THE EFFICIENT PROXIMATE CAUSE DOCTRINE—WHAT IS IT, AND WHY SHOULD I CARE?

Vonda Mallicoat Laughlin

Climate change and other environmental factors lead to increasing numbers of insurance claims. In addition to its toll on health, the Coronavirus (COVID – 19) has further led to an astounding number of losses to businesses, both large and small, that will invariably lead to disputes involving insurance coverage. The efficient proximate cause doctrine provides a method of determining the legally significant causative factor leading to a loss when multiple causative factors are involved and at least one is subject to a policy exclusion. The efficient proximate cause doctrine is of crucial importance to the host of attorneys who practice in the area of insurance law from either the plaintiff or defense perspective. Although the doctrine has been adopted in a majority of jurisdictions, its application by jurisdiction is surprisingly varied in approach. Additionally, significant issues involving the doctrine remain unresolved in a number of jurisdictions. An example is the emerging practice of applying the efficient proximate cause doctrine to third-party policies of liability protection as well as to first-party policies protecting the interests of the insured. That development has created uncertainty in the insurance market and is recognized as having the potential to have a dramatic effect on how policies are written.

This article examines pertinent issues in relation to the doctrine and provides suggestions as to the most desirable resolution in unclear situations. The better view is that the doctrine should be applied to most, if not all, insurance disputes involving multiple causative factors with the most significant event in the chain of causation determining the efficient proximate cause of a loss.

The article concludes with the examination of an important issue involving the effect of anti-concurrent causation clauses attempting to eliminate the effect of the efficient proximate cause doctrine. A majority of jurisdictions that have considered the issue have enforced such clauses although some jurisdictions have refused to do so based either on either public policy or statutory enactment. Interestingly, many jurisdictions have not confronted the issue of anti-concurrent cause clauses and whether they should be enforced. This article argues that such clauses should be denied

enforcement based on public policy and the reasonable expectation of insureds.

I. INTRODUCTION

The efficient proximate cause doctrine – what is it? When making a claim on an insurance policy, the claimant bears the burden of establishing that an insured event caused harm covered by the policy whereas the insurer bears the burden of establishing exclusionary events.[1] The efficient proximate cause doctrine sets forth a method to determine policy coverage in situations in which two or more identifiable causes contribute to a loss and both covered and excluded causative factors are involved.[2] Although its specific

[1] Smith v. Stonebridge Life Ins., 473 F. Supp. 2d 903, 908 (W.D. Wis. 2007).

[2] *See* 7 STEVEN PLITT ET AL., COUCH ON INSURANCE § 101:45 (3d ed.), Westlaw (database updated June 2020).

application varies greatly from jurisdiction to jurisdiction,[3] the efficient proximate cause doctrine is the rule applied by the majority of jurisdictions in regard to an insured's claims for property and casualty losses.[4] While, as discussed below, the matter is not without controversy, the doctrine has also been applied to other types of cases including claims by third parties alleging negligence or other misconduct on the part of an insured.[5]

Why should a consumer, business owner, or legal practitioner care about the contours of the efficient proximate cause doctrine? Policy language generally references causation in relation to both covered events and policy exclusions.[6] An understanding of how to determine coverage in the face of multiple causative forces and seemingly conflicting policy language is a crucial matter for purchasers of insurance, insurance claimants, and to those representing insureds and insurance companies. Many legal practitioners may never have heard of or considered the efficient proximate cause doctrine. Notably, however, given the amount of litigation involving whether claims constitute covered losses, causation is a significant matter. Courts adopting alternate causation rules, such as the concurrent cause doctrine, are in the

[3] *See* 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 44.03[7], LEXIS (database updated July 2020) (recognizing that the efficient proximate cause doctrine "has many different formulations").

[4] *E.g.*, Amherst Country Club, Inc. v. Harleysville Worcester Ins. Co., 561 F. Supp. 2d 138, 150 (D.N.H. 2008) (recognizing in regard to a property damage insurance claim that the efficient proximate cause is not the majority rule in determining causation); Fourth St. Place, LLC v. Travelers Indem. Co., 270 P.3d 1235, 1244 (Nev. 2011) (stating in regard to a policy claim for rain damage that "we take this opportunity to join with the majority of jurisdictions and adopt the doctrine of efficient proximate cause"); Murray v. State Farm Fire and Cas. Co., 509 S.E.2d 1, 11 (W. Va. 1998) (when confronted with an insurance claim for property damage, recognizing that the efficient proximate cause doctrine is the majority rule); 4 ANDREW B. DOWNS & LINDA M. BOLDUAN, LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 52.33 (David L. Leitner et al. eds.), Westlaw (database updated June 2019); Brian Lake, Article, *The Empire Strikes Back: The Insurance Industry Battles Toxic Mold*, 33 WM. MITCHELL L. REV. 1527, 1543 (2007); Randall L. Smith, *Insurance Causation: Texas Law on First-Party Claims*, 3 TEX. WESLEYAN L. REV. 63, 65 (2006); Randall L. Smith & Fred A. Simpson, *Causation in Insurance Law*, 48 S. TEX. L. REV. 305, 359 (2006); Mark D. Wuerfel & Mark Koop, 65 DEF. COUNS. J. 400 (1998); Julie A. Passa, Comment, *Insurance Law–Property Insurance: Adopting the Efficient Proximate Cause Doctrine, but Saying No to Contracting Out of It, Western National Mutual Insurance Co. v. University of North Dakota*, 79 N.D. L. REV. 561, 567 (2003) ("Today, the efficient proximate cause doctrine is all but universally accepted and applied in the United States.").

[5] *See* Hudson Specialty Ins. Co. v. Magio's Inc., 363 F. Supp. 3d 1351 (S.D. Fla. 2018); Xia v. ProBuilders Specialty Ins. Co., 400 P.3d 1234 (Wash. 2017).

[6] *See* Sunbreaker Condo. Ass'n v. Travelers Ins. Co., 901 P.2d 1079, 1083 (Wash. Ct. App. 1995).

minority,[7] resulting in the efficient proximate cause doctrine's prominence. Granted, the analysis of causation and specific policy language in relation to insurance coverage is not the most exciting of fields. Indeed, as one court noted, its reiteration of specific policy language was "[t]o remind the reader whose eyes may have glazed over at this point."[8] Nevertheless, whether approaching a claim from a plaintiff or from a defense perspective, or if drafting policy language, an understanding of the efficient proximate cause doctrine is crucial. Insurance disputes involving causation in relation to property damage will most certainly continue to rise due to climate change and natural disasters. For example, scientists predict that a rise in global temperatures will result in an increase in the number and severity of natural disasters,[9] and dangers, such as the Coronavirus Disease (COVID-19) causing devastating harm worldwide. The Coronavirus will result in increased business-related claims in addition to increased health care claims.[10] Estimates indicate that small businesses lost between $255 billion and $431 billion per month due to the pandemic.[11] In regard to claims,

[7] In cases involving multiple causes of loss, while the efficient proximate cause rule is applied in a majority of jurisdictions, it is not the only rule, such as the concurrent causation rule, that may be applied in regard to causation. A minority of states have expressly adopted the concurrent cause rule, and some states are unclear as to which rule, if any, is to be applied. *See* 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.03[3]. The concurrent cause rule is a more liberal approach taking the position that coverage should be found whenever two or more non-remote causes appreciably contribute to the loss and at least one of those causes constituted a covered risk. Under the concurrent cause rule, there is no requirement that a cause be a predominant cause in order for coverage to be found although some jurisdictions limit the concurrent cause rule by requiring that a covered cause be an independent causative factor. *See* 7 PLITT ET AL., *supra* note 2, at § 101:55. Additionally, as recognized in *Millar v. State Farm Fire & Casualty Co.*, 804 P.2d 822 (Ariz. Ct. App. 1980), Arizona has not adopted the efficient proximate cause rule and allows an insurer to limit its liability unless to do so would be inconsistent with public policy. Further, applying Maryland law, the judge in *Bethany Boardwalk Group LLC v. Everest Security Insurance Co.*, No. ELH-18–3918, 2020 WL 1063060 (D. Md. 2020), refused to adopt the efficient proximate cause rule stating, "[I]n sum, I shall not rely on a doctrine grounded in tort law to thwart the plain language of the Policy." *Id.* at *16.

[8] Utica Mut. Ins. Co. v. Hall Equip. Inc., 73 F. Supp. 2d 83, 88 (D. Mass. 1999).

[9] Dominic T. Clarke & Brian Lau, *Ongoing Consequences, Untested Coverage Potential Effects of Climate Change on Liability Insurance*, 57 DRI FOR DEF. 50, no. 5 (2015).

[10] *See* Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CONN. INS. L.J. 1, 4, 15 (2020).

[11] *Id.* at 5.

insurers have already begun to deny coverage for business interruption claims in regard to losses caused by the Coronavirus.[12]

Knowledge of the efficient proximate cause doctrine is critical in regard to causation disputes, although locating detailed coverage of the myriad issues involved in regard to application of the efficient proximate cause doctrine is challenging. This article covers significant issues involved in relation to the doctrine, many of which have not received significant attention. In addition to covering the evolution of the doctrine, this article addresses identification of the efficient proximate cause in the event of a loss, crucial distinctions made between jurisdictions, and the effect of anti-concurrent cause clauses. The article further suggests the preferred resolution of matters in dispute.

II. EVOLUTION AND DEVELOPMENT OF THE EFFICIENT PROXIMATE CAUSE DOCTRINE

The efficient proximate cause doctrine, originating in English common law, is rooted in the Latin phrase maxim "*causa proxima, non remota spectator*," widely interpreted to mean "the immediate not the remote cause is considered."[13] Followed by a majority of jurisdictions today, the doctrine's roots were recognized even in early insurance law cases.[14] For example, an early case arising during the Civil War addressing the efficient proximate cause doctrine is *Insurance Co. v. Boon*.[15] Boon sued to recover on a policy of insurance after goods and merchandise in his store were destroyed by fire.[16] The insurer relied on a policy exclusion for fire damage resulting from "any invasion, insurrection, riot, or civil commotion, or of any military or usurped power."[17] The exclusion was pertinent because the fire spread to the plaintiff's premises following a Union Commander's order that the local City Hall be burned to prevent access by the invading Confederate army to military goods stored there.[18]

[12] *See id.* at 4.

[13] Passa, *supra* note 4, at 564 (quoting Tillery v. Hull & Co., Inc., 876 F.2d 1517, 1519 (11th Cir. 1989)).

[14] *Id.* at 580.

[15] 95 U.S. 117 (1877).

[16] *Id.* at 130.

[17] *Id.* at 127.

[18] *Id.* at 129–30.

In regard to causation in *Boon* and the plaintiff's ability to collect under the policy, the Court stated that, "the inquiry is, whether the rebel invasion or the usurping military force or power was the predominating and operative cause of the fire."[19] Referencing the maxim *"causa proxima, non remota spectator*," the Court recognized incidental causes are not proximate or responsible ones and that "[t]he proximate cause is the efficient cause, the one that necessarily sets the other causes in operation."[20] The Court in *Boon* went on to rule that the fire took place through the means of a military or usurped poser and that coverage was, therefore, foreclosed.[21]

The efficient proximate cause doctrine, which comes into play only when one or more causative factors work together to cause a distinct loss, is not implicated when multiple perils occur at the same time but act independently to cause different losses. In that situation, the disputes involve evidentiary issues as to which occurrence caused which loss.[22] Nor does the efficient proximate cause doctrine apply when only one peril causes a loss.[23] As recognized in *Chadwick v. Fire Insurance Exchange*, the efficient proximate cause analysis is used only "where two or more distinct actions, events or forces combined to create the damage," and "[a]n insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss."[24]

Determining whether the efficient proximate cause is implicated can be challenging, and examples of the analysis used in specific situations are helpful. In discussing the types of circumstances properly invoking the efficient proximate cause doctrine, the *Chadwick* court referenced *Finn v. Continental Insurance Co.* as an example of the applicable principles involved.[25] The insured in *Finn* suffered a loss caused by a broken sewer pipe, and the defending insurer denied coverage based on a policy exclusion for "continuous or repeated seepage or leakage."[26] The insured party argued that the "break," rather than the "leak" was the efficient proximate cause of the loss.[27] The court, however, rejected that argument recognizing that the

[19] *Id.* at 130.

