased contained an explicit section on property exclusions regarding the flood coverage.[50] The policy purported to "not cover loss to any property resulting directly or indirectly from . . . flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind."[51] Therefore, the contract appears to bar coverage for any damage caused by water, even if wind was a factor. In addition, the court found that Nationwide's regular billing statements clearly reinforced the fact that flood coverage was not included in its homeowners' policies.[52]

There was no question that, as a result of Hurricane Katrina's wrath, Mr. Leonard's house sustained significant injuries. During the onslaught from the hurricane, the Leonard residence encountered winds that exceeded speeds of one hundred miles per hour.[53] As the contents of the Mississippi Sound were driven ashore by the hurricane, the water level surrounding the Leonard home rose to a peak level of approximately five feet.[54] The storm caused extensive damage to the first floor of the house as well as to the attached garage.[55] The most significant wounds included some broken roof shingles, a small hole in one of the windows of the second floor, damaged garage doors, and exterior walls that were "soiled by a combination of wind-driven materials and waterborne materials."[56]

A Nationwide adjuster examined the damage to the Leonard residence and determined that the wind damage consisted only of the broken shingles and the loss that resulted from a tree that was blown down

49. *Id.* at 688. Flood insurance was available in Mr. Leonard's community through the federally enacted NFIP. *See id.* at 688. As a matter of fact, the Nationwide representative from whom Mr. Leonard obtained the policy explicitly recommended against the acquisition of flood insurance. Mr. Leonard had asked the representative whether he should purchase the additional flood insurance, and the representative often recommended against its purchase even though it would result in a higher commission for him. *Id.* at 690–91. The court held that the representative's statement to Mr. Leonard that he did not need flood insurance was strictly an opinion of the agent and not a representation that the purchased policy would provide the flood coverage. *Id.* at 691–92. The Nationwide representative himself did not have flood insurance for his home. *Id.* at 690.

50. *See id.* at 688–89.

51. *Id.*

52. *Id.* at 691 ("In its billing statements, sent at the time its policies were renewed, Nationwide notified its policy holders, including the Leonards, that the Nationwide homeowners policy did not cover flood loss and that a flood insurance policy was available through the National Flood Insurance Program."). Consumer activists would likely argue that the parties were at unequal bargaining positions and therefore the standardized policy represents a "take it or leave it" adhesion contract. Although this argument leads to a discussion outside the scope of this note, I suggest that the cautionary language on the billing statements was likely sufficient notice to even unwitting or indifferent consumers.

53. *Id.* at 689.

54. *Id.*

55. *Id.*

56. *Id.* Although the roof shingles were damaged, the roof's water-tight integrity was not penetrated. *Id.*

across a fence.[57] As compensation for this damage, Nationwide issued a check in the amount of $1,661.17, after applying the $500 deductible.[58] Mr. Leonard, however, argued that the total damage resulting from the storm was $130,253.49.[59] Of this total, Mr. Leonard identified $47,365.41 as being directly attributable to wind.[60]

In his opinion, Judge L. T. Senter predictably gave credence to the validity of explicit water damage exclusions when he observed that the "provisions of the Nationwide policy that exclude coverage for damages caused by water are valid and enforceable terms of the insurance contract. Similar policy terms have been enforced with respect to damage caused by high water associated with hurricanes in many reported decisions."[61] Similarly, Judge Senter held that such policies provided coverage for wind damage, including any damage caused by waters that entered a home through opening caused by wind.[62] Critically, however, he rejected the specific anti-concurrent causation language of the exclusion provision of the policy as ambiguous.[63] In so doing, the court interpreted Nationwide's policy provisions to provide coverage for windstorm damage, an included peril, even when an excluded peril occurs at the same time.[64] Interestingly, Senter assigned Mr. Leonard the burden of proving that the house was first damaged by an included peril, specifically wind.[65] In other words, Mr. Leonard had the duty to establish that his homeowners' policy was applicable to the circumstances by showing that some damage was caused by a covered hazard that was, in this case, wind.[66] Upon satisfaction of this element, the burden of proof shifted to Nationwide to demonstrate that the portion of the damage for which payment was withheld was caused by flooding and thereby fell within the water damage exclusion.[67] An insurer does not bear responsibility for that damage it can prove was caused by water.[68]

It logically follows that in the event property is damaged first by wind and then by water, the insured can recover for the proportion of the damages caused by wind, but not for the later damages caused by water.[69]

57. *Id.* at 690.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 693.
62. *Id.*
63. *Id.*
64. *Id.* at 694.
65. *Id.* at 695. ("Under applicable Mississippi law, in a situation such as this, where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss), the insured may recover that portion of the loss which he can prove to have been caused by wind.").
66. This should be self-evident with an insurance contract of any type. For example, a car owner can only make a claim to his insurer in the event that he can show that damage to his automobile occurred as a result of some peril that was covered in the valid policy.
67. *Leonard*, 438 F. Supp. 2d at 694.
68. *Id.* at 695.
69. *Id.*

Judge Senter found that nearly all of the damage to the house could be attributed to flooding.[70] This factual determination was assisted by the fact that Hurricane Katrina mercifully left the house standing and, as a result, the source of the relative destruction was reasonably discernable. Pursuant to this conclusion, Judge Senter found the amount that Nationwide offered to compensate Mr. Leonard for the damage to his roof to be sufficient.[71] However, Judge Senter ordered Nationwide to compensate Mr. Leonard for one-half of the cleaning and repairing costs for the exterior walls of the residence.[72] Evidently, Nationwide had adequately met its burden of proof in the eyes of the court.[73]

