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The “Ensuing Loss” Clause in Insurance Policies: The Forgotten and Misunderstood Antidote to Anti-Concurrent Causation Exclusions

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THE “ENSUING LOSS” CLAUSE IN INSURANCE POLICIES: THE FORGOTTEN AND MISUNDERSTOOD ANTIDOTE TO ANTI-CONCURRENT CAUSATION EXCLUSIONS

By Christopher C. French*

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INTRODUCTION

At 5:12 a.m. on Wednesday, April 18, 1906, “a deafening rumble filled the air” in San Francisco as “buildings swayed” and then crumbled to the ground.¹ A massive earthquake had struck, but the real catastrophe was still to come.² The earthquake caused gas-fed fires to erupt, which were magnified by the fire department’s ill-fated attempts to stop the spreading blaze by using dynamite to create areas where the fire could not pass, which are known as firebreaks.³ With water mains broken, firefighters could not stop the inferno, and the largest city west of the Mississippi River was destroyed in three days.⁴ Thousands of people were killed and most of the residents were left homeless.⁵ The damage caused by the earthquake and fire cost billions in today’s dollars.⁶

At that time, most property policies in the U.S. covered losses caused by fire, but also contained an “anti-concurrent causation”⁷ exclusion that barred coverage for losses caused “directly or indirectly” by earthquakes.⁸ Not surprisingly, when the massive loss claims were presented, many insurers refused to pay. They argued the losses were not covered because the earthquake set in

¹ James S. Harrington, *Lessons of the San Francisco Earthquake of 1906: Understanding Ensuing Loss in Property Insurance*, 37 THE BRIEF: TORT TRIAL & INS. PRAC. SEC., Summer 2008, at 28.

² *Id.*

³ *See id.*; *see also Firebreak*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/firebreak> (last visited Jan. 20, 2013).

⁴ Harrington, *supra* note 1, at 28; *see also* PATRICIA GROSSI & ROBERT MUIR-WOOD, THE 1906 SAN FRANCISCO EARTHQUAKE AND FIRE: PERSPECTIVES ON A MODERN SUPER CAT 4 (Irene Fehr ed., 2006).

⁵ *See* GROSSI & MUIR-WOOD, *supra* note 4, at 4; Harrington, *supra* note 1, at 28.

⁶ GROSSI & MUIR-WOOD, *supra* note 4, at 4 n.1.

⁷ “Concurrent causation” is a phrase used to cover a number of situations in which a loss is caused by multiple perils. Typically, one or more of the perils is excluded from coverage. Although the term “concurrent” implies a temporal simultaneity, the term has been used by courts and commentators to include (1) sequential causes in a causal chain of events; (2) independent, unrelated events acting in conjunction; and (3) related or unrelated events that happen in succession. *See* Mark M. Bell, *A Concurrent Mess and a Call for Clarity in First-Party Property Insurance Coverage Analysis*, 18 CONN. INS. L.J. 73, 74 (2011). Although much has been written regarding concurrent causation when an ensuing loss clause is not at issue, this Article does not address concurrent causation disputes in situations where an ensuing loss clause is not in play. *See infra* p. 130 and notes 163–66.

⁸ Harrington, *supra* note 1, at 28.

motion the chain of events that led to the fires and destruction.⁹ The highest courts that heard the cases, the Supreme Court of California¹⁰ and the Ninth Circuit,¹¹ held the losses were covered notwithstanding the anti-concurrent causation language contained in the earthquake exclusion.

In the wake of these decisions, the California legislature enacted a set of statutes designed to prevent insurers from disclaiming coverage for fire damage that followed an earthquake.¹² In response, insurers created a policy provision known as the “ensuing loss” clause, which specified that losses that follow both an earthquake and a fire are covered even if the policy excludes coverage for losses caused by earthquakes.¹³ As the coverage provided under property insurance was expanded to cover losses caused by other perils in addition to fire, broader versions of the ensuing loss clause were adopted to encompass all covered perils even though such policies also often contain anti-concurrent causation exclusions. Thus, although originally created for the specific context of earthquakes and fires, the ensuing loss clause came to ensure that losses caused at least in part by a covered peril remain covered under property policies even if an excluded peril also played a role in causing the loss. Stated differently, for many losses, the ensuing loss clause is an antidote to anti-concurrent causation exclusions.

Despite its potential application in many situations, the clause has been largely ignored and generally misunderstood ever since it was created.¹⁴ This Article explains the clause’s history, purpose, and relevance in light of the recent attention in insurance law to concurrent causation and anti-concurrent causation exclusions in the wake of Hurricane Katrina.¹⁵

Today, the ensuing loss clause is found in various types of property policies such as “all risk” and homeowners policies that also contain anti-concurrent causation exclusions.¹⁶ It has various iterations,¹⁷ each drafted by

⁹ See *Williamsburgh City Fire Ins. Co. v. Willard*, 164 F. 404, 405 (9th Cir. 1908); *Pac. Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co.*, 111 P. 4, 4 (Cal. 1910). Lloyd’s of London, however, famously agreed to pay the claims. Harrington, *supra* note 1, at 36 n.3 (“Lloyd’s leading nonmarine underwriter Cuthbert Heath cabled the following terse instruction to his San Francisco agent after the news of the catastrophe reached London: ‘Pay all of our policyholders in full irrespective of the terms of their policies.’”).

¹⁰ *Pac. Heating & Ventilating Co.*, 111 P. at 4, 7.

¹¹ *Willard*, 164 F. at 404, 409.

¹² See, e.g., CAL. INS. CODE §§ 2081, 10088, 10088.5 (West 2005).

¹³ See INT’L RISK MGMT. INST., INC., COMMERCIAL PROPERTY INSURANCE § IV.J.38 (2011).

¹⁴ See discussion *infra* Parts III–IV.

¹⁵ See *infra* note 170.

¹⁶ “All risk” policies are intended to provide the broadest property insurance available to policyholders and cover all risks except for specific risks or perils expressly listed. See, e.g., Jeff Katofsky, *Subsiding Away: Can California Homeowners Recover from Their Insurer for Subsidence Damages to Their Homes?*, 20 PAC. L.J. 783, 785 (1989) (“In an ‘all-risk’ policy, all losses except those specifically excluded are covered. This is the broadest form of coverage and has been so interpreted by the courts.”). “All risk” policies evolved from “named peril” policies. Historically, “named peril” policies covered one specified peril. The earliest non-marine named peril policy reportedly was a fire policy, which originated in London following the Great Fire of 1666. See PETER J. KALIS, THOMAS M. REITER & JAMES R. SEGERDAHL, POLICYHOLDER’S GUIDE TO THE LAW OF INSURANCE COVERAGE § 13.02[A][1] (1st ed. 1997 & Supp. 2000) (citing RANDOLPH FIELDS, FINDING LOST TREASURE—HISTORICAL REVIEW OF FIRST PARTY PROPERTY POLICIES 3 (1991)). In the 1940s and

insurers.¹⁸ One common version found in “all risk” property policies provides: “This policy does not insure loss or damage caused directly or indirectly by any Peril excluded . . . [such as] faulty workmanship or faulty materials, unless loss or damage from an insured Peril ensues and then only for such ensuing loss or damage.”¹⁹ Notably, the terms “ensues,” “ensuing loss,” and “peril” are not defined.²⁰