[20] *Id.*

[21] *Id.* at 135.

[22] *See* 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.03[2].

[23] *See id.* § 44.03[1].

[24] 21 Cal. Rptr. 2d 871, 874 (Cal. Ct. App. 1993).

[25] 267 Cal. Rptr. 22 (Cal. Ct. App. 1990).

[26] *Id.* at 23.

[27] *Id.* at 24.

"break" was not conceptually distinct from the "leak" and that leaking and seepage necessarily implied a pipe break.[28] Because only one cause was involved, not two distinct perils, the efficient proximate cause doctrine was not implicated.[29]

Sabella v. Wisler,[30] however, was recognized by the *Finn* court as an example of a situation in which the efficient proximate cause doctrine was properly invoked. In *Sabella*, negligent construction of a sewer line led to a rupture that resulted in settling of the plaintiff's house in uncompacted fill.[31] The policy at issue excluded settling from coverage, but negligent construction of a sewer pipe was a covered peril. As recognized by the *Finn* court, the situation in *Sabella* involved a concurrence of different causes leading to the loss, namely the broken pipe and the uncompacted fill, two distinct and separate perils.[32]

City of West Liberty v. Employers Mutual Casualty Co., is another, very recent, case from the Iowa Supreme Court addressing the requirement that there be at least two independent causative forces at play prior to the application of the efficient proximate cause doctrine.[33] In an unfortunate incident, as described by the court as "a story that probably would not have been written by Beatrix Potter," a squirrel got onto an electrical transformer causing an electrical arc that killed the squirrel and caused significant damage to property of the plaintiff municipality.[34] Under the city's all-risks insurance policy, damage from electrical arcing was an excluded event.[35] The city attempted to avoid the effect of the exclusion through claiming that squirrel activity, not arcing damage, was the efficient proximate cause of its losses.[36] The court recognized, however, that the case did not involve two independent causes. Instead, as pointed out by the court, arcing always has some cause, in this case squirrel activity; and the exclusion for electrical arcing would be rendered meaningless if in order to avoid it, an insured had to merely point to the cause of the arcing.[37] The court affirmed the trial court's finding that

[28] *Id.*

[29] *Id.*

[30] 377 P.2d 889 (Cal. 1963).

[31] *Id.* at 34.

[32] *Finn*, 267 Cal. Rptr. at 23–34 (citing *Sabella*, 377 P.2d at 895).

[33] 922 N.W.2d 876 (Iowa 2019).

[34] *Id.* at 877.

[35] *Id.*

[36] *Id.* at 879.

[37] *Id.* at 880–81.

the squirrel by itself did not cause any independent damage "such as gnawing on a power line or digging for nuts in a dangerous area."[38] As recognized by the court, the efficient proximate cause doctrine is only applicable in insurance cases where covered and non-covered causes are independent. The damage resulting from the squirrel's activity did not involve "a situation where two independent causes, one covered and one excluded, may have contributed to the loss."[39]

III. TIMING IN RELATION TO DETERMINING EFFICIENT PROXIMATE CAUSATION

Once a court determines that the efficient proximate cause doctrine or rule should be applied, determining the efficient proximate cause of a loss raises significant issues. Crucial in many cases is the issue of whether the efficient proximate cause is determined according to (1) the triggering or initial cause, (2) the last causative event, or (3) the predominant, most significant causal event.[40] As opposed to either the initial causative event or the final causative event, basing the determination of efficient proximate cause on the most significant causative factor would more likely result in a question of fact for a jury determination.[41] Recognizing as such, one commentator argued that "[t]he laws of physics will give way to the art of persuasion" should the analysis of efficient proximate cause be based on the predominant cause of a loss as opposed to the initial cause of loss.[42] Ideas of fairness, however, dictate that a court consider the true primary cause of a loss which may or may not be the first or last link on the chain of causation. Strictly speaking, focusing on the predominant cause in determining efficient proximate causation should not favor either the insurer or the insured although, as a practical matter, jury sympathy for an insured would likely be a factor in many determinations. Set forth below are cases and authorities supporting application of the last link, the first link, and the predominant or

[38] *Id.* at 878.

[39] *Id.* at 877.

[40] *See* Dale L. Kingman, *First Party Property Policies and Pollution Coverage*, 28 GONZ. L. REV. 449 (1993); *see generally* 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3 (discussing various methods of setting the time of causation under the efficient proximate cause doctrine).

[41] Kingman, *supra* note 40, at 484.

[42] *Id.*

most substantial cause in relation to determining efficient proximate causation.

A. Support for the View That the Last Event in the Chain of Causation Determines Efficient Proximate Causation

In *Album Realty Corp. v. American Home Assurance Co.*, the court found that the last causative event was determinative in timing the efficient proximate cause of the loss at issue and resulting insurance coverage.[43] After a sprinkler head froze and ruptured causing water damage, the plaintiff sued to recover under a builder's risk policy issued by the defendant that provided coverage for "all risks of direct physical loss or damage."[44] The defendant denied coverage based on an exclusion for damage caused by "extremes in temperature" and/or "freezing."[45] Although conceding that the property damage would not have occurred in the absence of freezing, the court refused to accept, that the initial occurrence of freezing was the "proximate, efficient, and dominant" cause of the water damage.[46] The court focused instead on the expectations of a reasonable businessperson taking the view that, after observing the water damage, a reasonable business person would look no further for alternate causes.[47] The court did not expressly state that the last causative event would under all circumstances constitute the efficient proximate cause of damage. Providing support for the significance of the latter causative occurrence, the court, however, cited and relied upon *Home Insurance Co. v. American Insurance Co.*[48] for the proposition that in an insurance context, "a causation inquiry does not trace events back to their 'metaphysical beginnings.'"[49]

The dispute in *Home Insurance Co. v. American Insurance Co.*, involved an exclusion for losses resulting from electric currents. The insured suffered a loss after hot water and steam from an open drain line, a covered peril, caused an overload in the building's electrical distribution system leading to damages.[50] Finding that efficient or dominant cause of the loss was the short

[43] 607 N.E.2d 804 (N.Y. 1992).

[44] *Id.* at 804.

[45] *Id.* at 805.

[46] *Id.*

[47] *Id.*

[48] 537 N.Y.S.2d 516 (N.Y. App. Div. 1989).

[49] *Album Realty Corp.*, 607 N.E.2d at 805 (citing *Home Ins.*, 537 N.Y.S.2d at 517).

[50] *Home Ins.*, 537 N.Y.S.2d at 516.

circuit in the electrical system, the court applied the principle quoted in *Album Realty Corp.* that "the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings."[51]

While the above cases clearly express a preference for focusing on later causative events as opposed to the initial causative factor, that is a minority approach today.[52] While at one time, following English precedent, a majority of American courts looked to the last cause that resulted in a loss in relation to determining the legal causative factor, that practice is not typically used today.[53]

B. Support for the View That the First Event in the Chain of Causation Determines Efficient Proximate Causation

An early 1893 Massachusetts Supreme Court case, *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*, lends support to the position that the initial causative force should be given preference in determining the efficient proximate cause of a loss.[54] The dispute in the case involved whether the insured could recover on a policy of fire insurance after a lightning strike resulted in a fire that caused an electrical short circuit that damaged machinery although the machinery itself was not burned.[55] In determining that the policy of fire insurance covered the damage, the court stated that "the 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."[56] According to the court, the issue in such cases is whether an unbroken connection exists between the initial causative force and the harm sustained without the intervention of a new and independent causative force.[57] If so, then the initial force setting the succession of events in motion is the efficient and proximate cause of the loss at issue.[58]

---

[51] *Id.* at 517 (quoting Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1006 (2nd Cir. 1974)).

[52] *See* 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.03[1].

[53] *Id.*

[54] 33 N.E. 690 (Mass. 1893).

[55] *Id.* at 690.

[56] *Id.* at 691.

[57] *Id.*

[58] *See id.*

In *Jussim v. Massachusetts Bay Insurance Co.*, the Supreme Court of Massachusetts later relied on *Lynn Gas & Electric Co.* in ruling that recovery would be allowed on a homeowner's insurance policy after negligently released heating oil on property neighboring the plaintiff migrated onto the plaintiffs' property.[59] The negligence resulting in the initial release of the oil was a covered occurrence under the policy, but the insurer defended on the basis of a pollution exclusion clause.[60] The court allowed recovery for the insured based on what it termed the "well established principle that recovery on an insurance policy is allowed 'where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk.'"[61]

Very recent authority lending support to the position that the initial causative event is the crucial point at which to time the occurrence of efficient proximate causation includes the case of *Xia v. ProBuilders Specialty Insurance Co* decided by the Washington Supreme Court.[62] According to the *Xia* court, the rule of efficient proximate coverage applies to provide coverage "where a covered peril sets in motion a causal chain, the last link of which is an uncovered peril."[63] Focusing on the precipitating event, the court stated that, "[i]f the *initial* event, the 'efficient proximate cause,' is a covered peril, then there is coverage under the policy regardless whether *subsequent* events within the chain . . . are excluded by the policy."[64] As to exclusions in relation to efficient proximate cause, the court again focused on the initial causative force stating that, "It is perfectly acceptable for insurers to write exclusions that deny coverage when an excluded occurrence *initiates* the causal chain and is itself either the sole proximate cause or the efficient proximate cause of the loss."[65]

---

[59] 610 N.E.2d 954, 956–57 (Mass. 1993).

[60] *Id.* at 955.

[61] *Id.* (quoting Standard Elec. Supply Co. v. Norfolk & Dedham Mut. Fire Ins. Co., 307 N.E.2d 11, 13 (Mass. App. Ct. 1973)).

[62] 400 P.3d 1234, 1236 (Wash. 2017).

[63] *Id.* at 1240 (quoting Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co., 881 P.2d 201, 206 (Wash. 1994)).

[64] *Id.* (quoting Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co., 881 P.2d 201, 206 (Wash. 1994)) (emphasis added).

[65] *Id.* at 1241 (emphasis added) (citing Vision One, LLC v. Phila. Indem. Ins. Co. 276 P.3d 300, 309 (Wash 2012); Findlay v. United Pac. Ins. Co. 917 9.2d 116, 120 (Wash. 1996); McDonald v. State Farm Fire & Cas. Co., 837 P.2d 1000, 1006 (Wash. 1992); Safeco Ins. Co. of America v. Hirschmann, 773 P.2d 413, 416 (Wash. 1989)); *see also* Paulucci v. Liberty Mut. Fire Ins. Co., 190 F. Supp. 2d 1312, 1319 (M.D. Fla. 2002) (recognizing that in relation to an earthquake causing a

Hudson Specialty Insurance Co. v. Magio's Inc., a federal district court decision applying Florida law, is another recent case clearly distinguishing between an initial causative occurrence and a force occurring later in the chain of causation.[66] Specifically, in relation to the efficient proximate cause doctrine, the court stated that "insurance coverage exists where loss arises when a covered peril sets in motion an uncovered peril, but not vice versa."[67]

The California Supreme Court decision of *Sabella v. Wisler*[68] is often cited for the principle that the initial causative event is crucial in determining efficient proximate causation,[69] although, as discussed below, later authority from the California Supreme Court disputes that proposition. The plaintiffs in *Sabella* sued after settling of their home resulted in significant damage.[70] The evidence showed that the rupture of a sewer line resulted in waste water being emptied into loose fill at the home setting in motion forces leading to the settling at issue.[71] The policy involved insured against "all physical loss" but excluded coverage caused by settling.[72] Although there was no dispute but that settling of the home was involved, the court found that the policy covered the loss based on its determination that the efficient proximate cause of the loss was negligent construction of the sewer pipe.[73] The court recognized that the absence of settling prior to the breakage of the pipe indicated that the broken pipe was the "predominating" cause of the loss.[74] Other language, however, indicated a focus on the initial causative event as opposed to the predominating, or most significant, cause of the loss.[75] For example, according to the court, "where there is a concurrence of different causes, the efficient cause the one that sets others in motion is the cause to

break in a gas main resulting in a fire, coverage is dependent on whether the first event, the earthquake, was a covered peril).