2. Broussard v. State Farm Fire & Casualty Co.

Broussard v. State Farm Fire & Casualty Co. was also decided by Judge L.T. Senter, but the facts vary from those in *Leonard* in several key areas. Most importantly, in what has become known as a "slab" case, the Broussard residence was completely destroyed by the storm, leaving only the concrete foundation of the structure in place.[74]

Much like Paul Leonard, Norman and Genevieve Broussard purchased a standard homeowners' insurance policy without supplemental flood insurance.[75] Also, as with Mr. Leonard's Nationwide policy, the Broussards' contract included explicit coverage exclusions that specifically disqualified recovery for losses caused by water damage.[76] However, the Biloxi, Mississippi couple argued that their residence was entirely destroyed by hurricane winds or a tornado prior to the onset of the flood waters.[77] The home was valued at $120,698 with contents worth a total of $90,524 inside.[78] According to State Farm, this total figure of $211,222 represented the Broussards' policy limit.[79] State Farm relied on the validity and application of the contractual flood damage exclusion to deny the Broussards' claim entirely.[80]

70. *Id.*

71. *Id.* at 696. Judge Senter also stated that the amount tendered for the fence damage was adequate. *See id.*

72. The total estimate of the cleaning and repairing of the exterior walls came to $1,994.80. Judge Senter allowed the Leonards to recover half of that amount even though most of the exterior is above the water line because the portion below the water line was more soiled and would require more work to clean. *Id.*

73. *Id.* ("Nationwide has met the burden of proving, by a preponderance of the evidence, that all other damage to the Leonards' property was caused by water and waterborne materials within [the exclusion clause].").

74. A "slab" case simply means that the house and its contents were completely destroyed to the point that nothing was left but slab, which is the concrete foundation of a structure.

75. Broussard v. State Farm Fire & Cas. Co., No. 1:06cv6-LTS-RHW, 2007 WL 113942, at *1 (S.D. Miss. Jan. 17, 2007).

76. *Id.* at *2.

77. *See id.*

78. *Id.* at *1.

79. *Id.* at *3.

80. *See id.* at *2–3.

Adopting the burden of proof standard from the *Leonard* case, the Broussards successfully shifted the burden of proof to State Farm by stating a prima facie case that their home was at least partially damaged by wind, which was an included peril in the homeowners' policy.[81] However, because water damage was an explicitly excluded cause of property damage, State Farm would not have to cover any damage that it could show was a result of flooding.[82] In contrast, State Farm would bear full responsibility for any damage that it could not prove was caused by water.[83]

According to Judge Senter, the burden was entirely on State Farm to "prove the merits of its affirmative defense based upon the water damage exclusion in the policy."[84] Thus, State Farm had to demonstrate by a preponderance of the evidence exactly what parts of the total damage could legitimately be attributed to flood and flood-related causes, thereby excluding that damage from coverage.[85] "[W]here an exclusion is specifically pleaded as an affirmative defense the burden of proving such affirmative defense is upon the insurer."[86]

State Farm aimed to establish that the entirety of the damage sustained by the Broussards' home and personal property was the result of rising water.[87] Unfortunately for State Farm, it was unable to approach the level of proof required. In fact, its own witness testified that wind was a likely cause of some of the damage.[88] However, the force and duration of the flood likely would have totaled the house, regardless of any prior wind damage: "[T]he force of the storm surge was sufficient to destroy the dwelling if it were undamaged at the time the water reached it."[89] Despite this conclusion, Judge Senter proclaimed the key issue in the case to be the factual determination of how much wind damage had occurred prior to the arrival of the storm surge.[90]

Having articulated this dispositive question, Judge Senter concluded that, based on the available evidence, no finder of fact would be able to reasonably determine what damage was caused by wind and what damage was caused by water.[91] State Farm, furthermore, was unable to meet its burden of proof by either "segregati[ng] . . . this total loss into wind damages, which are covered, and water damages which are excluded from coverage," or showing that "the insured property sustained no wind damage."[92] Accordingly, Judge Senter granted the Broussards' motion

81. *See id.* at *2.
82. *Id.*
83. *Id.* at *3.
84. *Id.* at *2.
85. *See id.* at *2–3.
86. *Id.* at *2.
87. *See id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at *1.
92. *Id.* at *3.

for a directed verdict for $212,222, asserting that no reasonable juror could have found for State Farm.[93]

Judge Senter further stated that State Farm had a continuing duty to investigate and pay legitimate policy claims in good faith.[94] He decided that State Farm had not complied with this duty and was unreasonable in trying to shift the burden of proof back to the Broussards, stating that

> instead of conducting a reasonably prompt investigation of all relevant facts, making a realistic evaluation of the claim (whether as an initial or continuing duty), and shouldering its burden of proof, the Defendant took the extraordinarily troubling position . . . that it would rely on the jury to make the determination of the amount to pay the Plaintiffs for their covered losses.[95]

As a result of this determination of bad faith by State Farm, Judge Senter sent the question of punitive damages to the jury, who returned a verdict of $2.5 million.[96] On January 31, 2007, Judge Senter reduced the punitive damages to $1 million.[97] The rule on punitive damages in insurance law seems to be that an insurance company may be liable for punitive damages for the wrongful denial of indemnification.[98] However, the insurer must typically do more than just refuse to pay a claim, though this area of law is still unsettled.[99]

The *Leonard* and *Broussard* cases represent just a small fraction of the hundreds of cases pending in the Southern District of Mississippi and of the thousands more pending throughout the Gulf Coast region.[100] However, these cases provide a broad spectrum of valuable insight into

93. *Id*. State Farm was obviously surprised and concerned about the ruling. "'We did not expect this decision,' said Kim Brunner, Executive Vice President, Secretary, and General Counsel for State Farm. 'Testimony of expert witnesses showed that damage to the Broussard home was overwhelmingly caused by water and not wind.'" Press Release, State Farm, State Farm Disappointed by Outcome of Katrina Case, http://www.statefarm.com/about/media/media_releases/broussard.asp (last visited Oct. 2, 2007).

