

KANNER & WHITELEY, L.L.C.

701 Camp Street ■ New Orleans, Louisiana 70130 ■ (504) 524-5777 ■ Fax: (504) 524-5763

CAUSATION ISSUES IN INSURANCE POLICIES **HURRICANE KATRINA**

Property insurance policies cover “direct physical loss” to covered property from covered causes of loss. Courts generally interpret “direct” as being synonymous with “proximate cause.” *Milton v. Main Mutual Ins. Co. of Ill.*, 261 So.2d 723 (La. App.4 Cir. 1972). With a single peril causing the damage, the analysis is straightforward - if a covered peril proximately causes the loss, the loss is covered. However, the analysis is more complicated when several perils come together to cause a loss.

Absent an anti-concurrent causation (“ACC”) clause, most courts resolve the multiple peril issue by applying the efficient proximate cause doctrine. This means that if a covered risk and a non-covered risk combine to cause a loss, the loss is covered only if the dominant, or efficient risk, caused the loss. Louisiana has adopted the efficient proximate cause doctrine to resolve coverage issues when a covered and uncovered risks combine to cause a loss:

- *Morehead v. Allstate Ins. Co.*, 406 F.2d 122 (5th Cir. 1969) (policy excluded loss caused by flood, surface water, or waves; dwelling destroyed in hurricane; evidence sufficient to support finding that loss occurred because of water damage rather than as a direct result of wind damage)
- *Roach-Strayhan-Holland Post No. 20 v. Continental Ins. Co.*, 112 So.2d 680 (La. 1959) (insured brought suit to recover for windstorm damage to building; insurer claimed that loss was due to improper construction; “it is sufficient, in order to recover upon a windstorm insurance policy not otherwise limited or defined, that the wind was the proximate or efficient cause of the loss or damage, notwithstanding other factors contributing thereto”)
- *A.P. Leanards v. Travelers Ins. Co.*, 506 So.2d 509 (La. App. 1986) (policy covered wind but excluded water damage; court held that wind, though not sole contributing cause was proximate or efficient cause of the damage suffered by the building during windstorm; loss was covered by policy)
- *Ebert v. Pacific Nat’l Fire Ins. Co.*, 40 So.2d 40 (La. App. 1949) (policy covered damage by wind but excluded damage by water; insured’s camp was damaged by hurricane; court held that evidence supported finding that damage was due to wind and not due to water).

Where different perils cause discrete damage, Louisiana courts have generally examined each loss to determine if it was caused by a covered risk. *See, e.g., Milton*, 261 So.2d 723 (hurricane winds caused a carport roof to collapse, damaging policyholder’s auto, but flood, an excluded peril, then further damaged the auto; court allowed policyholder to recover for damage attributable to the windstorm only).

It is important to note that these efficient proximate cause cases were either prior to 1983 when insurers began including ACC language in policies or were in policies where the ACC clause was not at issue.

Most commercial and many homeowners' policies have anti-concurrent causation clauses that preface the flood exclusion. The ISO introduced the clause in 1983 in reaction to court decisions that refused to enforce earlier formulations of the anti-concurrent causation language. The clause typically provides, "we do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss."

The intent of the ACC clause is to eliminate the need for any analysis of proximate causation or concurrent causation by eliminating coverage for a loss if a risk subject to the clause, *e.g.*, flood, contributes in any way or in any sequence to a loss.

Most states enforce the ACC clauses, as the contract is the law between the parties. These clauses have been upheld in Louisiana and Mississippi courts. *See Prytania Park Hotel v. General Star Indem.*, 896 F.Supp. 618 (E.D. La. 1995)(upholding denial under an ordinance and law exclusion of policyholder's demand that insurer pay for installation of a sprinkler system to comply with code).

In *Prytania Park Hotel*, following a fire, in rebuilding the hotel, the insureds were required to add a new sprinkler system in accordance with the City building code. The policy contained the standard exclusion language, including the ACC clause:

[Insurer] 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.

a. Ordinance or Law.