[66] 363 F. Supp. 3d 1351, 1356 (S.D. Fla. 2018).

[67] *Id.* (quoting Doe v. Hudson Specialty Ins. Co., No. 16-CIV-24176, 2017 WL 979263, at *3 (S.D. Fla. Mar. 14, 2017)).

[68] 377 P.2d 889, 896 (Cal. 1963).

[69] *E.g.*, Jussim v. Mass. Bay Ins. Co., 610 N.E.2d 954, 956 (Mass. 1993) (relying on the *Sabella* decision as support for its analysis focusing on the initial causative event); Sebo v. Am. Home Assurance Co., 208 So. 3d 694, 698–99 (Fla. 2016) (relying on *Sabella* for the proposition that the efficient proximate cause is the cause that sets others in motion).

[70] *Sabella*, 377 P.2d at 892.

[71] *Id.*

[72] *Id.* at 890.

[73] *Id.* at 892.

[74] *Id.* at 895.

[75] *Id.* at 896.

which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster."[76] The court further stated that the breaking of the sewer pipe acted as a "trigger" in regard to the settlement that occurred.[77]

Significantly, the California Supreme Court later clarified in *Garvey v. State Farm Fire & Casualty Co.* that what was meant in *Sabella* was that the "predominating" cause was the significant event in determining efficient proximate causation, disclaiming references to a "moving" or "triggering" cause.[78] The *Garvey* decision is discussed fully below.

C. Support for the View That the Most Significant Event in the Chain of Causation Determines Proximate Causation

The better reasoned theory is that the efficient proximate cause of a loss should be determined based on the predominant or most significant cause, which may be the first, last, or intermediate event leading to a loss. As quoted below, in clarifying its decision in *Sabella*, the California Supreme Court in *Garvey v. State Farm Fire & Casualty Co.*, recognized as such:

> We use the term "efficient proximate cause" (meaning predominating cause) when referring to the *Sabella* analysis because we believe the phrase "moving cause" can be misconstrued to deny coverage erroneously, particularly when it is understood literally to mean the "triggering" cause. Indeed, we believe misinterpretation of the *Sabella* definition of "efficient proximate cause" has added to the confusion in the courts . . . .[79]

[76] *Id.* at 895 (quoting 6 COUCH ON INSURANCE § 1466 (1930)).

[77] *Id.* at 897.

[78] 770 P.2d 704, 708 (Cal. 1989) (in bank).

[79] *Id.*; Florea v. Nationwide Mut. Fire Ins. Co., No. 7908, 1983 WL 5030 (Ohio App. Jan. 28, 1983), further illustrates the variations in reasoning presented in relation to determining the efficient proximate cause of a loss. The court in *Florea* stated that "[i]f the nearest efficient cause of the loss is one of the perils insured against, the courts look no further. If the nearest efficient cause of the loss is not a peril insured against, recovery may nevertheless be had if the dominant cause is a risk or peril insured against." *Id.* at *16 (citations omitted). This analysis varies from that typically employed by courts focusing on the most significant causative event, in which case the "efficient" cause of the loss would be the "dominant" cause of the loss regardless of its location on the chain of causation. The better view on this issue was expressed in W. Nat'l Mut. Ins. Co. v. Univ. of N.D., 643 N.W.2d 4 (N.D. 2002), in which the court approved an instruction to the jury that "[t]he efficient

The plaintiffs in *Garvey* sued to recover under an all-risk homeowner's policy after encountering a home addition pulling away from the main structure along with other problems.[80] The plaintiffs' contention was that building contractor negligence, a covered occurrence, led to their losses whereas the insurer defended on the basis of an exclusion for losses caused by earth movement.[81] After clarifying the standard to be employed in determining the efficient proximate cause of the loss, the court remanded the case for a jury determination as to the efficient proximate cause of the loss.[82]

The *Garvey* court is not alone in its conclusion that the efficient proximate cause of a loss is the predominant cause regardless of its location in the sequence of events leading to the loss. For example, when confronted with an issue of causation, the West Virginia Supreme Court in *Murray v. State Farm Fire and Casualty Co.* refuted the contention that the efficient proximate cause of a loss should be limited to an initial or triggering occurrence.[83] The plaintiffs in *Murray* sued for coverage under homeowner's insurance policies after their homes were damaged by rocks falling from the highwall of a nearby abandoned rock quarry.[84] The insurers denied coverage based on policy exclusions for landslides and erosion.[85] The plaintiffs, however, argued that the facts showed that the damage was caused by the negligent creation of the highwall and its negligent maintenance, events that would be covered under the policies of insurance.[86]

The *Murray* court stated that the efficient proximate cause of a loss is the predominating cause which is "not necessarily the last act in a chain of events, nor is it the triggering cause."[87] The court instead focused on the "quality of the links in the chain of causation" pointing to the "predominant cause."[88] According to the court, "No coverage exists for a loss if the covered risk was only a remote cause of the loss, or conversely, if the excluded risk

proximate cause is considered the predominating cause of the loss. By definition there can only be one efficient proximate cause; i.e., predominant cause of loss." *Id.* at 14.

[80] *Garvey*, 770 P.2d at 705.

[81] *Id.* at 706.

[82] *Id.* at 715.

[83] 509 S.E.2d 1, 12 (W. Va. 1998).

[84] *Id.* at 5.

[85] *Id.* at 6.

[86] *Id.* at 12–13.

[87] *Id.* at 12.

[88] *Id.*

was the efficient proximate cause of the loss."[89] In its analysis, the court stated that "[t]he efficient proximate cause is the risk that sets others in motion."[90] Notably, while the court made clear that it considered the efficient proximate cause of a loss to be the predominating cause of the loss, use of language such as the loss "setting others in motion," without a qualifier as to exactly what was meant, contributes to confusion in relation to application of the doctrine.[91]

In *West Virginia Fire & Casualty Co. v. Mathews*, the West Virginia Supreme Court reaffirmed the standard set forth in *Murray* that the efficient proximate cause of a loss is the predominating cause.[92] The *Mathews* case is significant in that it illustrates that while a standard focusing on the predominant or most substantial cause of a loss, as opposed to the initial or final cause, is more likely to result in a jury question, that is not necessarily so. The plaintiff in *Mathews* sustained a loss when an imposter fraudulently convinced a contractor to demolish a house owned by the plaintiff.[93] The defending insurer denied coverage based on an exclusion for vandalism or malicious mischief, which were uncovered perils under the policy.[94] The court recognized that a combination of causes resulted in the loss, namely the action of the imposter, the contractor's failure to verify the identity of the person requesting the demolition, and the actual act of demolition.[95] The court, however, found that the predominating cause of the loss and the efficient proximate cause of the loss was the action of the imposter, an excluded act of vandalism or malicious behavior, and affirmed the trial court's grant of summary judgment to the insurer.[96]

The North Dakota Supreme Court in *State ex rel. State Fire and Tornado Fund of North Dakota Insurance Department v. North Dakota State University* similarly stated that the efficient proximate cause "is not necessarily the last act in the chain of events, nor necessarily is it the triggering cause" and that instead, the efficient proximate cause doctrine focuses on the predominating cause of the loss and "looks to the quality of

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] 543 S.E.2d 664, 668 (W. Va. 2000).

[93] *Id.* at 666.

[94] *Id.*

[95] *Id.* at 668–69.

[96] *Id.* at 669–70.

the links and the chain of causation."[97] Quoting *North Dakota State University*, the treatise *Bruner & O'Connor on Construction Law*,[98] also adopts the principle that the efficient proximate cause of a loss is the predominant causative factor which may or may not be the first or last act in a chain of events.[99]

IV. TYPES OF POLICIES TO WHICH THE EFFICIENT PROXIMATE CAUSE DOCTRINE IS APPLIED

As discussed below, some jurisdictions limit the application of the efficient proximate cause doctrine to certain types of claims, policies, or factual situations. The better view is that the doctrine should be applied universally. The efficient proximate cause doctrine is a reason-based doctrine that can be applied equitably to insureds and insurers alike.[100] A universal approach to its application would result in less confusion and more consistency among jurisdictions.

A. The Efficient Proximate Cause Doctrine as Applied to Claims in Addition to Those for Property and Casualty Losses

Many of the cases addressing the efficient proximate cause doctrine involve claims for property damage brought under property and casualty policies or commercial general liability policies. In fact, the court in *Cain v. Fortis Insurance Co.*, a decision of the Supreme Court of South Dakota,

[97] 694 N.W.2d 225, 233 (N.D. 2005) (quoting W. Nat'l Mut. Ins. Co. v. Univ. of N.D., 643 N.W.2d 4, 15 (N.D. 2002)).

[98] 4 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR, BRUNER & O'CONNOR ON CONSTRUCTION LAW § 11:70, Westlaw (database updated Jan. 2020).

[99] *Id.*; *see also* Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co., 863 F. Supp. 1226, 1230 (D. Nev. 1994) (recognizing that the efficient proximate cause of a loss is the predominating cause, not necessarily the triggering cause); THOMAS E. MILLER ET AL., HANDLING CONSTRUCTION DEFECT CLAIMS WESTERN STATES § 6.03[A] (4th ed.), Westlaw (database updated 2021) (recognizing that the efficient proximate cause is the predominating cause of a loss and does not have to be the immediate or last cause or the triggering or moving cause); Patrick J. O'Connor, Jr., *Recent Issues in Property Coverage*, 34 WM. MITCHELL L. REV. 177, 226 (2007) (quoting State ex rel. State Fire and Tornado Fund of N.D. Ins. Dept. v. N.D. State Univ., 694 N.W.2d 225, 234 (N.D. 2005) for the proposition that the efficient proximate cause is the predominant cause of the loss, not necessarily the last or the trigger in the chain of causation).

[100] Recognizing the equitable nature of the doctrine, the Supreme Court of Washington in Kish v. Ins. Co. of N. Am., 883 P.2d 308, 312 (Wash. 1994), characterized the doctrine as a "workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer." (quoting Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 708 (Cal. 1989)).

declined to apply the doctrine because the policy of insurance involved was not a property and casualty policy.[101] The plaintiff in *Cain* sued under a policy of health insurance for coverage of gastric bypass surgery.[102] The insurer defended based on an exclusion for treatment of obesity.[103] The plaintiff argued that coverage should be provided because she needed the procedure as necessary treatment for hypertension and joint deterioration which were the "efficient proximate causes" of her condition.[104] In refusing to consider the efficient proximate cause doctrine in relation to her claim, the court stated that the doctrine had been utilized in cases involving property and casualty insurance cases but that "there is almost no case law to support its application to health insurance policies."[105]

The court in *Cain* referred to, but refused to follow, *Rozek v. American Family Mutual Insurance Co.*, an Indiana appellate decision relying on the efficient proximate cause doctrine in relation to coverage under a policy of health insurance.[106] Without further elaboration, the *Cain* court stated that the issues in *Rozek* were distinguishable.[107] The issues in *Rozek*, however, while not identical to those in *Cain*, do indeed support application of the doctrine to policies of health insurance. The plaintiff in *Rozek* sued for coverage under a policy of health insurance for surgery to remove an adrenal gland tumor.[108] The insurer denied coverage under a policy provision excluding coverage for claims for which "hypertension, its underlying causes, and its complication"

[101] 694 N.W.2d 709, 715 (S.D. 2005).