94. *Broussard*, 2007 WL 268344 at *1 ("An insurance company such as the Defendant has a duty to its insureds—the Plaintiffs—to conduct a reasonably prompt investigation of all relevant facts and . . . make a realistic evaluation of the claim. . . . It may not look for a defense to deny paying an otherwise legitimate claim.").

95. *Id.* at *2.

96. *Id.* at *1.

97. *Id.* at *3. According to Kelly Simpkins, a Mississippi attorney, it is important to note that the punitive damages in this case were a product of the fact that State Farm failed to "tender unconditionally an amount that State Farm's own experts said was owed to the Plaintiffs. So that turned a potential pocketbook case in the Judge's eyes into a bad faith case." *The Insurance Law Podcast: State Farm Loses the First High-Profile Post-Katrina Homeowners Case*, Jan. 24, 2007, http://feeds.feedburner.com/~r/InsuranceLaw/~3/80994207/insurance_law-podcast_01.mp3 (transcript available at http://www.rmi.gsu.edu/rmi/faculty/klein/RMI_3500/Readings/Other/ExpertsDissectCase.htm). Simpkins further states that Judge Senter probably would have allowed the punitive damage issue to go to the jury even if he had determined that it was possible to accurately attribute the damages to wind and water. *See id.*

98. JERRY, *supra* note 21, at 770.

99. *Id.*

100. *See* Maniloff, *supra* note 12, at 2.

both "slab" cases and those in which structures remain standing. Further, they demonstrate how the actions of the insurers, in either offering or rejecting partial payment, are likely to impact future cases.

With the vast media coverage from both traditional sources as well as the omnipresent Internet reporters, it may seem that insurance companies never pay out claims in the Gulf Coast Region.[101] In fact, quite the opposite is true. According to Randy J. Maniloff, a Partner in the Business Insurance Practice Group at White and Williams, LLP in Philadelphia, approximately ninety percent of residents who filed post-Katrina claims are fully satisfied with their insurers.[102] Moreover, less than two percent of claims are or have been in dispute.[103] However, the relatively paltry number of disputed claims is primed to have a considerable impact on the homeowners' insurance industry.

III. ANALYSIS

As Part II suggests, there is no bright line rule with respect to deciphering the formidable enigma that is the wind vs. water controversy. An array of integral factors is involved in illuminating the penumbra of insurer liability. However, an important step involves an in-depth examination of the element of causation. Causation in insurance law notably differs from that in tort law insofar as both parties voluntarily assume contractual obligations.[104]

According to Professor Peter Swisher, there are three different approaches utilized by American courts in insurance causation disputes involving multiple concurrent causation.[105] The first of these approaches, referred to as the predominant cause approach, or efficient proximate cause view, provides a middle ground formulation that states that "if multiple concurrent causes exist and if the dominant, most significant, or most important cause is a covered peril, coverage exists for the entire loss; otherwise, the loss is not covered."[106] This approach has been adopted by the majority of the courts that have decided concurrent causation cases.[107] The second approach, known as the California approach, or liberal concurrent causation approach, holds the insurer liable for the entire loss as long as one of the proximate causes of the loss was covered

101. For one opinion of such news coverage, see Amy Menefee, *Unhappy Anniversary: Katrina Insurance Battle Continues*, http://www.businessandmedia.org/articles/2006/20060823162442.aspx (last visited Oct. 2, 2007).

102. Maniloff, *supra* note 12, at 3.

103. *See id.* However, some lawyers for Mississippi policyholders have disagreed with the statistics. One attorney, Don Barrett, who represents about 3000 policyholders has argued that "[t]he insurance industry has paid out two to three cents on the dollar. Nobody is satisfied with that." *Id.*

104. *See* JERRY, *supra* note 21, at 584–85.

105. Swisher, *supra* note 18, at 369.

106. *See* JERRY, *supra* note 21, at 587. However, if neither cause is dominant then the loss is usually attributed to the cause that would result in coverage. *See id.* at 592.

107. *Id.* at 587.

under the policy.[108] Finally, the third approach, known as the traditional minority approach, or conservative concurrent causation approach, provides that if there is a covered cause combined with an excluded cause to create damage, the insured will not be permitted to recover.[109] In order to recommend an appropriate standard it is essential to fully understand the fundamental framework of each of the three approaches.

The efficient proximate cause approach, the liberal approach, and the conservative approach each have distinct pros and cons. Likewise, the judicial application of each approach generates drastically different, often conflicting results.[110] In order to select the best approach to produce an optimal outcome, it is necessary to understand the details of each approach as applied to concurrent-causation cases and, specifically with respect to the efficient proximate cause approach, the detrimental consequences of its application.