Another common version of the ensuing loss clause provides: “We insure for all risks of physical loss to the property described in Coverage A except for loss caused by . . . [any of the 6 following excluded causes of loss]. . . . Any

1950s, insurers began to bundle coverage of certain named perils together under one policy. These policies became known as “multi-peril” policies. Under “named peril” or “multi-peril” policies, any perils that were not expressly listed were excluded. *Id.* § 13.02[A]. “All risk” policies were then developed from “multi-peril” policies. *Id.* § 13.02[B]. Unlike “multi-peril” policies, however, “all risk” policies cover all perils unless a peril is specifically excluded. *See* 5 JOHN ALAN APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE WITH FORMS* § 3092 (4th prt., rev. vol. 1987); 3 NEW APPLEMAN *INSURANCE LAW PRACTICE GUIDE* § 31.06[2][d] (Jeffrey E. Thomas et al. eds., 2011); 10A LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 148:50 (3d ed. 1996) [hereinafter *COUCH ON INSURANCE*].

¹⁷ *See, e.g.*, Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1277–1314 (2011) (discussing the various versions of homeowners policies used by insurers).

¹⁸ *See, e.g.*, *Wagner v. Yates*, 912 N.E.2d 805, 811 (Ind. 2009) (“[T]he insurer drafts the policy and foists its terms upon the customer.”); *401 Fourth Street, Inc. v. Investors Ins. Grp.*, 879 A.2d 166, 171 (Pa. 2005) (noting that “the insurer drafts the policy, and controls coverage”). *See also* Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075, 1091 (2010) (describing the “hyperstandardization” of insurance policies); Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 125 (2008) (“[I]n some lines of insurance, all insurance companies provide identical coverage on the same take-it-or-leave-it basis.”); 1 JEFFREY W. STEMPER, *STEMPEL ON INSURANCE CONTRACTS* § 4.06[B] (3d ed. 2007) [hereinafter *STEMPEL ON INSURANCE CONTRACTS*] (“In a sense, the typical insurance contract is one of ‘super-adhesion’ in that the contract is completely standardized and not even reviewed prior to contract formation.”); Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 534 (1996); Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. REV. 13, 18 (1993); James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 996 (1992) (“The only part of the standard policy that is generally customized to the consumer-insured is the Declaration Sheet, . . . there is little, if any, freedom to negotiate the standardized language of the insurance contract that determines the scope of coverage.”); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1153 (1990) (“[P]roperty owner’s liability insurance contracts are standardized across insurers in a form few insureds have the power or experience to bargain around.”).

¹⁹ *Blaine Constr. Corp. v. Ins. Co. of N. Am.*, 171 F.3d 343, 346 (6th Cir. 1999). *See also* cases cited *infra* notes 56, 80, and 103.

²⁰ “Ensue” commonly is understood to mean “to follow.” *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY 613 (3d ed. 1996). “Peril,” according to Black’s Law Dictionary, is “[t]he risk, hazard, or contingency insured against by a policy of insurance. In general, the cause of any loss such as may be caused by fire, hail, etc.” BLACK’S LAW DICTIONARY 1138 (6th ed. 1990). “Perils” also have been described by one court as “fortuitous, active, physical forces such as lightning, wind, and explosion, which bring about the loss.” *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (Cal. 1989).

ensuing loss from items 1 through 6 not excluded is covered.”²¹ Again, “ensuing loss” is not defined.

To put the clause and how it becomes an issue in context, consider the following scenario, which occurs daily throughout America. A homeowner’s roof leaks and the intruding rainwater causes damage to the walls, floor, and other parts of the interior of the house.²² The homeowner submits a claim to the insurer of the house and the insurer sends a claims adjuster to the house to investigate the claim. The investigator concludes the leak was due to the improper installation of the roof. The insurer then denies coverage for the claim by pointing to the anti-concurrent causation language and arguing that “faulty workmanship,” which is an excluded peril, “directly or indirectly” caused the loss. Insurers, such as the one in this example, attempt to avoid coverage by framing the issue as a question of whether an excluded peril had a role in causing the damage. If an excluded peril did have a role, then the insurers contend the loss is not covered.

Yet, when the ensuing loss clause is in play, whether an excluded peril had a role in causing the damage should not be determinative. If it were, then the ensuing loss clause, which appears *in the exclusions themselves*, would be superfluous because it would be overridden in every case in which an excluded peril played any role in causing the loss. Such a result is contrary to the way the ensuing loss clause is intended to operate. The clause is intended to preserve coverage for losses caused, in part, by an excluded peril if a loss follows (or “ensues”) from a covered peril. Indeed, the very purpose of the ensuing loss clause is to clarify that the exclusions should not swallow the basic coverage provided by the policy.

In the leaking roof example, of course the negligent installation of the roof played a role in the chain of events that led to the damage. The homeowner’s claim, however, is for the rainwater damage to the interior of the house, not the costs to repair the roof. It is undeniable that the water damage ensued from a covered peril—rain. Thus, when applying the ensuing loss clause, the real question is whether a loss “ensued from,” meaning “followed,” a covered peril. If it did, then the claim should be covered regardless of whether excluded perils were also involved in causing the loss because the loss or damage ensued from, at least in part, a covered peril.

Such a conclusion is also dictated by the doctrine of *contra proferentem*.²³ As currently worded, the ensuing loss clause is confusing and contradictory.

²¹ *Roberts v. State Farm Fire & Cas. Co.*, 705 P.2d 1335, 1336 (Ariz. 1985) (emphasis omitted). See also cases cited *infra* notes 56, 80, and 103.

²² It is not unusual for a loss to be caused by multiple perils. See, e.g., *Campbell v. Ins. Serv. Agency*, 424 N.W.2d 785, 789–90 (Minn. Ct. App. 1988) (listing eight possible causes implicated in the loss: “storms, ice, rain, flying rocks, a high [lake] water level, wind, waves and faulty shutters”); *Henning Nelson Constr. Co. v. Fireman’s Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 648 (Minn. 1986) (noting eight possible causes of a wall collapse: negligent backfilling, crane vibrations, pressure from trucks, concrete truck vibrations, vibration caused by a subcontractor, pressure from a dirt pile, rain, and wall construction of concrete block instead of poured concrete).

²³ As is discussed more fully below in Part II.A., *contra proferentem* is the contract interpretation rule that provides that ambiguities in contractual language should be construed against the drafter of the language. The insurers are the drafters of ensuing loss clauses.