[102] *Id.* at 711.

[103] *Id.*

[104] *Id.* at 714.

[105] *Id.* at 715. Interestingly, in N. Star Mut. Ins. Co. v. Peterson, 749 N.W.2d 528 (S.D. 2008), a case involving coverage under an automobile liability policy for a gunshot injury caused by an insured, the South Dakota Supreme Court noted that the trial court found that the vehicle incident involved was the "efficient and predominating cause" of the accident. *Id.* at 536 n.4. The court went on to note that although the doctrine had been utilized in cases involving property and casualty policies, the court had earlier refused to apply the efficient proximate cause doctrine to issues of health insurance coverage. *Id.* (citing Cain v. Fortis Ins. Co., 694 N.W.2d 709, 714 (S.D. 2005)). The court stated that it declined to discuss the issue of whether the efficient proximate cause doctrine applied in the case involving liability coverage for the gunshot wound because the issue was not properly before the court. *Id.* The court's recognition of an issue as to the extent of the reach of the efficient proximate cause doctrine raises the question of whether the court was indicating its inclination to reexamine the issue under an appropriate factual situation.

[106] 512 N.E.2d 232 (Ill. App. 1987).

[107] *Cain*, 694 N.W.2d at 715.

[108] *Rozek*, 512 N.E.2d at 233–34.

were the "sole, primary, or secondary cause" of medical treatment.[109] The insurer claimed that the adrenal gland problem was an "underlying cause" cause of hypertension and, therefore, excluded.[110] In reversing the trial court's grant of summary judgment to the insurer, the court recognized, however, that the policy exclusion was inapplicable to a condition, such as a diseased adrenal gland, requiring "independent corrective treatment," without regard to hypertension.[111] In support of its decision, the court relied on the efficient proximate cause doctrine stating that "[w]hen two or more causes contribute to an injury . . . which of the contributing causes is the efficient, dominant, proximate cause is a question to be submitted to the jury."[112]

In addition to health insurance, the efficient proximate cause doctrine has been relied upon in relation to claims under policies of life insurance,[113] accident insurance,[114] automobile insurance in relation to coverage for medical expenses,[115] mortgage protection insurance,[116] hospitalization

[109] *Id.*

[110] *Id.* at 235.

[111] *Id.*

[112] *Id.* (quoting Nationwide Mut. Ins. Co. v. Neville, 434 N.E.2d 584, 591 (Ind. Ct. App. 1982)).

[113] Romero v. Hartford Life & Accident Ins. Co., CIV No. 10-0867 LH/DJS, 2011 WL 13277501, at *6 (D.N.M. Dec. 6, 2011) (referencing "proximate efficient cause"); Parra v. Life Ins. Co. of N. Am., 258 F. Supp. 2d 1058, 1066 (N.D. Cal. 2003); English v. Ins. Co. of N. Am., 270 F. Supp. 713, 719 (N.D. Miss. 1967); Nationwide Mut. Ins. Co. v. Neville, 434 N.E.2d 585, 591–92 (Ind. Ct. App. 1982) (quoting Cont'l. Cas. Co. v. Lloyd, 73 N.E. 824, 826 (Ind. 1905)); Esman v. Equitable Assurance Soc'y, No. 1960071, 1997 WL 33344948, at *3 (Mich. Ct. App. Aug. 26, 1997); Harris v. N.Y. Life Ins. Co., 516 S.W.2d 303, 308 (Mo. Ct. App. 1974) (recognizing the continued validity of the maxim "*causa proxima non remota spectator*" translated as "the direct and not the remote cause is considered"); Fetter v. Fidelity & Cas. Co. of N.Y., 73 S.W. 592, 595 (Mo. 1903) (quoting the maxim "*[c]ausa proxima, non remota, spectator*"); Kievit v. Loyal Protective Life Ins. Co., 170 A.2d 22, 31 (N.J. 1961); Armijo v. World Ins. Co., 429 P.2d 904, 905–06 (N.M. 1967).

[114] Holland v. Nat'l Union Fire Ins. Co. of Pittsburgh, No. 2:12-CV-1983-TLN-AC, 2014 WL 6886783, at *6 (E.D. Cal. Dec. 4, 2014); Brooks v. Metro. Life Ins. Co., 163 P.2d 689, 691 (Cal. 1945).

[115] State Farm Mut. Auto Ins. Co. v. Johnson, 133 So. 2d 288, 290 (Miss. 1961) (citing Maness v. Life & Cas. Ins. Co. of Tenn., 28 S.W.2d 339 (Tenn. 1930)).

[116] *See* Cont'l Cas. Co. v. Freeman, 481 S.W.2d 309, 311 (Ken. App. 1972). The court in *Freeman* relied in part on Couey v. Nat'l Benefit Life Ins. Co., 424 P.2d 793, 795 (N.M. 1967), a case involving a hospitalization policy of insurance and recognizing that liability of the insurer arose if the proximate efficient cause of the hospitalization was an accident covered under the policy. *Freeman*, 481 S.W.2d at 313–14 (citing Couey v. Nat'l Benefit Life Ins. Co., 424 P.2d 793, 795 (N.M. 1967)).

insurance providing a set amount for each day of hospitalization,[117] and commercial general liability insurance, which protects businesses from liability when a business's operations or employees cause harm to another.[118] In *Xia v. ProBuilders Specialty Insurance Co.*, a case involving liability under a commercial general liability policy, the Supreme Court of Washington stated "[w]e have never before suggested that the rule of efficient proximate cause is limited to any one particular type of insurance policy. Instead, the rule has broad application whenever a covered occurrence under the policy—whatever that may be—is determined to be the efficient proximate cause of the loss."[119]

There does not seem to be a logical reason to limit the application of the efficient proximate cause doctrine to only claims under property and casualty policies of insurance. The weight of authority appears to be that the doctrine is applicable to other types of policies as well. As the examples listed above demonstrate, issues of causation arise in relation to many types of claims. Absent the efficient proximate cause doctrine, insured consumer and businesses would often be denied recovery.

There is an exception to the suggestion that the efficient proximate cause doctrine should apply to various types of insurance coverage. The exception involves coverage on named peril policies in jurisdictions basing the determination of efficient proximate cause on the initial causative event.[120] That situation is covered in the section below.

B. Distinctions Made in Regard to First-Party v. Third-Party Claims

A first-party insurance claim occurs when an insured sustains a loss and makes a claim against the insured's own policy of insurance.[121] A third-party insurance claim occurs when a party allegedly injured by an insured makes a claim against the insured covered by the insured's policy of liability insurance.[122] Some courts make a distinction between first-party claims and

[117] Couey v. Nat'l Benefit Life Ins. Co., 424 P.2d 793, 795 (N.M. 1967).

[118] *See* Hudson Specialty Ins. Co. v. Magio's Inc., 363 F. Supp. 3d 1351 (S.D. Fl. 2018) (involving allegations related to sexual assault and coverage under a general liability insurance policy).

[119] 400 P.3d 1234, 1240 (Wash. 2017).

[120] *See* Doe v. Hudson Specialty Ins. Co. 719 F. App'x 951, 954 (11th Cir. 2018) (discussing the application of the doctrine of efficient proximate clause where doing so would render the exclusionary clause a nullity).

[121] Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 705 n.2 (Cal. 1989) (in bank).

[122] *Id.*

third-party claims in relation to whether the efficient proximate cause doctrine is applied.[123]

1. The View That the Efficient Proximate Cause Doctrine Is Applied to First-Party Claims Only with Third-Party Claims Invoking the Concurrent Cause Doctrine

There is support for the view that the efficient proximate cause doctrine applies to first-party insurance claims but that the concurrent cause doctrine applies to third-party insurance claims. The concurrent cause doctrine takes the approach that coverage should be permitted whenever two or more causes appreciably contribute to a loss and at least one of the causes is a covered risk.[124] An example of the bifurcated approach is *Garvey v. State Farm Fire & Casualty Co*., applying California law, in which the court drew a sharp distinction between the causation analysis applied to a first-party insurance claim as opposed to a third-party claim.[125]

After a home addition began pulling away from the main structure, the plaintiffs in *Garvey* made a first-party insurance claim alleging contractor negligence which the insurer denied on the basis of a policy exclusion for earth movement.[126] Based on its concurrent cause analysis, the trial court directed a verdict for the plaintiffs as to the defendant's liability.[127] The California Supreme Court, however, overturned the trial court's ruling on the basis that in a first-party claim, the court should utilize the efficient proximate cause analysis to determine the predominant cause of the harm at issue.[128] According to the court, the concurrent cause analysis should be used only in a third-party situation involving a liability claim when two proximate concurrent causes, each originating from an independent act of negligence, join together to produce injury.[129]

---

[123] *See generally id.*; Allstate Ins. Co. v. Blount, 491 F.3d 903 (8th Cir. 2007); Utica Mut. Ins. Co. v. Hall Equip., 73 F. Supp. 2d 83 (D. Mass. 1999); Xia v. ProBuilders Specialty Ins. Co., 400 P.3d 1234 (Wash. 2017).

[124] *Blount*, 491 F.3d at 911 (recognizing that under Missouri law, when multiple perils constitute proximate causes of injury, the insurer is liable so long as one of the causes is a covered peril); 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, at § 44.03[3]; 7 PLITT ET AL., *supra* note 2, at § 101:55.

[125] 770 P.2d at 710–11.

[126] *Id.* at 706.

[127] *Id.*

[128] *Id.* at 715.

[129] *Id.* at 705.

As support for its decision, the *Garvey* court distinguished the third-party claim involved in *State Farm Mutual Auto Insurance Co. v. Partridge*.[130] Under the circumstances of *Partridge*, described by the court as "an instance of what can only be described as blatant recklessness," the insured, after filing the trigger mechanism of his pistol so that it would have "hair-trigger" action, went with friends to hunt jackrabbits at night from his vehicle.[131] As he drove over rough terrain while waving his gun in his hand, the gun fired and injured a passenger resulting in litigation brought by the passenger.[132] The homeowner's policy under which the third-party claim was made excluded coverage for injuries arising out of the use of motor vehicles.[133] Because the use of the gun and the driving were independent of each other and both caused injury, coverage was found based on a concurrent proximate cause analysis.[134]

Referencing distinctions between first-party insurance and tort liability coverage provided under a third-party liability policy, the *Garvey* court expressed concern that applying the concurrent cause approach in a first-party liability context would nullify policy exclusions.[135] According to *Garvey*, in a situation involving property insurance, in a third-party liability context, the insurer agrees to cover a broader spectrum of risks than that involved in a first-party claim.[136] In the court's analysis, the reasonable expectations of the insured and insurer in regard to first-party property losses under a homeowner's policy "cannot reasonably include an expectation of coverage in property loss cases in which the efficient proximate cause of the loss is an activity expressly excluded under the policy."[137]

[130] *Id.*

[131] State Farm Mut. Auto. Ins. Co. v. Partridge, 514 P.2d 123, 125 (Cal. 1973), *superseded by statute* CAL. INS. CODE § 11580 (West, Westlaw through Ch. 27 portion of 2020 Reg. Sess.) *as recognized in* Wincor Nixdorf Inc. v. Discover Prop. & Cas. Ins. Co., CV 13-02772 GAF (FFMx), 2013 WL 12131718 (C.D. Cal. 2013).

[132] *Id.* at 125–26.