A. The Efficient Proximate Cause Approach

"Because so many risks are contemplated by insurance contracts, causation doctrines, such as the efficient proximate cause doctrine, are of particular importance in property insurance."[111] The efficient proximate cause doctrine, adopted from tort law, prescribes that in situations involving the concurrence of multiple perils, a loss shall be attributed to the most significant or dominating cause, even if other causes were closer in time or place to the consummation of the disaster.[112] In his dissent in the famous *Palsgraf v. Long Island Railroad Co.* tort case, Judge Andrews explained that establishing a proximate cause serves a valuable purpose "of convenience, of public policy, of a rough sense of justice [because] the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[113] Thus, whether the cause was nearest in time or place to the damage is not necessarily dispositive.[114] In other words, the hazard that occurs nearest to a result may merely be incidental or an instrument of a controlling agency and therefore not the proximate or responsible cause.[115]

108. *See id.* at 593.
109. *See* Swisher, *supra* note 18, at 363.
110. *See* discussion *infra* Parts III.A.1, III.B.1, III.C.1.
111. Passa, *supra* note 20, at 563.
112. La. Mut. Ins. Co. v. Tweed, 74 U.S. 44, 47 (1868).
113. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).
114. *See La. Mut. Ins. Co*., 74 U.S. at 44–45 (stating where cotton bales were destroyed by fire, an excluded peril, the spreading of the fire by wind could not make wind the efficient proximate cause of the damage); *see also* Leyland Shipping Co. Ltd. v. Norwich Union Fire Ins. Soc'y Ltd., [1918] A.C. 350, 350 (H.L.) (appeal taken from K.B.) (holding that the entry of seawater was not the efficient proximate cause in the sinking of a ship where the ship was first struck by a torpedo, which was an excluded peril); Passa, *supra* note 20, at 566.
115. Aetna Ins. Co. v. Boon, 95 U.S. 117, 130 (1877) ("It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster.").

1. Applying the Efficient Proximate Cause Approach

In insurance cases, courts typically hold, in accordance with the efficient proximate cause rule, that "there will be coverage if a risk of loss that is specifically insured against in the policy sets in motion, in an unbroken sequence, the events that cause the ultimate loss, even though the last 'immediate cause' in the chain of causation is an excluded cause."[116]

Application of the efficient proximate cause approach is seen in *Shinrone, Inc. v. Insurance Co. of North America*.[117] In that case, a farmer had insured his livestock against death by windstorm but not against extreme temperatures.[118] His calves subsequently died due to a combination of wind and cold temperature, among other factors.[119] The jury determined that the wind was the most dominant cause because it had enhanced the effect of all other causes.[120] Therefore, the farmer was able to recover on the theory that wind was the efficient proximate cause.

In the context of the flood damage exclusions, the efficient proximate cause doctrine was applied by Judge Senter in *Leonard* when he stated that the insureds would not be permitted to recover for damages caused by flooding unless they could first demonstrate that wind had caused structural damage prior to the onset of the storm surge.[121] Similarly, where the storm surge had first caused significant damage and the wind that followed did not enhance the loss, the insurer would not be held liable.[122] Judge Senter made specific mention that

> [u]nder applicable Mississippi law, where there is damage caused by both wind and rain (covered losses) and water (losses excluded from coverage) the amount payable under the insurance policy becomes a question of which is the efficient proximate cause of the loss. To the extent that the Allstate policy is inconsistent . . . the exclusionary language is invalid.[123]

Indeed, according to Judge Senter's opinion in *Broussard*, the storm surge was sufficient in both force and duration to destroy the home whether or not it had already suffered extensive wind damage.[124] Therefore, in order to defeat the apparent results of the efficient proximate cause doctrine, State Farm needed to provide evidence of the extent of the wind damage that preceded the flood. State Farm was unable to

116. Swisher, *supra* note 18, at 367 (illustrating that in *Safeco Insurance Co. v. Hirschmann*, wind and rain caused a mudslide and the damage was ruled covered by the insurance policy even though mudslides were excluded). On the other hand, a minority of courts have applied a more traditional immediate cause rule for insurance law cases. *See id.* at 366.

117. 570 F.2d 715 (8th Cir. 1978).

118. *See id.* at 716.

119. *See id.*

120. *See id*. at 719.

121. *See* Leonard v. Nationwide Mut. Ins. Co., 438 F. Supp. 2d 684, 695–96 (S.D. Miss. 2006).

122. *See id.* at 695.

123. Buente v. Allstate Ins. Co., 422 F. Supp. 2d 690, 697 (S.D. Miss. 2006).

124. Broussard v. State Farm Fire and Cas. Co., No. 1:06cv6-LTS-RHW, 2007 WL 113942, *2 (S.D. Miss. 2007).

comply with such a requirement and summarily lost in a directed verdict.[125]

2. Problems with the Efficient Proximate Cause Approach

The concept of proximate cause in tort law is widely debated and particularly confusing.[126] Consequently, the application of the efficient proximate cause test to insurance law is fodder for an equally nebulous debate. The most widely used definition of proximate cause in insurance law comes from *Lynn Gas & Electric Co. v. Meriden Fire Insurance Co*., which explained that "[t]he active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause referred to in the cases."[127]

In other words, the rule of efficient proximate cause states that if a covered hazard sets off an unbroken chain of events resulting in an uncovered loss, then the loss is covered.[128] The rule of proximate cause in insurance law differs from the tort law concept in that it is not as concerned with delving deeply into the recesses of the chain of events to examine distant causes.[129] Instead, insurance law is more comparable to contract law in that it focuses on the reasonable expectations and purposes of the contracting parties.[130] Nevertheless, it is unlikely that the insurers in concurrent causation cases intended such unfavorable results when the contracts were initially authored.