896 F.Supp. at 623.

The insureds argued that the policy language demonstrated that enforcement of the ordinance must cause the loss complained of in order for the exclusion to apply and that the loss they suffered from was caused by fire, not enforcement of the building code. *Id.* Both parties cited to various cases, the court noting that the insureds cited to cases in other jurisdictions, while the insurer cited to a Louisiana case, but the court found that it did not have to look to other cases, as the language of the policy was unambiguous. *Id.*

Although it is true that the fire caused the damage to the property which necessitated the repair, the policy language specifically states that losses arising from enforcement of an ordinance or regulation, such as the building code requirement for a sprinkler system, are excluded "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." In other words, the Court finds that it is inconsequential under the language of the policy whether the fire which caused the loss occurred before the repair that required installation of a sprinkler system. Plaintiffs' costs arising from enforcement of the City of New

Orleans' building code, even though they arose from the repair of the hotel after the fire, are simply excluded according to the policy's plain, unambiguous language.

896 F.Supp. at 623-624. The court granted summary judgment in favor of the insurer.

Leonard

The Fifth Circuit upheld the ACC language in *Leonard v. Nationwide Mutual Ins. Co.*, 499 F.3d 419 (5th Cir. 2007), a case out of Mississippi. The lower court in *Leonard* had found the ACC ambiguous, concluding that the language does not exclude coverage for different damage, which would be the wind damage. As long as the insured could parse out damage for the covered loss - wind - he could recover for that loss, even if it combined with excluded water damage. The Fifth Circuit found that the district court reached the correct ultimate conclusion regarding the amount of damages, but for the wrong reasons and in doing so, the district court invalidated the ACC.

The Fifth Circuit identified three discrete categories of damages at issue: (1) damage caused exclusively by wind; (2) damage caused exclusively by water; and (3) damage caused by wind concurrently or in any sequence with water. 499 F.3d at 430. “The classic example of such a concurrent wind-water peril is the storm-surge flooding that follows on the heels of a hurricane’s landfall.” *Id.* The court found that the only type of damage covered under the policy was the damage caused exclusively by wind. *Id.* The other two categories of damages were excluded.

The Fifth Circuit gave examples of how the ACC works. If an insured’s roof blows off and rain enters through the opening, the damage is covered. 499 F.3d at 431. However, if storm-surge flooding then inundates the same area that the rain damaged, then the ensuing loss is excluded because the loss was caused concurrently or in sequence by the action of a covered and a non-covered peril. *Id.* The Fifth Circuit found that the district court’s conclusion that the ACC was ambiguous and the insured could parse out that portion of the concurrently caused damage that was attributable to wind contradicted the policy language. *Id.*

Since the Fifth Circuit found that the ACC was not ambiguous, the only way the insured could prevail was if the ACC was prohibited by Mississippi caselaw, statutory law or public policy. 499 F.3d at 431. The Fifth Circuit examined each and found no prohibition of the use of the ACC to preclude recovery for concurrently caused hurricane losses. *Id.*

With respect to caselaw, the Fifth Circuit refuted the district court’s conclusion that Mississippi courts applied the default of efficient proximate cause in insurance contracts. 499 F.3d at 431-35. The Court noted that caselaw reflected a general Mississippi contract principle that where the contract clause did not violate any statute or public policy and was unambiguous, it was enforceable as written. *Id.* The Court cited to courts in other jurisdictions that also held that ACC in a policy can circumvent default causation rules. *Id.*

The Fifth Circuit found that Mississippi had not adopted an efficient proximate cause doctrine as a matter of public policy. 499 F.3d at 435. Likewise, Mississippi had no statute mandating the default efficient proximate cause. *Id.* Thus, there was no bar to the ACC in the policy at issue.

As noted above, Louisiana courts have adopted the efficient proximate cause doctrine to resolve causation problems under circumstances with covered and non-covered perils. However, the Louisiana Supreme Court has not spoken on whether the ACC can trump the default efficient proximate cause. Louisiana courts that have ruled on the ACC issue have found that the ACC is unambiguous and therefore, trumps the efficient proximate cause analysis. *See Ngyuen v. Atlantic Casualty Ins. Co.*, 2008 WL 1884050 (E.D. La. 4/28/08) (noting that while the Louisiana Supreme Court has not yet ruled on the validity of the ACC, courts in the Eastern District have found such clauses to be clear and to exclude damage caused by flooding).