[133] *Id.* at 126.

[134] *Id.* at 130–31; *Garvey*, 770 P.2d at 709–10.

[135] 770 P.2d at 705.

[136] *Id.* at 710.

[137] *Id.* at 711.

2. The View That the Efficient Proximate Cause Doctrine is Applied to First-Party Claims Only with Third-Party Claims Remaining Subject to Exclusionary Language

The court in *Utica Mutual Insurance Co. v. Hall Equipment, Inc.*,[138] applying Massachusetts law, distinguished between first-party claims and third-party claims in relation to application of the efficient proximate cause doctrine but reached a different ultimate conclusion regarding coverage than did the court in *Garvey v. State Farm Fire & Casualty Co.*,[139] discussed above. Citing a pollution exclusion clause, the insurer in *Utica* claimed that it had no duty to defend or indemnify the defendants in regard to underlying litigation alleging environmental property damage.[140] The insureds, on the other hand, claimed that under the efficient proximate cause "train of events" test, coverage existed because negligence, a covered peril, was the instigating cause of the damage at issue.[141]

The court in *Utica* acknowledged that in *Jussim v. Massachusetts Bay Insurance Co.*,[142] a first-party claim situation decided by the Supreme Judicial Court of Massachusetts, coverage for pollution damage was found despite a policy exclusion for pollution.[143] The court in *Jussim* based its decision on a finding that negligence, a covered peril, was the efficient proximate cause of the environmental contamination at issue.[144] The court in *Utica*, however, on the basis that *Jussim* was a first-party liability case, refused to extend the doctrine to a third-party liability situation.[145] The court based its reasoning on the purpose behind the different types of coverages stating that first-party policies cover physical loss or damage to the insured's property and provide protection for fortuitous losses caused by actions outside the policyholder's control.[146] According to the court, third-party policies, on the other hand, are intended to protect an insured from liability

[138] 73 F. Supp. 2d 83 (D. Mass. 1999).

[139] 770 P.2d 704 (Cal. 1989) (in bank).

[140] 73 F. Supp. 2d at 87.

[141] *Id.* at 87–88, 91.

[142] 610 N.E.2d 954, 957 (Mass. 1993).

[143] *Utica Mut. Ins. Co.*, 73 F. Supp. 2d at 91.

[144] 610 N.E.2d at 955–57.

[145] *Utica Mut. Ins. Co.*, 73 F. Supp. 2d at 92.

[146] *Id.*

to others, and the efficient proximate cause doctrine should not be extended to that type of policy.[147]

U.S. Liability Insurance Co. v. Bourbeau,[148] cited and relied upon by the *Utica* court,[149] provides additional reasoning in regard to the refusal to apply the efficient proximate cause doctrine to third-party liability cases. The insurer in *Bourbeau* sought a declaration that, based on a pollution exclusion clause, the third-party policy at issue did not cover damages caused when the insured, a painter, negligently released lead paint chips.[150] In its refusal to apply the efficient proximate cause doctrine, the court emphasized the requirement of fortuity in connection with application of the doctrine.[151] As defined by Black's Law Dictionary, a "fortuitous event" is "[a] happening that, because it occurs only by chance or accident, the parties could not reasonably have foreseen."[152] According to the *Bourbeau* court, the efficient proximate cause doctrine is applicable to first-party policies in that they are generally intended to cover fortuitous losses.[153] On the other hand, the court stated that whether a loss is fortuitous is immaterial under a third-party policy in that the policy exclusion is targeted at a specific peril, such as pollution, regardless of fault.[154] In refusing to apply the efficient proximate cause doctrine, the *Bourbeau* court further noted that, in a third-party case, an insured should not be allowed to avoid policy exclusions in order to invoke the efficient proximate cause doctrine to obtain coverage for the insured's own negligence.[155]

Notably, while both *Garvey*, applying California law, and *Utica* and *Bourbeau*, applying the law of Massachusetts, agreed on the proposition that the efficient proximate cause doctrine should not apply to third-party coverage situations, the effect of the decisions differs greatly. The effect of *Garvey* is that the concurrent cause doctrine, a more liberal rule in favor of the insured, would be applied in a third-party case allowing the insured to recover so long as a covered event was a cause of the harm, regardless of

[147] *Id.*

[148] 49 F.3d 786, 790 (1st Cir. 1995).

[149] F. Supp. 2d at 92 (citing U.S. Liab. Ins. Co. v. Bourbeau, 49 F.3d 786, 789 (1st Cir. 1995)).

[150] 49 F.3d at 787.

[151] *Id.* at 790.

[152] *Fortuitous Event*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[153] 49 F.3d at 790.

[154] *Id.*

[155] *Id.*

whether the covered cause was the efficient proximate cause of the harm.[156] The effect of *Utica* and *Bourbeau*, however, is that full force and effect would be given to an exclusionary clause without consideration of either the efficient proximate cause doctrine or the concurrent cause doctrine.[157]

3. The View That the Efficient Proximate Cause Doctrine Applies to Third-Party Claims as Well as to First-Party Claims

The majority of cases involving the efficient proximate cause doctrine involve first-party claims, and the distinction between first-party and third-party claims has not been addressed in many jurisdictions.[158] There is authority, however, supporting the application of the doctrine to third-party claims. For example, in what has been opined to be the first case in the country to apply the efficient proximate cause beyond first-party claims,[159] the Supreme Court of Washington, in *Xia v. ProBuilders Specialty Insurance Co. RRG*, applied the efficient proximate cause doctrine to a third-party claim involving negligence.[160] The plaintiff in the underlying lawsuit alleged that the insured had responsibility for the negligent installation of a hot water heater that led to the release of toxic levels of carbon monoxide into a residential home.[161] In determining that the efficient proximate cause doctrine was appropriately applied to the third-party claim at issue, the court stated that, "We have never before suggested that the rule of efficient proximate cause is limited to any one particular type of insurance policy."[162] According to the court, "[i]nstead, the rule has broad application whenever a covered occurrence under the policy—whatever that may be—is determined to be the efficient proximate cause of the loss."[163]

The issue of whether the efficient proximate cause doctrine should be extended to third-party liability claims is an emerging topic. In a recent

[156] *See* Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 711 (Cal. 1989) (in bank).

[157] *See* Utica Mut. Ins. Co. v. Hall Equip., 73 F. Supp. 2d 83, 92–93 (D. Mass. 1999).

[158] *See* Alex Selarnick et al., *Recent Developments in Insurance Coverage*, 53 TORT TRIAL & INS. PRAC. L.J. 477, 492 (2018) (recognizing the potential impact of Xia v. ProBuilders Specialty Ins. Co. RRG, 400 P.3d 1234 (Wash. 2017) and its application of the efficient proximate cause doctrine on third-party claims).

[159] *Id.*

[160] 400 P.3d 1234, 1244 (Wash. 2017).

[161] *Id.* at 1236.

[162] *Id.* at 1240.

[163] *Id.* (citing Vision One, LLC v. Phila. Indem. Ins. Co., 276 P.3d 300 (Wash. 2012); Bowers v. Farmers Ins. Exch., 991 P.2d 734 (Wash. Ct. App. 2017)).

edition of the *Tort Trial & Insurance Practice Law Journal*, the authors of *Recent Developments in Insurance Coverage* opine that the *Xia* decision "has the potential to create uncertainty in the insurance market since insurers potentially must plan and prepare to cover third-party claims that were previously believed to be excluded under prior case law."[164] The authors further recommend that the effect of the efficient proximate cause doctrine on broad risk policies "be considered and analyzed by anyone in the insurance industry because it could have a dramatic effect on how insurance policies are written and priced going forward."[165]

The federal district court in *Hudson Specialty Insurance Co. v. Magio's Inc.*, arising in the Southern District of Florida and decided the year after *Xia*, likewise applied the efficient proximate cause doctrine to a third-party coverage dispute.[166] The plaintiff in the underlying litigation alleged negligence and vicarious liability on the part of the defending insureds.[167] The court did not further elaborate on application of the doctrine as applied to the facts of the case except to say that the efficient proximate cause doctrine "provides that where there is a concurrence of different perils, the efficient cause—the one that set the other in motion—is the cause to which the loss is attributable."[168]

The better view is that the efficient proximate cause doctrine should be applied to third-party claims as well as to first-party claims. As recognized by the court in *Xia*, the doctrine should be applied to any type of policy involving causation disputes, and there seems to be no logical reason to limit its application. Application of the concurrent cause doctrine, as opposed to the efficient proximate cause doctrine, to third-party liability policies, as advocated by the court in *Garvey v. State Farm Fire & Casualty Co.*, provides excessive exposure to insurers.[169] The better view is that an insurer should only be responsible for the efficient proximate cause of a loss. The

[164] Selarnick, *supra* note 158, at 492.

[165] *Id.* at 493.

[166] 363 F. Supp. 3d 1351, 1356 (S.D. Fla. 2018). The Eleventh Circuit case of Doe v. Hudson Specialty Ins. Co., 719 F. App'x. 951, 954 (11th Cir. 2018), also construing Florida law, further indicated in dicta that the efficient proximate cause doctrine would be applied in a third-party liability case.

[167] *Magio's Inc.*, 363 F. Supp. 3d at 1353–54.

[168] *Id.* at 1356 (quoting Sebo v. Am. Home Assurance Co., 208 So.3d 694, 697 (Fla. 2016)).

[169] *See* 770 P.2d 704, 710 (Cal. 1989) (in bank).

Garvey court's explanation that an insured in a third-party liability situation has an expectation of broader coverage is not convincing.[170]

Likewise, the limiting distinction discussed above made by the courts in *Utica Mutual Insurance Co. v. Hall Equipment, Inc.*[171] and *U.S. Liability Insurance Co. v. Bourbeau*,[172] between first-party and third-party claims based on the concept of first-party policies providing broader protection for fortuitous, unforeseen events, is not logical. Granted, an insured in a first-party coverage situation might not anticipate the occurrence of a very specific harm. The same is also true, however, in a third-party claim situation. For example, it is a rare insured who expects and foresees acting in a negligent manner and causing harm.

As discussed above, the court in *U.S. Liability Insurance Co. v. Bourbeau* was also of the opinion that the doctrine should not be extended to third-party claims because an insured should not be able to avoid responsibility for his or her own negligence.[173] The same reasoning, however, would apply to first-party claims. For example, an insured might contribute to his or her own property harm through negligence in not maintaining a roof structure but recover because of an outside force, such as a hurricane, being deemed the efficient proximate cause of the loss of the roof. Insureds are entitled to reasonably expect that if the predominate and proximate cause of a loss is an insured peril that coverage is available regardless of whether a first-party or third-party type of claim is involved.

C. The Effect of the Efficient Proximate Doctrine in Relation to Policies for Named Perils

In jurisdictions determining efficient proximate cause based only on the initial causative event, there is authority disregarding the efficient proximate cause doctrine when a policy is limited to a single named peril. For example, in *Doe v. Hudson Specialty Insurance Co.*, a case involving Florida law, the plaintiff sought a declaration that, under a liquor liability policy, the defending insurer owed coverage to the bar it insured after, as an underage seventeen-year-old college student, she was illegally served alcohol by a bar employee.[174] The plaintiff claimed that, as a result of intoxication, she was

[170] *See id.*

[171] 73 F. Supp. 2d 83, 92 (D. Mass. 1999).

[172] 49 F.3d 786, 790 (1st Cir. 1995).