Although it may be reasonably functional to determine the efficient proximate cause in a case such as *Leonard* in which evidence of the hazards was readily available, such an analysis becomes exponentially more difficult in a "slab" case such as *Broussard*, in which the structure and its contents were completely destroyed. Moreover, the concurrence of multiple hazards at the same time rather than in sequence further muddles the determination of which cause was the proximate one.

Judge Senter's factual determination requirement, applied in both *Leonard* and *Broussard*, creates a hostile environment for insurance providers in which virtually all homeowners displaced by a natural disaster can bring a viable claim against an insurer.[131] According to Maniloff, "by

125. *See id.* at *3.

126. *See* SHAPO, *supra* note 19, ¶ 55.05 (describing diverse theories of proximate cause).

127. JERRY, *supra* note 21, at 606 (quoting Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co., 33 N.E. 690, 691 (Mass. 1893)).

128. *See id*. at 589.

129. *See* Sidney I. Simon, *Proximate Cause in Insurance*, 10 AM. BUS. L.J. 33, 35–37 (1972).

130. *See* JERRY, *supra* note 21, at 607.

131. This is why Zach Scruggs, an attorney for the Leonards, saw the ruling as a clear victory for insured parties. He noted that "[t]here were some good rulings in there about anti-concurrent cause clause, which are consistent with what he ruled in other cases but had not ruled in Nationwide. There were some good rulings in there about meteorology and that the wind was devastating before water.

failing to give credit to the anti-concurrent cause clause in the Nationwide policy, Senter is insuring that [lawyers] can force an expensive trial in almost every case, creating settlement value where none is appropriate."[132] The insurers will feel significant judicial pressure to pay out settlements for homeowners' claims that may have been fairly rejected under the policy. An unfortunate corollary to the forced payouts is that the insurers may succumb to financial pressure and raise insurance premiums or even refuse to provide policies in Louisiana, Mississippi and other hurricane-heavy areas.[133] In other words,

> [i]t creates a situation whereby hundreds of millions in losses could be paid by insurers who have collected not a cent for this type of loss . . . . If insurers have never collected any money to cover floods, but they're on the hook, then these sorts of situations will have to be imbedded into rates, and that'll have negative consequences for the cost of insurance.[134]

Ironically, it was precisely this financial situation that spurred Congress to enact the NFIP nearly forty years ago.[135]

As a matter of fact, on February 14th, 2007, State Farm publicized that it would at least temporarily suspend offering new homeowners' insurance policies in Mississippi.[136] According to the company, it withdrew coverage because "criticisms about how it handled Hurricane Katrina claims have complicated matters. The company is concerned that provisions in its insurance policies are being reinterpreted after the fact to provide for coverages that were not contemplated when the policies were written."[137] State Farm went on to state that it would not be sensible to continue to take on risk in the unpredictable Mississippi legal environment.[138]

That and the anti-concurrent cause clause will impact a number of other cases other than the Leonards." Maniloff, *supra* note 12, at 6.

132. *Id.* at 7. Furthermore, the insurance companies are at a tremendous disadvantage entering the courtroom for a jury trial in similar cases after the decisions of *Leonard* and *Broussard*. Juries are unlikely to be sympathetic to the "faceless" insurance companies as opposed to their neighbors who have lost their homes and property in the Hurricane Katrina. The insurance companies are seen as having deep pockets and are most able to absorb the losses whereas the victims of Katrina seem to have lost everything. *See* Posting of Ted Frank to Point of Law, http://www.pointoflaw.com/archives/002833.php (Aug. 17, 2006, 03:40 AM).

133. Maniloff, *supra* note 12, at 4.

134. Posting of Ted Frank to Point of Law, http://www.pointoflaw.com/archives/003414.php (Jan. 12, 2007, 03:51 PM) [hereinafter Point of Law].

135. *See* Maniloff, *supra* note 12, at 4 ("Because the federal government long ago stepped into this breach [the difficulty of spreading flood risk], private insurers haven't collected a penny in flood premiums in years. Yet if the Scruggs theory prevails, these companies could be stuck with an estimated $15 billion in claims. The only way to cover that bill would be to raise premiums for homeowners far and wide. That, or stop selling policies in states (like Mississippi) with higher than normal flood risks.").

136. *See* Randy J. Maniloff, *Senter Ring: Looking Beyond the Side Show of the Mississippi Katrina Coverage Litigation*, NATIONAL UNDERWRITER'S FC&S ONLINE at 3 (Feb. 22, 2007), *available at* http://www.whiteandwilliams.com/CM/Articles/FCS_Randy_Maniloff_Feb_22.pdf.

137. *Id*.

138. *See id.*

B. The Liberal Approach

The damage in proximate causation situations is relatively uncomplicated to attribute when caused by singular hazards, but frequently the sequence of events is unclear and several causes may even occur simultaneously.[139] In such situations of concurrent causation, the assignment of damage to specific causes is drastically more difficult and often impossible.