Post Leonard Decisions

In *Dickinson v. Nationwide*, 2008 WL 941783 (S.D. Miss. April 4, 2008), Judge Senter, the district judge in *Leonard*, had the opportunity to address the ACC clause again. In *Dickinson*, Nationwide argued that any hurricane damage that was caused by both wind and water was excluded. The court found Nationwide's interpretation of *Leonard* to be too broad and unreasonable. *Id.* at *5. Judge Senter analyzed the *Leonard* and concluded that the court recognized two distinct type of damage - exterior damage to roof and windows caused by wind and interior damage to floors and carpet caused by flood, and the damage caused by wind was covered damage. *Id.* Judge Senter stated that the ACC had no application in a situation where two distinct forces act separately and sequentially to cause different damage to insured property. *Id.* "Each force may cause damage to different parts or items of insured property, as occurred in the *Leonard* case, or the two forces may cause damage to the same item of insured property at different points in time. But the two forces, *i.e.*, wind and water, remain separate and not concurrent causes of this damage. In either case, the damage caused by wind is covered under the policy while the damage caused by water is not." *Id.*

Judge Senter elaborated on this wind versus water analysis and his interpretation of the ACC in his denial of reconsideration. *Dickinson v. Nationwide*, 2008 WL 1913957 (S.D. Miss. April 25, 2008). Nationwide argued that the ACC precluded recovery for wind damage to any item of property that was later damaged by storm surge flooding. Judge Senter rejected this argument, finding this to be an unreasonable interpretation of the ACC.

In *Tuepker v. State Farm*, 507 F.3d 346 (5th Cir. 2007), the Fifth Circuit again addressed the ACC in a lower court case from Judge Senter in Mississippi. In *Tuepker*, the insureds argued that the ACC was ambiguous because it conflicted with other provisions of the policy, namely the express coverage for wind losses provisions. *Id.* at 353. The Fifth Circuit disagreed with the insureds, finding that the ACC was not ambiguous and did not conflict with any other policy provision. *Id.* at 354. "[T]he 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." *Id.* The Fifth Circuit also noted, as in *Leonard*, that while the efficient proximate cause doctrine is the default causation rule, the ACC in a policy can circumvent and override the efficient proximate cause doctrine. *Id.* at 356.

Valued Policy Law

Policyholders may rely on valued policy law to secure coverage in cases where both wind and water cause property damage. In a recent Florida case, *Mierzwa v. Florida Windstorm Underwriting Association*, 877 So.2d 774 (Fla. App. 2004), a homeowner had damage caused by

both wind and flooding from Hurricane Irene. The policy contained an anti-causation clause excluding coverage for any damage other than by wind. Construing Florida's valued policy law, the court found that if the building is insured by a carrier for a covered peril and the building is deemed to be a total loss, the valued policy law mandates that the carrier is liable to the owner for the face amount of the policy, no matter what other facts are involved as to the cost of repairs or replacement. *Id.* at 775. Once there is a determination that there is a covered peril and a total loss, the actual cause of the total loss is irrelevant.

The carrier argued that the ACC clause relieved it of any obligation for loss resulting from an excluded peril, such as flood, even if such excluded peril combined with a peril covered under the policy to cause loss or damage to the building. The court disagreed, finding that neither the statute nor the policy had wording that required the building damages be caused only by a covered peril for the valued policy statute to apply, stating that the "statutory text does not require that a covered peril be *the* covered peril causing the entire loss, it need merely be *a* covered peril." *Id.* at 776 (emphasis in original). The court found that giving effect to the ACC clause would be contrary to the valued policy law. *Id.* Thus, the valued policy may be a way around the ACC clauses in the case of total loss.¹

¹Louisiana and Mississippi courts have adopted the "restoration test" in defining a total loss. Under this test, a structure is declared a total loss if a reasonably prudent owner would not use the remains of the structure after the loss as a basis for restoring the building to its pre-loss condition.