[173] *Id.*

[174] 719 F. App'x 951, 952 (11th Cir. 2018).

unable to fend off attackers and was sexually assaulted.[175] The policy at issue provided coverage imposed "by reason of selling, serving or giving of any alcoholic beverage" but contained an exclusion for claims "arising out of" an assault or battery.[176]

Doe claimed that the sexual assault was covered pursuant to the efficient proximate cause doctrine because it was caused by her intoxication, a covered harm.[177] According to the court, however, the efficient proximate cause doctrine should not be applied where doing so would render the exclusionary clause a nullity."[178] Doe challenged that proposition on the basis that alcohol is not always an antecedent to an assault and battery.[179] The court, however, recognized that the alcohol liability policy at issue would be implicated only when alcohol-related events were involved, a point supporting the court's conclusion that disregarding the exclusion would result in it being rendered a nullity.[180]

The court further disagreed with the plaintiff's argument that, while it would not exclude coverage in her situation, the assault and battery exclusion would act to exclude coverage in certain situations.[181] Under the plaintiff's theory, the exclusionary clause would indeed work to preclude coverage when an assault and battery, not the serving of alcohol, was found to be the efficient proximate cause of a loss. Therefore, the exclusion would apply in certain situations and its disregard in her situation would not mean that the exclusion was an absolute nullity.[182] A problem with the plaintiff's theory, however, is that under Florida law, efficient proximate cause is determined according to the first triggering event, in this case the illegal serving of alcohol.[183] As the court stated, the doctrine applies "where a covered peril sets an uncovered peril into motion, not vice versa."[184] According to the court's logic, the efficient proximate cause had to be the initial serving of alcohol, and disregard of the exclusionary clause would indeed render it a

[175] *Id.*

[176] *Id.*

[177] *Id.* at 954.

[178] *Id.* (citing Arawak Aviation, Inc. v. Indem. Ins. Co. of N. Am., 285 F.3d 954, 958 (11th Cir. 2002)).

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *See id.*

[183] *Id.* (citing Sebo v. Am. Home Assurance Co., 208 So. 3d 694, 697 (Fla. 2016)).

[184] *Id.*

nullity. A different conclusion would likely have been reached in jurisdictions determining efficient proximate cause based on the predominant, most significant cause of loss.

Distinguishing *Doe*, the court in *Hudson Specialty Ins. Co. v. Magio's Inc.*, also decided under Florida law, recognized the significance of a named peril policy and the additional leeway available for a finding of coverage in regard to policies covering multiple perils.[185] The claimant alleged that, while at Magio's, she was given an adulterated beverage affecting her cognition and then driven from the premises and sexually assaulted by individuals, one of whom was an employee, agent, or apparent agent of Magio's.[186] She claimed negligent supervision and security, and vicarious liability on the part of Magio's and its lessor.[187] The insurer sought a declaratory judgment that under the commercial general liability insurance policy at issue, it had no duty to defend in regard to the underlying lawsuit.[188]

The policy at issue required the insurer to defend claims for bodily injury caused by an "occurrence" broadly defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[189] While the plaintiff's claims of negligence appeared to be covered under that provision, the insurer contended that there was no coverage based on a policy exclusion for assault and battery.[190] Pursuant to the efficient proximate cause doctrine, however, the court ruled that negligent supervision or security in failing to prevent the drugging of the patron, covered perils, set in motion the events that resulted in the sexual assault, an uncovered peril.[191] Therefore, according to the court, the efficient proximate cause doctrine permitted coverage under the policy.[192]

The court in *Magio's Inc.* distinguished *Doe* on the basis that under the liquor liability policy at issue in *Doe*, only one peril was covered: liability related to the provision of alcohol.[193] As explained in *Magio's*, the *Doe* court determined that application of the efficient proximate cause doctrine to the single-peril policy involved would have rendered the exclusion for assault

[185] 363 F. Supp. 3d 1351, 1357 (S.D. Fla. 2018).

[186] *Id.* at 1353.

[187] *Id.* at 1353–54.

[188] *Id.* at 1353.

[189] *Id.* at 1355.

[190] *Id.*

[191] *Id.* at 1356.

[192] *Id.*

[193] *Id.* at 1356–57.

and battery a nullity.[194] Specifically, every claim against the bar under the liquor liability policy would either involve: (1) an assault committed after the service of alcohol, in which case the efficient proximate cause doctrine, as applied in the jurisdiction, would result in coverage, or (2) an assault unrelated to the sale of alcohol and, therefore, not covered by the liquor liability policy.[195] Either way, the assault and battery exclusion would be meaningless.[196] On the other hand, under the commercial general liability policy before the court in *Magio's*, coverage for multiple perils was provided, and application of the efficient proximate cause doctrine to find the claim covered would not render the assault and battery exclusion a nullity.[197] The court cited as an example a patron sexually assaulted at Magio's without having been first drugged in which case the assault exclusion would apply to preclude coverage for a claim that negligence on Magio's part contributed to the assault.[198] The court's reasoning was based on authority from the jurisdiction recognizing the effectiveness of an assault and battery exclusion to preclude coverage for claims "which arise out of the alleged assault or battery" without the presence of other causative factors.[199] As the court explained, not all of the claimant's claims against Magio's, however, directly pertained to the assault.[200] Instead, her claims involved negligence on the part of Magio's and its lessor in that they failed to prevent her from being drugged.[201] In reliance on that alleged failure, the court stated, "Because this alleged negligence set in motion the events that resulted in the sexual assault, the efficient proximate cause doctrine applies and permits coverage under the Policy."[202]

[194] *Id.*

[195] *Id.* at 1357.

[196] *Id.* (citing Doe v. Hudson Specialty Ins. Co., 719 F. App'x 951, 954 (11th Cir. 2018)).

[197] *Id.*

[198] *Id.*

[199] *See id.* (quoting Essex Ins. Co. v. Big Top of Tampa, Inc., 53 So. 3d 1220, 1223 (Fla. Dist. Ct. App. 2011)).

[200] *Id.*

[201] *Id.*

[202] *Id.*

D. Distinctions Made in Relation to the Sequence and Independent Nature of Causative Events

Distinction made in some jurisdictions between first-party and third-party claims in relation to application of the efficient proximate cause doctrine are discussed above.[203] Some courts further address the sequence or interrelation of events leading to loss in determining the applicability of the efficient proximate cause doctrine or a doctrine known as the concurrent cause doctrine, which takes the approach that coverage should be permitted whenever two or more causes appreciably contribute to a loss and at least one of the causes is a covered risk.[204]

1. The View that the Efficient Proximate Cause Doctrine Is Only Applicable When One Peril Sets Another in Motion

Although most jurisdictions adhere to the efficient proximate cause doctrine, not the concurrent cause doctrine,[205] there is authority for the proposition that the causative factors involved dictate the application of one or the other doctrines within the same jurisdiction. For example, under the view of the federal district court in *Paulucci v. Liberty Mutual Fire Insurance Co.*, applying Florida law, the efficient proximate cause and concurrent cause doctrines are not "mutually exclusive."[206] According to the *Paulucci* court, the efficient proximate cause doctrine should be applied when perils are dependent and one sets another in motion, such as when an earthquake breaks a gas main resulting in a fire.[207] On the other hand, the court stated that the concurrent cause doctrine should be applied when a claim invokes multiple independent causes such as an earthquake and a lightning strike, or a windstorm and wood rot, with one cause not setting the other cause in motion.[208]

The effect of this distinction was illustrated by the causative factors present in *Hudson v. Magio's Inc.*, also arising under Florida law, in which the plaintiff sued the defendants after she consumed an adulterated beverage

---

[203] *See supra* Part IV. B.

[204] *See* 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.03[3]; *see also* 7 PLITT ET AL., *supra* note 2, § 101:55.

[205] *See* 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.03[6].

[206] 190 F. Supp. 2d 1312, 1319 (M.D. Fla. 2002).

[207] *Id.*

[208] *Id.*

at the defending bar and was later assaulted.[209] As discussed above, based on the efficient proximate cause doctrine, the plaintiff was able to avoid a policy exclusion for assault.[210] The plaintiff initially, however, unsuccessfully relied on the concurrent cause doctrine in an effort to avoid the exclusion.[211] The court acknowledged that the concurrent cause doctrine, as applied in Florida, permitted insurance coverage for a loss attributed to multiple causes so long as one of the causes constituted an insured risk.[212] Nevertheless, as recognized by the court, the doctrine was applied in the jurisdiction only when multiple causes were independent with each involving a separate and distinct risk.[213] The court found the concurrent cause doctrine inapplicable in regard to dependent causes, with one peril setting others in motion.[214] The court proceeded to find that the causative factors involved were dependent perils with one, the adulterated drink, setting the other, the assault, in motion.[215] The concurrent cause doctrine was therefore found inapplicable.[216]

The better view is that the efficient proximate cause rule should be applied regardless of whether one cause directly sets another in motion. In regard to the concurrent cause doctrine, finding coverage because a non-remote cause contributed to a result, even if the cause was not the most predominant, seems excessive and unfair to insurers. Further, attempting to determine whether a causative factor did indeed set another in motion is challenging, and situations involving multiple causative factors would likely be subject to different interpretations. The efficient proximate cause doctrine, using a predominant factor approach, seems a more reasonable alternative.

[209] 363 F. Supp. 3d 1351, 1353 (S.D. Fla. 2018).

[210] *See id.* at 1356 ("[T]he efficient proximate cause doctrine should permit coverage under the Policy.").

[211] *Id.* at 1355–56.

[212] *Id.* at 1355.

[213] *Id.*

[214] *See id.* (expressing that the concurrent cause doctrine only applies "when the multiple causes are not related and dependent, and involve a separate and distinct risk" and that "causes are dependent when one peril instigates or sets in motion the other").

[215] *Id.* at 1356.

[216] *Id.*

2. The View that the Efficient Proximate Cause Doctrine Is Only Applicable When Each Causative Factor Could Independently Have Caused the Loss at Issue

There is some support for the view that each causative factor leading to a loss must have been independently capable of causing the loss in order for the efficient proximate cause doctrine to apply. That principle is illustrated in the case of *Amherst Country Club, Inc. v. Harleysville Worcester Insurance Co.*, applying the law of New Hampshire, in which a swimming pool was destroyed following heavy rains after it floated up and out of the ground, leading to significant cracking and breakage.[217] It was undisputed that both the draining of the pool prior to the rain as well as groundwater pressure, an excluded event, led to the pool's demise.[218] According to the court, because neither causative event was sufficient standing alone to have caused the damage, the efficient proximate cause doctrine was inapplicable.[219]

The better view, however, is that the doctrine should be applied when multiple causative factors are involved regardless of whether each would have been independently capable of causing the loss. The California Supreme Court case of *Sabella v. Wisler* exemplifies that approach.[220] The court in *Sabella* applied the efficient proximate cause doctrine to find coverage when a negligently installed sewer pipe emptied waste near and below the foundation of the plaintiffs' home, which was negligently constructed on improperly compacted fill dirt.[221] Settling of the home, an uncovered peril, was the result.[222] The court agreed with the contention of the plaintiffs that the rupture of the sewer line, rather than settling, was the efficient proximate

[217] 561 F. Supp. 2d 138, 141–42 (D.N.H. 2008).

[218] *Id.* at 141.

[219] *See id.* at 150–151; *see also* DOWNS & BOLDUAN, *supra* note 4, § 52.33 (expressing support for the principle that the efficient proximate cause doctrine is applicable only when the causative factors involved were each capable of independently causing the loss at issue). In *Massachusetts Bay Insurance Co. v. American Healthcare Services Assoc.*, the Supreme Court of New Hampshire affirmed the reasoning of *Amherst* in regard to the application of the efficient proximate cause doctrine. 170 N.H. 342, 353 n.7 (N.H. 2017). The court further clarified that when the efficient proximate cause doctrine is inapplicable, the presence of an anti-concurrent cause clause is unnecessary in order to find coverage barred by an applicable exclusion. *Id.*

[220] 377 P.2d 889 (Cal. 1963).

[221] *Id.* at 895.