How can a loss that is caused “directly or indirectly” by certain perils be excluded from coverage under the exclusionary language but simultaneously be covered if the loss nonetheless ensues from a non-excluded peril? According to insurers, the words “directly or indirectly” in the first part of the clause encompass all losses that are caused in any way by an excluded peril regardless of whether or not a loss nonetheless ensues from a covered peril. Consequently, insurers argue that if the “directly or indirectly” exclusionary language were not intended to apply, then what would be the point of the exclusion? The clause also provides, however, that if a loss ensues from a covered peril despite being indirectly or directly caused by an excluded peril, then the loss is covered. What does it mean for a loss to ensue from a covered peril? Although, “ensue” and “ensuing loss” are not defined in the policies, “ensue” commonly is understood simply to mean to take place subsequently.²⁴ Thus, one reasonable interpretation of the clause is that any time a loss follows a covered peril, then the loss is covered. Another reasonable interpretation is that any time a loss follows a covered peril, then the loss is covered even if an excluded peril is also involved in causing the loss. When there are multiple interpretations of policy language that are reasonable, the language is ambiguous and thus, it should be construed in favor of coverage under the doctrine of *contra proferentem*.²⁵

Other policy interpretation rules, such as the “reasonable expectations” doctrine and construction of the policy as a whole, also dictate that the ensuing loss clause should be interpreted in a way that results in coverage for many losses, such as the rainwater damage in the above example. When a homeowner purchases an “all risk” homeowners policy, the homeowner reasonably expects that losses caused by perils such as rain will be covered. Indeed, in the above example, because rainwater damage is one of the common risks for which a homeowner seeks coverage when he or she buys a homeowners policy, the homeowner reasonably expects such damage will be covered regardless of whether the rainwater damage also was caused, in part, by faulty workmanship or some other excluded peril. Consequently, when the policy language is interpreted with the primary purpose of homeowners insurance in mind, the policyholder’s reasonable expectation that rainwater damage will be covered should be fulfilled.²⁶

Remarkably, the ensuing loss clause is often completely overlooked in concurrent causation coverage disputes even though the clause may preserve coverage for many claims that are otherwise excluded under an anti-concurrent causation exclusion. In addition, in cases where the clause has been considered, it has confused and divided the courts. Although many courts have reached the correct result when they interpreted and applied the ensuing loss clause, some of them have done so for the wrong reasons.²⁷ Other courts have reached the wrong result when interpreting and applying the clause because they have either misunderstood the clause or failed to correctly apply the insurance policy

²⁴ See *supra* note 20 and accompanying text.

²⁵ See discussion *infra* Parts II.A, V.

²⁶ See discussion *infra* Parts II.B–C.

²⁷ See discussion *infra* Part III.

interpretation rules to the clause.²⁸ For example, some courts have gone astray in their analysis by adopting some insurers’ argument that a “separate and intervening” covered peril, unrelated to an excluded peril, must occur after the excluded peril in the causation chain of events in order for the loss to be covered.²⁹ Other courts mistakenly have applied the tort concept of “efficient proximate cause” to the analysis and reframed the issue as a question of whether the “initial” event in the causation chain of events that caused the loss was covered or excluded.³⁰ Such approaches are not consistent with the language of the ensuing loss clause or the rules of policy interpretation.

Indeed, the words “separate” and “intervening” do not appear in the ensuing loss clause. Nor does the language in the ensuing loss clause, or insurance law generally, support applying tort concepts such as “efficient proximate cause” to the analysis. One of the reasons tort law is inapplicable is because it is driven by assignment of blame to parties and analysis of parties’ duties of care, neither of which is relevant to interpreting and applying insurance policy language.³¹ Whether a policy covers a loss is a question of contract interpretation, not an exercise in assigning blame.

Moreover, tort concepts such as “efficient proximate cause” are malleable and lead to metaphysical arguments regarding which “cause” in a long causation chain of events was the most important cause of the loss or which “cause” started the causation chain that led to the loss.³² Attempting to determine the “efficient proximate cause” of a loss in insurance disputes is misguided because most losses have many causes and it is a legal fiction to suggest that only one peril caused a loss.³³ Consequently, applying tort causation concepts to insurance disputes not only increases the costs of litigation by encouraging debates regarding “the” cause of the loss, but also leads to unpredictable and inconsistent results.

Applying the interpretation proposed in this Article should provide more certainty and predictability in the outcome of insurance disputes than malleable tort tests such as the “efficient proximate cause” or “separate and intervening cause” tests, which invite debate and litigation. Thus, under this proposed approach, litigation costs should be largely eliminated in many insurance claims involving the ensuing loss clause because many claims should never result in litigation where the outcome of such litigation is predictable. Further, disputes that nonetheless end up in court should be capable of being resolved by a summary judgment motion rather than by a jury at trial because the parties should not need to debate which “cause” of the loss was “dominant” or came first or whether a “separate and intervening” covered peril occurred after an excluded peril. Consequently, trial judges should be able to decide such cases simply by applying the policy language to the undisputed facts of the case.

This Article discusses the ensuing loss clause and how the clause should be interpreted and applied in five parts. Part I discusses the relevant policy

²⁸ See discussion *infra* Part III.

²⁹ See discussion *infra* Part III.B.

³⁰ See discussion *infra* Part III.A.

³¹ See discussion *infra* Parts IV.A–B.

³² See discussion *infra* Parts IV.A–B.

³³ See discussion *infra* Parts IV.A–B.

language and the various iterations of the ensuing loss clause. Part II addresses the principles of insurance policy interpretation relevant to analyzing and applying the ensuing loss clause. Part III discusses the different approaches courts have taken in interpreting and applying the clause, including certain courts' attempts to incorporate tort causation principles into the clause. Part IV discusses the problems and inefficiencies associated with the existing approaches to interpreting and applying the clause, and Part V presents the author's thoughts regarding how the clause should be interpreted and applied. The Article concludes that when the rules of policy interpretation are applied to the ensuing loss clause, and the strengths and weaknesses of the various approaches to interpreting and applying the clause are considered, a loss should be covered even if an excluded peril played a role in causing the loss so long as the loss is caused at least in part by a covered peril.

I. THE RELEVANT POLICY LANGUAGE

A. *The Insuring Agreement*

"All risk" property and homeowners policies typically contain broad insuring language that is the same as or similar to the following: "This policy insures against all risks of direct physical loss or damage to property insured . . . except as excluded."³⁴

B. *The Ensuing Loss Clause*

Under "all risk" property policies, the ensuing loss clause is commonly worded as follows: "This policy does not insure loss or damage caused directly or indirectly by any Peril excluded. . . . [such as the Perils of] faulty workmanship or faulty materials, unless loss or damage from an insured Peril ensues and then only for such ensuing loss or damage."³⁵ As previously noted, the ensuing loss clause often follows an anti-concurrent causation exclusion and the terms "ensues," "ensuing loss," and "peril" are not defined in such policies.

An ensuing loss clause in a homeowners policy often is worded as follows: "We insure for all risks of physical loss to the property described in Coverage A except for loss caused by . . . deterioration, . . . latent defect, . . . [or] wet or dry rot Any ensuing loss from [an excluded cause listed above that is] not excluded is covered."³⁶ Again, "ensuing loss" is not defined in the policy.