Under the liberal approach to causation, a loss is covered in a multiple cause scenario as long as any one of the causes is a covered peril.[140] This practice is very insured friendly because the insured party need only show one covered cause to establish coverage, notwithstanding the existence of an excluded or uncovered cause.[141] As long as a single cause was covered under the applicable insurance contract, all of the damage would be covered even if some, or most, of it had been caused by hazards that were explicitly excluded by a clause in the policy.

1. Applying the Liberal Approach

The application of this approach works to effectively reject the implementation of anti-concurrent causation clauses in insurance contracts. Proponents of the liberal approach would argue that such anti-concurrent causation clauses are unfair on their face and amount to deceptive marketing by the insurance companies. This is because the insurers appear to offer coverage for a certain specified peril on the one hand, but attempt to deny that same coverage if the peril occurs concurrently with another excluded peril.[142]

An example of the liberal approach is seen in *State Farm Mutual Automobile Insurance Co. v. Partridge*.[143] The insured, Wayne E. Partridge, was covered under both a homeowners' policy and an automobile policy by State Farm.[144] Accompanied by two friends, Partridge drove his car over rough terrain with a loaded .357 Magnum pistol that he had negligently modified to create a "hair trigger."[145] The vehicle hit a bump and the pistol discharged, shooting one of his friends in the spinal cord, resulting in paralysis.[146] The injured friend sued Partridge for $500,000 and the issue arose as to which policy would cover the damages.[147] State

139. *See generally* John Lowry & Philip Rowlings, *Proximate Causation in Insurance Law*, 68 MODERN L. REV. 310 (2005).

140. *See* JERRY, *supra* note 21, at 594.

141. *See id.*

142. *See* JERRY, *supra* note 21, at 595.

143. 514 P.2d 123 (Cal. 1973).

144. *See id.* at 126.

145. *See id.* at 125. A hair trigger is more sensitive than a standard trigger and thus creates a more dangerous weapon. *See id.*

146. *See id.*

147. *Id.* at 126.

Farm agreed to pay the $15,000 limit of the automobile insurance policy but withheld the $25,000 homeowners' insurance limit, invoking an exclusionary clause that barred coverage for injuries "arising out of the . . . use of . . . any motor vehicle."[148] In holding the homeowners' policy applicable, the court stated that the occurrence of a covered cause, the negligent filing of the hair trigger, was sufficient to invoke coverage for the injury, regardless of the concurrence of an excluded peril or even whether the covered cause was the dominant one.[149]

The application of the liberal approach to the post-Katrina concurrent causation cases would result in frequent judicial victories for claimants. Invocation of full coverage would require only that the insured cross the relatively insubstantial threshold of showing the occurrence of a covered cause. The clear benefit of such a rule is the ease of its use in situations where it is difficult to segregate independent causes to determine which one is the dominant or efficient proximate one.

2. Problems with the Liberal Approach

Notwithstanding its relative ease of use, the liberal approach is an insufficient solution to the concurrent causation cases for several reasons. The obvious problem with the liberal approach, from the insurance company's point of view, is that it negates a valid exclusionary clause written into the insurance contract. Therefore, the liberal approach effectively broadens the scope of an insured's coverage to include even losses that may have been expressly excluded from coverage.[150] This approach leaves no room for contractual freedom to decrease insurer liability. Moreover, the insurers are left paying for losses that were legitimately excluded from the actuarial calculations used to determine insurance premiums. Consequently, if the occurrence of any covered cause were sufficient to automatically invoke coverage, then the industry could be left without adequate reserves to handle a major catastrophe.[151]

With respect to any assertion of deceptive marketing practices, it is highly unlikely that there would be any intent to deceive on the part of the insurance companies because the language of the insurance contracts first must be approved by industry regulators prior to being used for consumers.[152] Furthermore, the purpose of anti-concurrent causation language is to reduce ambiguity by making it as clear as possible that a risk is not covered.[153]

148. *Id.*
149. *See id.* at 129.
150. *See id.* Also, the exclusion is contemplated to the underwriting and rate making stages. This is important because the whole insurance industry relies on accurate rate making.
151. *See* JERRY, *supra* note 21, at 594.
152. *See* KING, *supra* note 27, at 15.
153. *See id.* at 4 n.6.

C. The Conservative Approach

Unlike the liberal approach, the conservative view is particularly insurer-friendly because it drastically narrows the field of covered losses to those that do not involve any contribution from a contractually excluded source.[154] Therefore, under this approach, the insured may not recover if any excluded cause contributes to a loss.[155]

Importantly, this approach first differentiates between an "excluded cause" and a "noncovered cause" with respect to the idiosyncratic parlance of insurance contracts.[156] An excluded cause is one that is expressly disqualified from coverage under the insurance policy, whereas a noncovered cause is simply never mentioned in the insurance document.[157] Although the concurrence of a covered cause and a noncovered cause will always result in full coverage for the insured, the conservative approach rejects coverage when a covered cause and an excluded cause combine to produce the loss.[158] In the event that the damage can be adequately segregated by cause, then the insured may recover the portion of the loss attributed to the covered cause.[159] However, if it is impossible to segregate the losses, then no coverage would be provided.[160]

1. Applying the Conservative Approach

Gradually, insurers have attempted to utilize the substantial benefits of the conservative approach by adjusting policy terminology in support of this viewpoint.[161] Such conservative-approach oriented language is expertly crafted to exclude coverage for a loss even if a covered cause contributed concurrently or sequentially to the loss.[162] Effectively, the inclusion of the conservative language is generously designed to give the courts a "helping hand" towards the adoption of the conservative viewpoint.[163]

The clauses that insurers implement as tools to limit coverage in multiple causation scenarios are commonly referred to as anti-concurrent causation clauses.[164] In fact, many insurance providers use anti-concurrent causation language similar to that employed by the insurers in

154. *See* JERRY, *supra* note 21, at 595 ("An earthquake (which is excluded) that results in a fire loss would be outside coverage. A windstorm (covered) that produces a large wave (excluded) that destroys a building would be outside the coverage, even if the wind produces the wave.").