[222] *Id.*

cause of the loss.[223] As recognized by the court, "where there is a concurrence of different causes, the efficient cause the one that sets others in motion is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster."[224] The court expressed no requirement that each cause be independently and standing alone capable of causing the resulting damage.[225]

Application of the efficient proximate cause doctrine regardless of whether multiple causative factors would each have been sufficient to cause the loss at issue seems more logical for a number of reasons. In many instances after the fact, as in *Sabella*, it would present significant difficulties for an insured, in hindsight, to establish the specific effect of each causative factor standing alone. Additionally, there seems to be no logical reason to limit the application of the doctrine to cases in which causative factors could independently have caused a loss. Regardless of the presence of other causative factors, when the insurer agreed to cover the factor constituting the efficient proximate cause of the loss, coverage should be available.

V. THE EFFECT OF ENSUING LOSS CLAUSES ON THE EFFICIENT PROXIMATE CAUSE DOCTRINE

An ensuing loss policy provision, most often seen in relation to policies of property insurance, adds an additional level of complexity to the efficient proximate cause doctrine.[226] An ensuing loss is one which follows from a loss caused by an excluded peril but is brought within coverage due to an ensuing loss clause.[227] The case of *Moda Furniture, LLC v. Chicago Title Land Trust Co.*, provides an example of an ensuing loss clause and its application.[228] The plaintiff in *Moda Furniture* suffered a loss when roofers failed to place a protective covering over the company's inventory of rugs resulting in gravel and other debris falling onto and damaging the rugs.[229] Based on a policy exclusion for faulty workmanship, the defending insurer denied the plaintiff's claim for coverage under the company's property insurance policy.[230] The

[223] *See id.*

[224] *Id.* (quoting 6 COUCH ON INSURANCE § 1466 (1930)).

[225] *See Sabella*, 337 P.2d at 895–96.

[226] *See* 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.05[1].

[227] 7 PLITT ET AL., *supra* note 2, § 101:43.

[228] 35 N.E.3d 1139, 1142 (Ill. App. Ct. 2015).

[229] *Id.* at 1141.

[230] *Id.*

policy at issue, however, had an ensuing loss clause providing that "[i]f an excluded cause of loss . . . results in a Covered Cause of Loss, we will pay for the resulting loss or damage caused by that Covered Cause of Loss."[231] Recognizing the broad nature of the clause, the court found that the ensuing loss clause entitled the plaintiff to recover under the policy for the damage to the rugs.[232] Not surprisingly, it is difficult to predict the outcome of a case involving an ensuing loss clause. As one commentator stated, "the problem of ensuing loss and possible coverage is subjected to the vagaries of the common law system and the particular viewpoints of insureds, insurers, judges, juries, lawyers, and commentators."[233]

Gelwan v. Vermont Mutual Insurance Co., construing Massachusetts law, is an example of a case applying the efficient proximate cause doctrine in conjunction with an ensuing loss clause.[234] The plaintiff in *Gelwan* suffered property damage after a contractor did a poor job re-roofing his home resulting, over the course of several years, in structural water damage and rot.[235] While the insurance policy at issue covered water damage, faulty workmanship was excluded.[236] The policy, however, covered ensuing losses from faulty workmanship in the event that such ensuing losses were insured risks under the policy.[237] The Second Circuit Court of Appeals affirmed the trial court's finding that the water damage fell within the ensuing-loss exception.[238] Applying the efficient proximate cause doctrine and recognizing that "the question of proximate cause is quintessentially factual not legal," the court refused to find error in the trial court's determination that water proximately caused the damage at issue.[239]

New London County Mutual Insurance Co. v. Zachem, applying the law of Connecticut, is another case relying on the efficient proximate cause doctrine in order to determine the applicability of an ensuing loss clause but reaching a conclusion favorable to the insurer.[240] The insureds in *Zachem* sought coverage for damages after an intruder in the process of stealing

[231] *Id.* at 1142.

[232] *Id.* at 1154–55.

[233] 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.05[1].

[234] 507 F. App'x. 38, 40 (2d Cir. 2013).

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] 74 A.3d 525 (Conn. App. Ct. 2013).

copper piping broke a copper propane gas line resulting in an explosion and fire.[241] The insurer denied coverage based on a vandalism exception applicable to vacant buildings.[242] The policy, however, had an ensuing loss provision upon which the plaintiffs relied providing that "[A]ny ensuing loss to property . . . not excluded or excepted in this policy is covered."[243] In reliance on previous case law, the court in *Zachem* upheld the trial court's analysis determining that the efficient proximate cause of the loss was caused by vandalism, an event not covered by the ensuing loss provision.[244]

Courts addressing ensuing loss clauses have reached differing conclusions in making coverage determinations.[245] When confronted with a loss implicating an ensuing loss provision, a review of specific jurisdictional precedent is necessary in order to make determinations regarding policy expectations.[246] Ensuing loss clauses, however, may provide an insured with an opportunity to obtain coverage, or at least obtain a settlement from an insurer, based on uncertainty as to whether coverage would ultimately be found to exist.

VI. THE EFFECT OF ANTI-CONCURRENT CAUSE CLAUSES ON THE EFFICIENT PROXIMATE CAUSE DOCTRINE

Anti-concurrent cause clauses purport to deny coverage whenever an uncovered event exists in the chain of causation.[247] The majority of jurisdictions expressing a position allow insurers to contract out of the efficient proximate cause and other causation doctrines through the use of anti-concurrent cause clauses.[248] Some jurisdictions, however, refuse to give

[241] *Id.* at 528.

[242] *Id.*

[243] *Id.*

[244] *Id.* at 533.

[245] Moda Furniture v. Chicago Land Tr. Co., 35 N.E.3d 1139, 1148–49 (Ill. App. Ct. 2015); *see* 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.05[1] (recognizing that ensuing loss clauses "add another wrinkle" to the causation question in regard to the efficient proximate cause doctrine and other causation doctrines).

[246] *See Moda Furniture*, 35 N.E.3d at 1155.

[247] *See* Joshua T. Carryback, *Anti-Concurrent Causation Clauses in Insurance Contracts: The State of the Law in 2017*, 19 TRANSACTIONS: TENN. J. BUS. L. 21, 21 (2017).

[248] *See* 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.04. Even in jurisdictions enforcing anti-concurrent cause clauses, the anti-concurrent clause should not be applied if it is inapplicable to the coverage section at issue. *See* Ken Johnson Prop., LLC v. Harleysville Worcester Ins. Co., Civil No. 12-1582, 2013 WL 5487444, at *12 (D. Minn. Sept. 30,

effect to such clauses; and, significantly, many jurisdictions have not determined the effect of anti-concurrent cause clauses.[249] In fact, *The New Appleman on Insurance Law Library Edition*, lists each state and the District of Columbia according to the jurisdiction's view on multiple causation, and of forty-three jurisdictions indicating either adoption of the efficient proximate cause doctrine, possible or likely adoption, or uncertainty on the issue, twenty-two have not expressed a definitive view as to the enforceability of anti-concurrent cause clauses.[250] The large number of jurisdictions in which the issue is unclear is of importance to both insurers and insureds.

The better view is that public policy concerns and reasonable expectations of insureds should prevail over attempts by insurers to decline coverage whenever an uncovered event contributes to a loss. In the normal course of affairs, losses often have multiple causative factors.[251] An imaginative insurer could find innumerable ways to unearth an uncovered event within multiple causative events.[252]

Section 2-316 of the Uniform Commercial Code, applicable to the sale of goods, provides a useful analogy.[253] According to Section 2-316(1), words or conduct relevant to the creation of an express warranty and disclaimers should be construed when reasonable as consistent with each other.[254] Significantly, however, the section recognizes that generally a disclaimer's "negation or limitation is inoperative to the extent that such construction is unreasonable."[255] Construing Section 2-316(1), the Supreme Court of

2013) (refusing to apply an anti-concurrent cause clause contained in the body of a policy to an additional endorsement covering certain types of water damage); *see also* Worldwide Sorbent Prods., Inc. v. Invensys Sys., Civil Action No. 13-CV-252, 2014 WL 12597394, at *7–*8 (E.D. Tex. July 31, 2014) (applying anti-concurrent cause clauses only to the sections of coverage in which the clauses were present).

[249] *See generally* Carryback, *supra* note 247 (discussing the enforceability of anti-concurrent clause causes by jurisdiction).

[250] 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.04[5] (Jurisdictions not expressing a definitive view are Arkansas, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Montana, Nebraska, New Mexico, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, and Washington).

[251] *See, e.g.*, 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.04[6].

[252] *See, e.g.*, *id.* (compiling cases).

[253] U.C.C. § 2-316(1) (AM. L. INST. & UNIF. L. COMM'N), Westlaw (database updated 2019).

[254] *Id.*

[255] *Id.*

Delaware in *Bell Sports, Inc. v. Yarusso,* ruled that the "restrictive provision" of the section rendered any effort of the manufacturer in that case to disclaim an express warranty ineffective as a matter of law.[256] The court further recognized that a principle of warranty law is to hold a seller responsible and assure that a buyer receives that for which he or she bargained.[257] Public policy concerns should protect consumers, as well as business owners, from surprises in relation to insurance coverage. As recognized by the Washington Supreme Court in *Xia v. ProBuilders Specialty Insurance Co.*, discussed more fully below, an exclusion cannot be allowed to "eviscerate" a covered loss merely because an uncovered peril occurred somewhere in the causal chain.[258]

A. Support for Enforcement of Anti-Concurrent Cause Clauses

State Farm Fire & Casualty Co. v. Slade,[259] a decision of the Supreme Court of Alabama, is recognized by commentators as an example of the reasoning employed by the majority of courts reviewing the issue and supporting enforcement of anti-concurrent cause provisions.[260] The claimants in *Slade* sought insurance coverage under a homeowner's policy after noticing cracking in the ceilings and walls of their home.[261] The plaintiffs attributed the problems with their home to a lightning strike, a covered peril, with one of their primary theories being that the lightning strike caused a retaining wall to collapse leading to movement of soil beneath the home.[262] The insurer, however, denied coverage in reliance on an anti-concurrent cause policy provision excluding coverage for earth movement regardless of "whether other causes acted concurrently or in any sequence with the excluded event to produce the loss . . ."[263]

Relying on the efficient proximate cause doctrine, the insureds in *Slade* claimed that the loss was covered based on the lightning strike, regardless of whether the excluded event of earth movement occurred within the chain of

[256] 759 A.2d 582, 593 (Del. 2000).

[257] *Id.* (citing Jensen v. Seigel Mobile Homes Grp., 668 P.2d 65, 71–72 (Idaho 1983)).

[258] 400 P.3d 1234, 1241 (Wash. 2017).

[259] 747 So. 2d 293 (Ala. 1999).

[260] *See* 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, *supra* note 3, § 44.04[1]; Carryback, *supra* note 247, at 26–28.

[261] *Slade*, 747 So. 2d. at 298 (Ala. 1999).

[262] *Id.*

[263] *Id.* at 299.

events resulting in the loss.[264] In reliance on the anti-concurrent cause clause, the court, however, recognized the freedom of insurance companies and insureds in the state to agree to any terms in a contract "so long as they do not offend some rule of law or contravene public policy."[265] The court rejected the resulting argument that the policy as written did indeed contravene public policy on that basis, stating that finding as such would invade the province the state legislature had delegated to the commissioner of the Department of Insurance of the state to supervise insurance policies.[266] According to the court, the claimants could not prevail "because the earth-movement exclusion unambiguously excludes coverage for any loss caused in any way by earth movement and because that exclusion is enforceable."[267]

The court in *Slade* further rejected the argument of the insureds that because one section of the policy provided coverage for lightning strikes, enforcement of the earth-movement exclusion would violate the reasonable expectations rule.[268] The court acknowledged the rule or doctrine of reasonable expectations in that an insured is entitled to the protection reasonably expected from the policy purchased.[269] Nevertheless, the court upheld the exclusionary language stating that "expectations that contradict a clear exclusion are not 'objectively reasonable.'"[270]

B. Support for the Refusal to Enforce Anti-Concurrent Cause Clauses

1. The Refusal to Enforce Anti-Concurrent Cause Clauses on the Basis of Public Policy and Expectations of the Insured

Recognizing the danger to insureds should such clauses be enforced, the Supreme Court of West Virginia in *Murray v. State Farm Fire and Casualty Co.*, refused to give effect to an anti-concurrent cause clause.[271] Based on policy exclusions for landslides and erosion, the insurer in *Murray* denied coverage for property damage sustained by the insureds caused by rocks

[264] *Id.* at 312–13.