II. PRINCIPLES OF INSURANCE POLICY INTERPRETATION RELEVANT TO THE APPLICATION OF THE ENSUING LOSS CLAUSE

When courts are asked to interpret and apply policy language such as the ensuing loss clause, three well-established rules of policy interpretation are par-

³⁴ See, e.g., *Blaine Constr. Corp. v. Ins. Co. of N. Am.*, 171 F.3d 343, 346 (6th Cir. 1999) (emphasis omitted). See also cases cited *infra* notes 56, 80, and 103.

³⁵ *Blaine Constr. Corp.*, 171 F.3d at 346; see also cases cited *infra* notes 56, 80, 103.

³⁶ *Roberts v. State Farm Fire & Cas. Co.*, 705 P.2d 1335, 1336 (Ariz. 1985) (emphasis omitted). See also *Blaine Constr. Corp.*, 171 F.3d at 346; cases cited *infra* notes 56, 80, 103.

ticularly relevant to the analysis: (1) *contra proferentem*, (2) the “reasonable expectations” doctrine, and (3) construction of the policy as a whole.

A. *The Doctrine of Contra Proferentem*

It is hornbook insurance law that because insurers are the drafters of policy language, such as the ensuing loss clause,³⁷ the doctrine of *contra proferentem* applies, which means any ambiguities in the policy language should be construed against the insurers and in favor of coverage.³⁸ The test under many states’ laws for determining whether policy language is ambiguous is whether the provisions at issue are reasonably or fairly susceptible to different interpretations or meanings.³⁹ If the policyholder and insurer both offer reasonable

³⁷ See *supra* note 18 and accompanying text.

³⁸ See 13 APPLEMAN & APPLEMAN, *supra* note 16, § 7401; 2 COUCH ON INSURANCE, *supra* note 16, § 22:14; 4 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE §§ 16.04, 16.06 (2009); JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS § 5.1 (1994); 1-2 BUSINESS INSURANCE LAW AND PRACTICE GUIDE § 2.02[1] (Matthew Bender & Co. ed., 2012) [hereinafter BUSINESS INSURANCE LAW GUIDE]; 1 BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 1.03[b][1] (15th ed. Supp. 2011); David B. Goodwin, *Disputing Insurance Coverage Disputes*, 43 STAN. L. REV. 779, 795 (1991) (reviewing BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES (3d ed. 1990)). See also *Crane v. State Farm Fire & Cas. Co.*, 485 P.2d 1129, 1130 (Cal. 1971) (“Any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer.”); *Phillips Home Builders, Inc. v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997) (“If there is an ambiguity, however, the contract language is ‘construed most strongly against the insurance company that drafted it.’ ”); *Crawford v. Prudential Ins. Co.*, 783 P.2d 900, 904 (Kan. 1989) (“Since an insurer prepares its own contracts, it has a duty to make the meaning clear, and if it fails to do so, the insurer, and not the insured, must suffer.”); *RPM Pizza, Inc. v. Auto. Cas. Ins. Co.*, 601 So. 2d 1366, 1369 (La. 1992) (“[A]ny ambiguity must be construed against the insurance company and in favor of the reasonable construction that affords coverage.”); *Am. Bumper and Mfg. Co. v. Hartford Fire Ins. Co.*, 550 N.W.2d 475, 480 (Mich. 1996) (“[I]n construing insurance contracts, any ambiguities are strictly construed against the insurer to maximize coverage.”); *Ohio Cas. Ins. Co. v. Flanagan*, 210 A.2d 221, 226 (N.J. 1965) (“If the controlling language will support two meanings, one favorable to the insurer, and the other favorable to the insured, the interpretation sustaining coverage must be applied.”); *Gomolka v. State Auto. Mut. Ins. Co.*, 436 N.E.2d 1347, 1348–49 (Ohio 1982) (“Policies of insurance, which are in language selected by the insurer and which are reasonably open to different interpretations, will be construed most favorably for the insured.”).

³⁹ See 13 APPLEMAN & APPLEMAN, *supra* note 16, § 7403 (insurer has burden of establishing that insurer’s interpretation is the only fair interpretation of contract); 4 LONG, *supra* note 38, § 16.06, at 16–35. See also *Shepard v. CalFarm Life Ins. Co.*, 7 Cal. Rptr. 2d 428, 432–33 (Cal. Ct. App. 1992) (“A policy provision is ambiguous when it is capable of two or more constructions, both of which are reasonable” and the burden of proving one reasonable construction falls to the insurer) (internal quotation marks omitted); *Phillips Home Builders, Inc. v. Travelers Ins. Co.*, 700 A.2d 127, 130 (Del. 1997) (“ ‘Convoluting or confusing terms are the problem of the insurer . . . not the insured.’ ”) (quoting *Pa. Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149–50 (Del. 1997)); *High Country Assocs. v. N.H. Ins. Co.*, 648 A.2d 474, 476 (N.H. 1994) (“If the language of the policy reasonably may be interpreted more than one way and one interpretation favors coverage, an ambiguity exists in the policy that will be construed in favor of the insured and against the insurer.”); *Salem Grp. v. Oliver*, 607 A.2d 138, 139 (N.J. 1992) (“When a policy fairly supports an interpretation favorable to both the insured and the insurer, the policy should be interpreted in favor of the insured.”); *Harris, Jolliff & Michel, Inc. v. Motorists Mut. Ins. Co.*, 255 N.E.2d 302, 306–07 (Ohio Ct. App. 1970) (where insurer and insured each presented reasonable interpretations of exclu-

interpretations of the policy language, then the policy language is ambiguous and should be construed in favor of coverage.⁴⁰ Where the controversy involves a phrase that the insurers have failed to define and has generated many lawsuits with varying results, common sense dictates that the policy language must be ambiguous.⁴¹

Further, because the exclusions that contain the ensuing loss clause purport to limit coverage that otherwise is provided, the exclusionary language should be narrowly construed and not interpreted and applied in such a way as to swallow the basic coverages provided under a policy.⁴²

sion, exclusion is ambiguous and must be interpreted in favor of the insured); *Bartlett v. Amica Mut. Ins. Co.*, 593 A.2d 45, 47–48 (R.I. 1991) (noting ambiguity if clause has more than one reasonable meaning); *Bonner v. United Servs. Auto. Ass'n*, 841 S.W.2d 504, 506 (Tex. App. 1992) (“The court must adopt the construction of an exclusionary clause urged by the insured as long as [the] construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties’ intent.”).

⁴⁰ See sources cited *supra* note 39 and accompanying text.