155. *See id.*

156. *See id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *See id.*

163. *See generally* James A. Knox, Jr., *Causation, the Flood Exclusion, and Katrina,* 41 TORT TRIAL & INS. PRAC. L.J. 901 (2006) (discussing causation issues in insurance contracts).

164. *See id.* at 923–27.

both *Leonard* and *Broussard*.[165] The stated purpose of such language is to "exclude certain perils from coverage if they are a cause of loss, regardless of any other perils acting concurrently or in sequence with them."[166] This creates a situation in which the parties to the contract voluntarily attempt to contract out of the efficient proximate cause doctrine, or otherwise contract around the favored causation test of the jurisdiction.[167] Many courts have asserted that the parties to a contract have substantial freedom to contract as they choose and therefore are permitted to contract out of the effects of the efficient proximate cause doctrine.[168] Indeed, it is permissible for the "insurer [to] contract for a more limited liability in insuring a risk, but it is up to him to express it with precision."[169] However, some courts have held that parties cannot use contracts to avoid or alter the prevailing rule of causation.[170]

The conservative approach was notably applied in *Lydick v. Insurance Co. of North America*.[171] As farming partners, William and James Lydick purchased an insurance policy that covered their cattle for damage that resulted from windstorm.[172] However, the policy expressly excluded coverage for damage caused by cold weather or ice.[173] According to the insured, the cattle sought refuge from the cold wind when they fell through the ice of a frozen pond and drowned.[174] The court ultimately held that the loss was not covered because "[t]he general rule is that if a windstorm combines with a hazard expressly excluded from the policy coverage to produce the loss, the insured may not recover."[175] In other words, an insurer is not responsible for damage caused by an excluded peril.[176]

The application of the conservative approach to the Katrina cases would embolden the contract terms of the insurance policies. The adoption of such a position ensures the contractual independence of both parties and provides the most accurate estimate of the parties' expectations of the policy coverage without rewriting the contract from the bench.

2. Problems with the Conservative Approach

Clearly, the language of the contracts at issue in both *Leonard* and *Broussard* utilize anti-concurrent causation clauses to contract out of ef-

165. *See* Leonard v. Nationwide Mut. Ins. Co., 438 F. Supp. 2d 684, 688–89 (S.D. Miss. 2006).
166. Passa, *supra* note 20, at 572 (quoting Mark D. Wuerfel & Mark Koop, "*Efficient Proximate Causation" in the Context of Property Insurance Claims*, 65 DEF. COUNS. J. 400, 407 (1998)).
167. *Id.*
168. *Id.*
169. Swisher, *supra* note 18, at 363.
170. *See* JERRY, *supra* note 21, at 598.
171. 187 N.W.2d 602 (Neb. 1971).
172. *Id.* at 603–04.
173. *Id.* at 604.
174. *Id.* at 603.
175. *Id.* at 605.
176. *See* JERRY, *supra* note 21, at 595.

ficient proximate cause and into the insurer-friendly conservative approach to concurrent liability. Where the intent of the insurers is at odds with the ruling of Judge Senter is in the application of the anti-concurrent causation language.[177] Senter ruled that a factual determination must be made to particularly ascribe the cause of all property damage to either wind or water, even in "slab" cases such as *Broussard*.[178] Nationwide, State Farm, and other insurers, however, deliberately crafted the exclusions with the intent that the losses caused by the concurrence of a covered cause with an excluded cause would be summarily excluded from coverage.[179]

Opponents of the conservative approach argue that the language of the unilateral homeowners' insurance policies is contradictory and detrimental to the nonwriting party.[180] This position further suggests that the anti-concurrent causation language is too broad and an innovative insurer will be able to deny just about any claim by demonstrating the participation of an excluded cause.[181] However, this position again fails to recognize that the language of the insurance contracts must first be approved by state regulators before being used with consumers.[182] Additionally, the notice that the policy does not provide flood coverage, on both the policy itself and the regular billing statements, should be sufficient to inform the consumer and adhere to the consumer's reasonable expectations.

IV. RECOMMENDATION

The foregoing analysis exposes the limitations of both the efficient proximate cause approach and the markedly consumer-friendly liberal approach of insurance contract interpretation. As Judge Senter pointed out in another recent decision, *Buente v. Allstate Ins. Co.*,[183] there are two situations where the hurricane losses become a question of fact. First, if the evidence indicates that a portion of the losses was attributable to the covered perils of wind and rain and a portion was attributable to flood damage, then the determination of which was the proximate cause of the destruction would be a question of fact.[184] Second, if the wind damage clearly preceded the storm surge, then the wind damage would be cov-

177. *See* Maniloff, *supra* note 12, at 5.
178. *Id.*
179. *See id.*
180. *See* Brendan Vaughan, Comments *Wind vs. Water*, *available at* http://iblsjournal.typepad.com/illinois_business_law_soc/2006/11/wind_vs_water.html (last visited Oct. 2, 2007).
181. *See id.*
182. *See id.*; *see also* Terri Vaughan, *The NAIC's 2002 Agenda: Toward a More Efficient System of Insurance Regulation*, J. INS. REG., 2002, at 1, 5.
183. 422 F. Supp. 2d 690 (S.D. Miss. 2006).
184. *Id.* at 696.