[265] *See id.* at 313 (quoting Northam v. Metro. Life Ins. Co., 163 So. 635, 636 (Ala. 1935)).

[266] *Id.* at 314.

[267] *Id.*

[268] *Id.* at 310–11.

[269] *Id.* at 311 (quoting Aetna Cas. & Surety Co. v. Chapman, 200 So. 425, 426–27 (Ala. 1941)).

[270] *Id.* at 312 (quoting Wellcome v. Home Ins. Co., 849 P.2d 190, 194 (Mont. 1993)).

[271] *See* 509 S.E.2d 1, 15 (W. Va. 1998).

falling from a highwall of an abandoned rock quarry.[272] The insureds contended, however, that the damage was the result of the negligent creation of the highwall and its negligent maintenance, covered perils under the policy.[273] In remanding the case for trial, the court recognized that a determination as to the efficient proximate cause of the loss, a question of fact, was necessary in order to determine the coverage issue.[274]

The anti-concurrent cause provision at issue in *Murray* provided that the company did not insure for excluded events regardless of "other causes of the loss" and "whether other causes acted concurrently or in any sequence with the excluded event to produce the loss."[275] The court observed that enforcement of such clauses would defeat the reasonable expectations of insureds.[276] The court further expressed agreement with the proposition that giving full effect to such anti-concurrent causes clause would give insurers "carte blanche" to deny coverage in almost all cases resulting in an "all-risk" policy being converted into a "no-risk" policy.[277]

Emphasizing public policy considerations, *Xia v. ProBuilders Specialty Insurance Co.*, a decision of the Supreme Court of Washington, further exemplifies the rejection of anti-concurrent cause policy language insofar as it is asserted in an attempt to avoid application of the efficient proximate cause doctrine.[278] The plaintiff in *Xia* sued after a negligently installed hot water heater, a covered occurrence under the policy at issue, led to the release of toxic levels of carbon monoxide.[279] At issue was whether a pollution exclusion clause excused the insurer from providing coverage.[280] The court in *Xia* recognized that the efficient proximate cause rule applied in the state in regard to coverage decisions.[281] The insurer, however, took the position that application of the efficient proximate cause rule would conflict with the plain language of the policy.[282] In support of its position, the insurer pointed

[272] *Id.* at 5–6.

[273] *Id.* at 9.

[274] *Id.* at 12.

[275] *Id.* at 13.

[276] *See id.* at 14.

[277] *Id.* at 14–15 (quoting Howell v. State Farm Fire & Cas. Co., 267 Cal. Rptr. 708, 715 n.6 (Ct. App. 1990)).

[278] 400 P.3d 1234, 1241 (Wash. 2017).

[279] *Id.* at 1237.

[280] *Id.*

[281] *Id.* at 1240.

[282] *Id.* at 1241.

to broad anti-concurrent causation language purporting to exclude coverage regardless of whether "any other cause" leading to the loss would be covered.[283] The court rebuffed the insurer's attempt to circumvent the efficient proximate cause rule stating that the exclusion "cannot eviscerate a covered occurrence merely because an uncovered peril appeared later in the causal chain."[284] As recognized by the court, "[t]he efficient proximate cause rule exists to avoid just such a result, ensuring that an insurance policy offering indemnity for a covered peril will provide coverage when a loss is proximately caused by that covered peril."[285] The court, therefore, refused to apply any limitation, such as the anti-concurrent clause contained within the pollution exclusion, that conflicted with established state law in regard to enforcement of the efficient proximate cause doctrine.[286]

In addition to its refusal to uphold anti-concurrent cause policy language, the *Xia* case illustrates a significant matter of concern for insurers in that the court found the insurer liable for the bad faith refusal to defend its insured. The court recognized that whereas the duty to indemnify existed only if the insurance policy covers the insured's liability, "the duty to defend arises when the policy could *conceivably* cover allegations in a complaint."[287] The court was of the opinion that while a polluting event, the subject of exclusionary language, occurred, the insurer should have noted the potential issue of efficient proximate causation.[288] The court pointed to the lack of "any investigation into Washington law that might have alerted them to the rule of efficient proximate cause and this court's unwillingness to permit insurers to write around it."[289]

2. The Refusal to Enforce Anti-Concurrent Cause Clauses Based on Statutory Enactment

State legislative enactments may also affect the enforcement of anti-concurrent cause clauses. For example, the California Court of Appeal in

[283] *See id.*

[284] *Id.*

[285] *Id.*

[286] *See id.*

[287] *Id.* at 1240 (emphasis in original) (citing Am. Best Food, Inc. v. Alea London, Ltd., 229 P.3d 693 (Wash. 2010); Woo v. Fireman's Fund Ins. Co., 264 P.3d 454 (Wash. 2007)).

[288] *Id.* at 1242.

[289] *Id.* at 1243. Creating additional exposure for the insurer in addition to the bad faith claim, the court in *Xia* remanded the case for further proceedings in relation to the plaintiff's claims under the state Consumer Protection Act and the state's Insurance Fair Conduct Act. *Id.* at 1244.

Vardanyan v. Amco Insurance Co. reviewed policy limitations in regard to multiple-causation losses as affected by the California Insurance Code, including Section 530 providing as follows:

> An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.[290]

On the basis that the legislature had codified the efficient proximate cause doctrine, the court in *Vardanyan* stated that, "policy exclusions are unenforceable to the extent that they conflict with [Insurance Code] [S]ection 530 and the efficient proximate cause doctrine."[291] The court further recognized that "an insurer cannot contract around the efficient proximate cause doctrine to give broader effect to its policy exclusions."[292] According to the court, "[a] policy cannot extend coverage for a specified peril, then exclude coverage for a loss caused by a combination of the covered peril and an excluded peril, without regard to whether the covered peril was the predominant or efficient proximate cause of the loss."[293] In its decision, the *Vardanyan* court relied on the California Supreme Court case of *Garvey v. State Farm Fire & Casualty Co.*, in which the court addressed the effect of an anti-concurrent cause clause and held that the exclusion involved precluded coverage only if the excluded peril was the efficient proximate cause of the plaintiffs' loss.[294]

Specifically, the insured in *Vardanyan* sought coverage for damage to a rental home under a section of the policy at issue covering collapse of the

[290] 197 Cal. Rptr. 3d 195, 200 (Ct. App. 2015) (quoting Cal. Ins. Code § 530 (West 2015)).

[291] *Id.* at 201 (quoting Julian v. Hartford Underwriters Ins. Co., 110 P.3d 903, 907 (Cal. 2005)) (alteration added by *Vardanyan*). The *Vardanyan* court further construed a section of the California code, Section 532, providing that "[i]f a peril is specially excepted in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted." *Vardanyan*, 197 Cal. Rptr. 3d at 200 (quoting Cal. Ins. Code § 530 (West 2021)). The court, however, explained that case precedent established that the "but for" cause referred in Section 532 referred only to the peril that proximately caused the loss. *Vardanyan*, 197 Cal. Rptr. 3d at 200–01. Therefore, a remote cause would not work to defeat the application of the efficient proximate cause doctrine.

[292] *Id.* at 201.

[293] *Id.* at 208.

[294] *Id.* at 201 (citing Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 714–15 (Cal. 1989)).

structure caused by certain perils.[295] The defending insurer claimed that it could avoid the effect of earlier cases applying the efficient proximate cause doctrine based on specific policy language providing that coverage was available for collapse caused "only" by a specified peril.[296] The court stated, however, that:

> To the extent the term "caused only by one or more" of the listed perils can be construed to mean the contribution of any unlisted peril, in any way and to any degree, would result in the loss being excluded from coverage, the provision is an unenforceable attempt to contract around the efficient proximate cause doctrine.[297]

Employing reasoning similar to that used by the *Vardanyan* court, the Supreme Court of North Dakota in *Western National Mutual Insurance Co. v. University of North Dakota* likewise relied on legislative enactments in refusing to enforce anti-concurrent cause policy language.[298] The dispute in the case involved whether the insured university had coverage for damage caused by sewage backup or whether coverage was precluded by flooding which caused the municipality to shut down sewer stations leading to the sewage backup.[299] The policy at issue excluded coverage for losses caused by flood "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[300] The insurer did not dispute the contention that the policy provided coverage for sewage backup but argued that the anti-concurrent clause of the policy should be enforced as opposed to the efficient proximate cause doctrine.[301]

In prohibiting the use of anti-concurrent cause language to avoid the effect of the efficient proximate cause doctrine, the court relied on the following statute, similar to that quoted above in effect in California:

> An insurer is liable for a loss proximately caused by a peril insured against even though a peril not contemplated by the insurance contract may have been a remote cause of the loss.

[295] *Id.* at 198.

[296] *See id.* at 205.

[297] *Id.* at 208.

[298] 643 N.W.2d 4, 13 (N.D. 2002).

[299] *Id.* at 8.

[300] *Id.*

[301] *See id.* at 9.

> An insurer is not liable for a loss of which the peril insured against was only a remote cause.[302]

Noting that many North Dakota statutes shared a common derivation from the law of California, the court recognized that California decisions construing statutes similar to those in North Dakota were persuasive authority.[303] On that basis, the court referenced and relied upon California cases refusing to enforce anti-concurrent cause provisions in derivation of the efficient proximate cause doctrine, including *Garvey v. State Farm Fire & Casualty Co.*.[304]

The court in *Western National Mutual Insurance Co.* concluded that the state legislature had codified the efficient proximate cause doctrine for purposes of determining insurance coverage when both an excluded peril and a covered peril contributed to an insured's loss.[305] Upholding the position of the insured, the court stated that through an anti-concurrent cause clause, "a property insurer may not contractually preclude coverage when the efficient proximate cause of a loss is a covered peril."[306]

VII. CONCLUSION

An undisputed factor in regard to the efficient proximate cause doctrine is that it has presented definitional issues for courts and has been framed in varying ways.[307] As insurance disputes involving causation in relation to property damage, business losses, and other matters continue to rise due to climate change, natural disasters, and even pandemics, controversy in relation to application of the doctrine will continue to rise. While the efficient proximate cause doctrine presents a workable theory in relation to resolving causation disputes, courts and legislatures will be challenged in regard to application of the doctrine to complex and varied controversies. Most legal theories and principles, however, continue to evolve and become stronger with the passage of time and increased scrutiny and review. It is expected that the same will be true in regard to the efficient proximate cause doctrine.

---

[302] *Id.* at 10 (quoting N.D. Cent. Code Ann. § 26.1-32-01 (West 2021)); s*ee also* Passa, *supra* note 4, at 568 (discussing the status of the law in North Dakota in relation to the efficient proximate cause doctrine).

[303] *W. Nat. Mut. Ins. Co.*, 643 N.W.2d at 11.

[304] *See id.* at 11–13 (citing 770 P.2d 704 (Cal. 1989)).

[305] *Id.* at 7.

[306] *Id.* at 13.

[307] DOWNS & BOLDUAN, *supra* note 4, § 52:6.