⁴¹ See *New Castle Cnty. v. Nat'l Union Fire Ins. Co.*, 243 F.3d 744, 756 (3d Cir. 2001) (finding ambiguity where the contested phrase was not defined and had been interpreted differently by various courts); *Sec. Ins. Co. of Hartford v. Investors Diversified Ltd.*, 407 So. 2d 314, 316 (Fla. Dist. Ct. App. 1981) (“The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language.”); *Crawford v. Prudential Ins. Co.*, 783 P.2d 900, 908 (Kan. 1989) (“[R]eported cases are in conflict, the trial judge and the Court of Appeals reached different conclusions and the justices of this court [disagree] Under such circumstances, the clause is, by definition, ambiguous and must be interpreted in favor of the insured.”); *Allstate Ins. Co. v. Hartford Accident & Indem. Co.*, 311 S.W.2d 41, 47 (Mo. Ct. App. 1958) (“Since we assume that *all* courts adopt a reasonable construction, the conflict is of itself indicative that the word as so used is susceptible of at least two reasonable interpretations, one of which extends the coverage to the situation at hand.”); *George H. Olmsted & Co. v. Metro. Life Ins. Co.*, 161 N.E. 276, 276 (Ohio 1928) (“Where the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof, the question whether such clause is ambiguous ceases to be an open one.”) (quoting the Syllabus by the Court); *Cohen v. Erie Indem. Co.*, 432 A.2d 596, 599 (Pa. Super. Ct. 1981) (“The mere fact that [courts differ on the construction of the provision] itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation.”). See also 4 LONG, *supra* note 38, § 16.06, at 16-32–16-33; BUSINESS INSURANCE LAW GUIDE, *supra* note 38, § 2.02[1](2); STEMPER, *supra* note 38, § 5.8; Charles C. Marvel, Annotation, *Division of Opinion Among Judges on Same Court or Among Other Courts or Jurisdictions Considering Same Question, as Evidence that Particular Clause of Insurance Policy is Ambiguous*, 4 A.L.R.4th 1253 § 5 (1981).

⁴² See *Tews Funeral Home, Inc. v. Ohio Cas. Ins. Co.*, 832 F.2d 1037, 1045 (7th Cir. 1987) (policy excluding acts explicitly covered in prior section of policy construed against insurer); *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 390 (D. Del. 2002) (ambiguities construed against insurer in order to reduce the insurer’s incentive to draft policy language where certain provisions purport to give coverage while other clauses take that very coverage away); *Titan Indem. Co. v. Newton*, 39 F. Supp. 2d 1336, 1348 (N.D. Ala. 1999) (finding coverage even though “[t]he limitations of [the] policy completely swallow up the insuring provisions”); *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1380 (Md. 1997) (“If the exclusion totally swallows the insuring provision,” then such provisions create the greatest form of ambiguity, and the insurer is obliged to provide coverage.).

Further, the insurer has the burden of proving the exclusions are applicable.⁴³

So how does *contra proferentem* apply in the context of interpreting and applying the ensuing loss clause? As is discussed above and below in Part IV, an ambiguous insurance policy provision is one that has more than one reasonable meaning.⁴⁴ The ensuing loss clause is ambiguous in large part because its key term, “ensuing loss,” is undefined and the courts have struggled to even determine what the test should be to ascertain whether a loss ensues from a covered peril.⁴⁵ Consequently, the ambiguities should be construed against insurers in such cases.⁴⁶

B. The “Reasonable Expectations” Doctrine

Another staple of insurance policy interpretation law is that a policy should be interpreted to fulfill the “reasonable expectations” of the policyholder.⁴⁷ A seminal article regarding the “reasonable expectations” doctrine was written more than forty years ago by then-Professor Robert Keeton.⁴⁸ After

⁴³ See *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 313 (Minn. 1995) (insurer has burden “to prove the applicability of the exclusion as an affirmative defense”); *Cont’l Ins. Co. v. Louis Marx & Co.*, 415 N.E.2d 315, 317 (Ohio 1980) (insurer has burden of proving defense based upon exclusion); *Brown v. Snohomish Cnty. Physicians Corp.*, 845 P.2d 334, 340 (Wash. 1993) (once insured has made a “prima facie case that there is coverage,” the burden shifts to the insurer to prove an exclusionary provision applies). See also 13 APPLEMAN & APPLEMAN, *supra* note 16, § 12275; 17A COUCH ON INSURANCE, *supra* note 16, § 254:12.

⁴⁴ See *supra* note 39 and accompanying text.

⁴⁵ See *infra* Parts III–IV.

⁴⁶ See *supra* notes 38–40 and accompanying text.

⁴⁷ See OSTRAGER & NEWMAN, *supra* note 38, at 42–53 (identifying courts in forty states, Puerto Rico, and the District of Columbia that have expressed support for, or applied a form of, the reasonable expectations doctrine); ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* 633–35 (student ed. 1988); 2 COUCH ON INSURANCE, *supra* note 16, § 22.11; LONG, *supra* note 38, § 16.07, at 16–39; BUSINESS INSURANCE LAW GUIDE, *supra* note 38, § 2.02[1]; STEMPEL, *supra* note 38, § 11.1, at 312. See also *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990) (finding ambiguous coverage clauses of insurance policies are to be interpreted broadly to protect the objectively reasonable expectations of the insured); *Roland v. Georgia Farm Bureau Mut. Ins. Co.*, 462 S.E.2d 623, 625 (Ga. 1995) (“A contract of insurance should be strictly construed against the insurer and read in favor of coverage in accordance with the reasonable expectations of the insured.”); *Corgatelli v. Global Life & Accident Ins. Co.*, 533 P.2d 737, 740–41 (Idaho 1975) (applying reasonable expectations doctrine to exclusion notwithstanding conclusion that the provision was unambiguous); *A.B.C. Builders, Inc. v. Am. Mut. Ins. Co.*, 661 A.2d 1187, 1190 (N.H. 1995) (“[T]he policy language must be so clear as to create no ambiguity which might affect the insured’s reasonable expectations.”); *Fed. Ins. Co. v. Century Fed. Sav. & Loan Ass’n*, 824 P.2d 302, 308 (N.M. 1992) (giving effect to policyholder’s reasonable expectations in construing policy language); *Mills v. Agrichemical Aviation, Inc.*, 250 N.W.2d 663, 671–73 (N.D. 1977) (finding the doctrine of reasonable expectations properly invoked to discern intentions of parties and impose liability on insurer); *Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488, 495–96 (W. Va. 1987) (applying reasonable expectations doctrine to construe the policy in a manner that “a reasonable person standing in the shoes of the insured would expect the language to mean,” even though painstaking examination “of the policy provisions would have negated those expectations.”).

⁴⁸ Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

he became a judge, he summarized the doctrine in his treatise as follows: “In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer.”⁴⁹ As another law professor more recently stated, “In other words, even when the policy language unambiguously precludes coverage, under certain circumstances, courts will hold that coverage exists.”⁵⁰

Stated slightly differently, policyholders should receive the coverage they reasonably expect even if the insurer can point to some policy language that supports the insurer’s position that the claim at issue should not be covered.⁵¹ Thus, for example, a policyholder who buys an “all risk” homeowners policy to protect his home from damage caused by storms should be covered for rain damage because he reasonably expected that coverage.