ered under the policy and the storm surge damage would be properly excluded.[185]

However, the efficient proximate cause approach is rendered useless for the concurrent causation cases that followed Hurricane Katrina because the particular source of property damage is often unclear. Robert Hartwig, the chief economist for the Insurance Information Institute, noted that the outcome of *Broussard* "sets a horrendous precedent in terms of these cases when you're talking about a policy sold in Mississippi providing wind coverage but that has to pay several hundred thousand in water damages and several million in punitive damages."[186]

This Part accordingly makes two distinct recommendations. First, the judiciary should allow parties to adopt the conservative approach to establish a consistent and predictable standard for insurance policy interpretation. Second, Congress should amend the Flood Disaster Protection Act of 1973 to provide for stricter adherence to the flood insurance purchase requirements.

A. Judicial Adoption of the Conservative Approach

This Part advocates the judicial adoption of the conservative approach to interpreting homeowners' insurance policies and suggests that the language of the insurance policy contracts should ultimately govern. As previously observed, a contract should first be governed by the terms within it. Both the providers and consumers to an insurance contract should have adequately read and understood the terms prior to signing.[187] Judge Senter himself stated in *Buente* that "[t]he terms of an insurance policy are to be interpreted under the rules of construction generally applicable to written contracts; and, where the terms of the policy are clear and unambiguous, they are to be enforced as written."[188]

This is not to suggest that the rule of the presiding jurisdiction should be altered. However, the terms of the contract should provide a capable supplement or replacement to the rule of the jurisdiction in the event that the parties agree that the insurance provider should contract for either more or less liability. By this standard, the contracts that retained anti-concurrent causation clauses would be permitted to "contract out" of proximate cause. This would essentially allow an insurer to deny coverage to an insured based on the occurrence of an excluded peril, even with the concurrence of another, covered peril. The consumer

185. *Id.*

186. Point of Law, *supra* note 135 (quoting Robert Hartwig).

187. Importantly, if the agent of the insurance company has misrepresented the terms of the policy so that the insured relies on such statements to believe that the insurance coverage extends to an actually uncovered area, then that is a wholly unrelated matter. In fact, the insured can then file a separate tort action against the agent for misrepresentation.

188. *Buente*, 422 F. Supp. 2d at 695.

would be free to either reject a contract containing anti-concurrent causation language or obtain supplemental federal flood insurance.

Insurance companies calculate a customer's unique premium by predicting losses. This method allows these private companies to operate at a profit. If the insurers were to be held liable for losses that they specifically excluded from such actuarial calculations by means of strict adherence to the policy clauses previously approved by state regulators, then their opportunity for profit would substantially dwindle. When a for-profit company can no longer operate at a profit in a specific industry or region, then it is likely to discontinue business in that industry or region. The end result would be a lack of available insurance for consumers in the Gulf Coast region. Alternatively, if insurers were forced to raise premium rates to compensate for assuming the increased risk, consumers would likely end up paying even more than they would have paid for the NFIP coverage.[189]

B. Amendment to the Flood Disaster Protection Act of 1973

Congressional action is in order to ensure that a dire situation such as the post-Katrina litigation explosion does not recur and cripple the homeowners' insurance industry. While most uninsured and underinsured property owners have focused on the unenforceability of water damage exclusions in their homeowners' policies when seeking recompense for their losses, the government's focus should be on the preventative measure of achieving widespread utilization of the available NFIP coverage. Given that the NFIP was enacted when Congress observed that the private insurance industry was not a suitable provider of flood insurance, a more stringent mandate of the NFIP would serve to better complement the standard offerings of the private insurance providers without creating a significant gap in coverage. Widespread consumer participation in the NFIP can be accomplished through an amendment to the Flood Disaster Protection Act of 1973 that increases the geographical scope of the mandatory coverage area while advocating penalties for nonparticipation.

V. CONCLUSION

When he struck down the anti-concurrent causation clauses of the insurance policies in *Leonard* and *Broussard*, Judge Senter rejected the conservative view in favor of the majoritarian proximate cause approach to insurance coverage liability. Judge Senter erred in making this determination because it not only trivializes the relevance of the contractual agreement between two consenting and informed parties by rewriting it from the bench to reach the court's concept of justice, but also has re-

189. *See* KING, *supra* note 27, at 11–12.

sulted predictably in limited access to homeowners' insurance for residents of Mississippi and, likely, other states in the Gulf Coast region.[190] While analyzing strengths and weaknesses of the three primary approaches to insurance liability determination in concurrent causation cases, this note demonstrates that the application of the conservative approach would be the most consistent and just with respect to the intent and expectations of the contracting parties. The most effective way to prevent future litigation would be the institution of a more rigorous and penalty-laden government mandate ensuring the purchase of federal flood insurance in designated flood-prone areas, combined with an aggressive marketing campaign to inform homeowners and prospective homeowners of the nature, scope, and cost of the flood insurance program.

190. MSNBC, *State Farm: No New Home Policies in Miss.*, Feb. 14, 2007, http://www.msnbc.msn.com/id/17150886 (noting that State Farm has decided to suspend sales of new commercial or homeowner policies in Mississippi as of Feb. 16, 2007).