So what does this mean in the context of the ensuing loss clause? As is discussed below in Part IV, because the clause is, at best, ambiguous, one arguably does not even need to apply the reasonable expectations doctrine. The

⁴⁹ KEETON & WIDISS, *supra* note 47, at 633. For commentary regarding the reasonable expectations doctrine, see Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1395 (2007) (criticizing the reasonable expectations doctrine and arguing that the case law endorsing the doctrine is “confused and inconsistent”); Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21, 35–41 (1998) (discussing the doctrine as conceptualized by Keeton); Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 825–26 (1990) (providing a historical account of the doctrine and asserting that the doctrine is principled and can be applied within justifiable guidelines); William A. Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPP. L. REV. 267, 287–96 (1986) (formulating standards for applying the doctrine); Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 392 (1986) (arguing for refinements to the doctrine in response to the fading appeal that the doctrine holds for courts and commentators and contending that courts should “discard their unfortunate tendency to speak the platitudes of reasonable expectations without undertaking a careful and systematic analysis”); Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1151–52 (1981). While there is relatively broad acceptance of the doctrine, judicial interpretation and application of the doctrine is variable. See Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT & INS. L.J. 729, 731–32 (2000) (exploring judicial responses and proposing a middle ground approach); Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 191–92 (1998) (describing judicial approaches and noting both liberal and narrow approaches among the numerous states that have adopted the doctrine).

⁵⁰ Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 22 (1997).

⁵¹ The reasonable expectations doctrine is rooted in the fact that insurance policies generally are contracts of adhesion drafted by insurers and offered to consumers on a take-it-or-leave-it basis. See Schwarcz, *supra* note 49, at 1394, 1401–02. See also Keeton, *supra* note 48, at 967; Friedrick Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629–30 (1943); Susan M. Popik & Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425, 433 (1998); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1225 (1983).

ambiguities in the clause should be construed in favor of the policyholder. Nonetheless, even if the clause were viewed as unambiguous, a policyholder who buys an “all risk” policy reasonably expects to receive coverage for covered losses that may be caused, in part, by excluded perils so long as the loss is caused by, or ensues, at least in part, from a covered peril. In other words, in the leaking roof example discussed in the Introduction, courts should not permit insurers to agree in the insuring agreement portion of the policy to cover “all risks” including rain damage, but then, when a claim is presented, deny coverage based upon the argument that, although rainwater damaged the home, an excluded peril—faulty workmanship in the form of faulty roof installation—allowed the rainwater to enter the house. Such a denial renders the coverage provided to the homeowner under the policy illusory, which is impermissible.⁵²

C. Construction of the Policy as a Whole

The third policy interpretation principle applicable to the ensuing loss clause provides that, if possible, the policy should be interpreted in a way that reconciles its various provisions and attempts to give effect to all of them.⁵³ In essence, this principle means that courts should give effect to all of the policies’ provisions if possible, and, do so in a way that is consistent with the general purpose of the policy as a whole.⁵⁴ In the context of the ensuing loss clause, this means that the exclusionary language contained in the anti-concurrent causation exclusion should not be read in isolation in determining whether a claim is covered. To the contrary, courts should first look to the insuring language in the policy as well as the exclusionary language and its ensuing loss clause to

⁵² See *supra* note 42 and accompanying text. See also *Bowersox Truck Sales & Serv., Inc. v. Harco Nat’l Ins. Co.*, 209 F.3d 273, 277–78 (3rd Cir. 2000) (rejecting insurer’s interpretation of policy’s two-year limitation period where interpretation would have rendered coverage illusory); *Harris v. Gulf Ins. Co.*, 297 F. Supp. 2d 1220, 1226 (N.D. Cal. 2003) (rejecting insurer’s interpretation of exclusion in policy because “it would render the coverage provided by the policy illusory”); *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 398 (D. Del. 2002) (rejecting insurer’s interpretation of the policy’s deliberate fraud exclusion where, if applied, “there would be little or nothing left to that coverage” because “[n]o insured would expect such limited coverage from a policy that purports to cover all types of securities fraud claims”); *Atofina Petrochemicals, Inc. v. Cont’l Cas. Co.*, 185 S.W.3d 440, 444–45 (Tex. 2005) (rejecting insurer’s interpretation of additional insured endorsement because it “would render coverage under the endorsement largely illusory”).

⁵³ See GA. CODE ANN. § 13-2-2(4) (2012) (stating contracts should be interpreted as a whole); *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985) (applying New York Law, finding “an interpretation that gives a reasonable and effective meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect”); *Fireman’s Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal. App. 3d 1154, 1169 (Cal. Ct. App. 1991) (“In short, an insurance contract is to be construed in a manner which gives meaning to all its provisions in a natural, reasonable, and practical manner, having reference to the risk and subject matter and to the purposes of the entire contract.”) (quoting *State Farm Mut. Auto. Ins. Co. v. Crane*, 217 Cal. App. 3d 1127, 1132 (Cal. Ct. App. 1990)); *Weiss v. Bituminous Cas. Corp.*, 319 N.E.2d 491, 495 (Ill. 1974) (provisions in an insurance policy should be interpreted in context of entire policy); *Welborn v. Ill. Nat’l Cas. Co.*, 106 N.E.2d 142, 143 (Ill. App. Ct. 1952) (explaining that “the court should determine the intention [of the parties] from the whole agreement, and endeavor to give a meaning to all provisions, so far as possible, which will render them consistent and operative.”).

⁵⁴ See sources cited *supra* note 53.

determine whether the policy covers the claim at issue. Thus, when analyzing whether coverage exists for a claim, the exclusionary language, ensuing loss clause, and insuring agreement language should be read as a whole—keeping in mind that the basic purpose of insurance is to protect the policyholder from losses in exchange for the payment of a premium. To do otherwise could allow the insurance coverage purchased to become illusory.⁵⁵

III. COURT INTERPRETATIONS AND APPLICATIONS OF THE ENSUING LOSS CLAUSE

A. *Some Courts Have Interpreted the Clause to Require that a Covered Peril Be the “Efficient Proximate Cause” of the Loss in Order for the Loss To Be Covered*

One school of thought regarding the interpretation and application of the ensuing loss clause that has been endorsed by a handful of courts involves the incorporation of the “efficient proximate cause” test into the clause.⁵⁶ Under this approach, the coverage determination turns, not upon an analysis of the anti-concurrent causation language, but rather, upon an analysis of whether the initial peril that started a causation chain of events that led to a loss was a covered or an excluded peril.⁵⁷ An example of a case in which a court employed this test is the Supreme Court of Washington’s decision in *McDonald v. State Farm Fire and Casualty Company*.⁵⁸

In *McDonald*, a house was built on a hill,⁵⁹ and after heavy rains, the ground on the lower side of the house slid away and the foundation of the house cracked.⁶⁰ The policy at issue provided that the insurer would cover losses due to “accidental direct physical loss” subject to a number of listed exclusions.⁶¹ One of the listed exclusions was for “foundation cracking.”⁶²

⁵⁵ See *supra* notes 42, 51–52; see also discussion *infra* Part IV.

⁵⁶ See *Hartford Cas. Ins. Co. v. Evansville Vanderburgh, Pub. Library*, 860 N.E.2d 636, 639, 647 (Ind. Ct. App. 2007) (finding faulty workmanship, which the policy excluded, the efficient proximate cause of loss); *Alwart v. State Farm Fire & Cas. Co.*, 508 S.E.2d 531, 533–34 (N.C. Ct. App. 1998) (implicitly using an “efficient proximate cause” standard when barring coverage for all losses ensuing from faulty workmanship); *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1006 (Wash. 1992) (en banc) (discussing the “efficient proximate cause” rule and holding the ensuing loss clause did not reinstate coverage for a loss caused by faulty workmanship); *Bedford, LLC v. Safeco Ins. Co.*, 140 Wash. App. 1033, No. 55341-1-I, 2007 WL 2757271, at *2–3 (Wash. Ct. App. Sept. 24, 2007) (ensuing loss clause was inapplicable because the last event in chain of causation was an excluded peril); *Wright v. Safeco Ins. Co.*, 109 P.3d 1, 8 (Wash. Ct. App. 2004) (applying efficient proximate cause test and concluding mold contamination was caused by excluded peril).

⁵⁷ See cases cited *supra* note 56. Notably, in other contexts in which courts have applied the “efficient proximate cause” test, the analysis turns on what the “dominant” cause of the loss was. See *W. Nat’l Mut. Ins. Co. v. Univ. of N.D.*, 643 N.W.2d 4, 10–12, 14 (N.D. 2002); STEMPEL ON INSURANCE CONTRACTS, *supra* note 18, § 7.02; Joseph Lavitt, *The Doctrine of Efficient Proximate Cause, the Katrina Disaster, Prosser’s Folly, and the Third Restatement of Torts: Cracking the Conundrum*, 54 LOY. L. REV. 1, 15 (2008). Thus far, courts have not attempted to apply this variation of the test to the ensuing loss clause.

⁵⁸ *McDonald*, 837 P.2d at 1002.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

Another exclusion provided: “We do not insure under any coverage for loss consisting of one or more of the items below: . . . inadequacy, fault or unsoundness in . . . design, specifications, workmanship, construction, grading, compaction . . . of any property” The exclusion did, however, “*insure for any ensuing loss from [the above] items . . . unless the ensuing loss is itself a Loss Not Insured by this Section.*”⁶³

The insurer, citing engineers’ conclusions that the damage was caused by the “faulty design and construction of the filled area near the foundation with unsuitable fill materials,” denied coverage for the claim.⁶⁴ The trial court granted summary judgment in favor of the insurer based upon the above exclusions in the policy.⁶⁵ The Court of Appeals reversed the trial court’s ruling based upon the ensuing loss clause.⁶⁶ The Supreme Court of Washington reversed the Court of Appeals’ ruling and reinstated the trial court’s ruling.⁶⁷

In explaining its holding, the Supreme Court of Washington described the “efficient proximate cause” rule under Washington law as follows:

[T]he efficient proximate cause rule operates when an “insured risk” or covered peril sets into motion a chain of causation which leads to an uncovered loss. If the efficient proximate cause of the final loss is a covered peril, then the loss is covered under the policy. In chain of causation cases, the efficient proximate cause rule is properly applied after (1) a determination of which single act or event is the efficient proximate cause of the loss and (2) a determination that the efficient proximate cause of the loss is a covered peril.⁶⁸

The court then rejected the argument that the ensuing loss clause was either ambiguous or reinstated coverage for the otherwise excluded loss at issue: “The ensuing loss clause may be confusing, but it is not ambiguous. Reasonably interpreted, the ensuing loss clause says that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered.”⁶⁹ The court then concluded, “[i]nasmuch as no reasonable reading of the policy indicates that the efficient proximate cause of the property losses was a covered peril [in this case, there is no coverage].”⁷⁰

Notably, in reaching its decision, the court looked only at the “initial” event that set in motion the causal chain of events that led to the loss in determining what *the* efficient proximate cause was, which the policyholder conceded was faulty construction, an excluded peril.⁷¹

⁶² *Id.* n.1 (quoting a State Farm Homeowners Insurance Policy § 1—Losses Not Insured).

⁶³ *Id.* at 1002 n.3 (emphasis added) (quoting a State Farm Homeowners Insurance Policy § 1—Losses Not Insured).

⁶⁴ *Id.* at 1002–03.

⁶⁵ *Id.* at 1003.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1002.

⁶⁸ *Id.* at 1004 (internal citation omitted).

⁶⁹ *Id.* at 1005.

⁷⁰ *Id.* at 1006.

⁷¹ *Id.* In *Vision One, LLC v. Philadelphia Indemnity Insurance Co.*, the Supreme Court of Washington clarified that the application of the efficient proximate cause test under Washington law in ensuing loss cases is intended to benefit policyholders. Specifically, the court stated “[t]he efficient proximate cause rule operates as an interpretive tool to establish coverage when a covered peril ‘sets other causes into motion which, in an unbroken sequence,

The *Hartford Casualty Insurance Company v. Evansville Vanderburgh, Public Library* case is another example of a court using the “efficient proximate cause” test when interpreting and applying an ensuing loss clause.⁷² In *Evansville Vanderburgh*, a historic library was damaged during the excavation of a nearby property.⁷³ The library had an “all risk” property policy that contained an anti-concurrent causation exclusion for certain perils and contained this ensuing loss clause:

We will not pay for loss or damage caused by, resulting from, or arising out of any acts, errors, or omissions by you or others in any of the following activities, regardless of any other cause or event that contributes concurrently, or in any sequence to the loss or damage:

. . . .

Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction . . . [However,] [i]f physical loss or damage by a Covered Cause of Loss ensues, we will pay only for such ensuing loss or damage.⁷⁴

The insurer denied coverage for the claim on the basis that the loss allegedly was caused by the nearby excavation work which fell within the excluded perils of “design, specification, workmanship, construction, and renovation”⁷⁵ The insurer also contended the ensuing loss clause did not reinstate coverage for the claim because the clause “does not expand coverage.”⁷⁶

The Indiana Court of Appeals rejected the library’s argument that the ensuing loss clause reinstated coverage for the loss.⁷⁷ In doing so, the court did not analyze the anti-concurrent causation exclusionary language, but rather, applied the “efficient proximate cause” test to determine whether the initial event that started the causal chain of events that led to the loss was a covered or an excluded peril:

In this analysis, the concept of insurance law called the efficient proximate cause of loss rule is helpful. . . . “The efficient proximate cause rule states that where a peril specifically insured against sets other causes into motion which, in an unbroken sequence, produce the result for which recovery is sought, the loss is covered, even though other events within the chain of causation are excluded from coverage. ‘Stated in another fashion, where an insured risk itself sets into operation a chain of

produce the result for which recovery is sought.’ ” 276 P.3d 300, 309 (Wash. 2012) (en banc) (quoting *McDonald*, 837 P.2d at 1004).

The opposite proposition, however, is not a rule of law. When an *excluded peril* sets in motion a causal chain that includes covered perils, the efficient proximate cause rule does *not* mandate exclusion of the loss. . . . “the efficient proximate cause rule operates in favor of coverage. A converse rule would, of course, operate in favor of no coverage. . . . Because policies should normally be construed in favor of coverage, because there is no settled law favoring this argument, contrary to the insurer’s claim, and because the insurer does not offer any further justification or authority supporting such a rule, we decline to adopt the rule urged by the insurer.”

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

⁷² *Hartford Cas. Ins. Co. v. Evansville Vanderburgh, Pub. Library*, 860 N.E.2d 636, 647 (Ind. Ct. App. 2007).

⁷³ *Id.* at 638–39.

⁷⁴ *Id.* at 641 (emphasis omitted).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 646.

causation in which the last step may have been an excepted risk, the excepted risk will not defeat recovery.’ ”⁷⁸

The court then denied coverage, finding it undisputed that the loss was caused by an excluded peril.⁷⁹

In sum, courts that have incorporated the “efficient proximate cause” test into the ensuing loss clause seek to determine whether the *initial* event in a causation chain of events that results in a loss is a covered or an excluded peril regardless of the presence or absence of an anti-concurrent causation exclusion. If the initial event is a covered peril, then the loss is covered. But if the initial event is an excluded peril, then the policyholder will need to show that another covered peril subsequently occurred prior to the loss in order to have an opportunity to recover.

B. Some Courts Have Interpreted the Clause to Require that a “Separate and Intervening” Covered Peril Be the Cause of the Loss in Order for the Loss To Be Covered

The second school of thought, which has been adopted by several courts, is that insurance coverage for an otherwise excluded loss will be reinstated under the ensuing loss clause only if the damage at issue was caused by a “separate and intervening” peril that is covered even if the policy contains an anti-concurrent causation exclusion.⁸⁰ An example of such a decision is *Bill O.*

⁷⁸ *Id.* (quoting *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1004 (Wash. 1992)).

⁷⁹ *Id.* at 647.

⁸⁰ *See, e.g., In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 223 (5th Cir. 2007) (holding damage caused by Hurricane Katrina was due to flooding, an excluded cause of loss not ensuing from the negligent construction of levees); *GTE Corp. v. Allendale Mut. Ins. Co.*, 372 F.3d 598, 618 (3rd Cir. 2004) (holding Y2K losses were not covered because they did not ensue from a covered peril); *Merz v. Markel Ins. Co.*, No. G032263, 2004 WL 392890, at *2 (Cal. Ct. App. 2004) (finding the collapse of a retaining wall caused by a faulty grading of a slope was not covered because no separate and independent cause of the damages occurred); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 167–68 (Fla. 2003) (finding repair of structural deficiencies flowing from design defects was not an ensuing loss because there was no damage separate from the defects themselves); *Bd. of Educ. v. Int’l Ins. Co.*, 684 N.E.2d 978, 980 (Ill. App. Ct. 1997) (holding costs to repair asbestos-related property damage excluded by asbestos exclusion because the loss did not ensue from a separate covered peril); *Weeks v. Coop. Ins. Cos.*, 817 A.2d 292, 296 (N.H. 2003) (explaining damage due to negligent construction was not covered under ensuing loss clause because there was not a separate and intervening covered cause of the loss); *Narob Dev. Corp. v. Ins. Co. of N. Am.*, 631 N.Y.S.2d 155, 155 (N.Y. App. Div. 1995) (holding a faulty workmanship exclusion barred coverage for collapse of retaining wall because there was no damage other than collapsed retaining wall); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 751 (Tex. 2006) (holding mold contamination caused by routine drips and leaks was excluded under mold exclusion because the contamination did not ensue from a covered water damage event); *Vision One, L.L.C. v. Philadelphia Indem. Ins. Co.*, 276 P.3d 300, 302–03, 311 (Wash. 2012) (allowing insurance recovery under an ensuing loss clause for damage caused by the collapse of a floor, a non-excluded peril in an all-risk policy, but not for the faulty workmanship, an excluded peril, that led to the collapse); *Sprague v. Safeco Ins. Co.*, 276 P.3d 1270, 1273 (Wash. 2012) (barring insurance recovery for a deck that was about to collapse due to rotting caused by faulty workmanship, an excluded peril, where no separate loss ensued from a covered peril).

Weeks v. Co-Operative Insurance Companies.⁸¹ In *Weeks*, a brick veneer wall was built over an existing asphalt shingle wall.⁸² More than four decades later, the brick veneer wall was damaged when it separated from the asphalt shingle wall.⁸³ When the policyholder presented a claim for the damage, the insurer denied coverage on the basis that the damage was caused by faulty workmanship.⁸⁴

The insuring agreement in the policy at issue stated that the insurer agreed to cover “ ‘direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss’ . . . ‘unless the loss is . . . [e]xcluded.’ ”⁸⁵ The exclusions section of the policy provided: “We will not pay for loss or damage caused by or resulting from any of the following. . . . Faulty, inadequate or defective . . . [d]esign, . . . workmanship, . . . [or] construction . . . of part or all of any property on or off the described premises.”⁸⁶ However, the section went on to state: “[I]f an excluded cause of loss that is listed above results in a ‘specified cause of loss’ . . . we will pay for the loss or damage caused by that ‘specified cause of loss.’ ”⁸⁷

The trial court found the policy language ambiguous and held the repair of the faulty workmanship itself was not covered but the damage that ensued from the faulty workmanship was covered.⁸⁸ The Supreme Court of New Hampshire reversed and entered judgment in favor of the insurer.⁸⁹

In reaching its decision, the Supreme Court of New Hampshire explained its understanding of the purpose of the ensuing loss clause as follows: “[C]overage will be reinstated under the exception to the exclusion when an excluded risk sets into motion a chain of causation which leads to a covered cause of loss. In that case, the policy insures against damage directly caused by the ensuing covered cause of loss.”⁹⁰

The court then, however, without actual reference to the policy language at issue or the rules of policy interpretation, applied a “separate and independent” cause or damage test to the facts of the case and held the loss was not covered:

Here, there was no subsequent ensuing cause of loss separate and independent from the initial excluded cause of loss, i.e., the faulty workmanship. Therefore, we conclude that the exception to the exclusion for faulty workmanship does not apply.⁹¹

Acme Galvanizing Company, Inc. v. Fireman’s Fund Insurance Company is another example of a court applying a “separate and intervening cause” test to determine whether coverage for a loss was reinstated under an ensuing loss

⁸¹ *Weeks*, 817 A.2d 292.

⁸² *Id.* at 294.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 295.

⁸⁸ *Id.*

⁸⁹ *Id.* at 297.

⁹⁰ *Id.* at 296.

⁹¹ *Id.*

clause.⁹² In *Acme*, a manufacturing company that used molten zinc in its operations had purchased an “all risk” property policy.⁹³ The policy also contained the following anti-concurrent causation exclusion and ensuing loss clause:

The Property Coverage does not insure against loss caused by, resulting from, contributed to or aggravated by . . . [i]nherent vice, latent defect, wear and tear, marring and scratching, gradual deterioration, moths, termites or other insects or vermin, *unless loss by a peril not otherwise excluded ensues and then the Company shall be liable only for such ensuing loss . . .*⁹⁴

During the policyholder’s operations, an 84-ton capacity kettle that contained molten zinc ruptured and several tons of the hot, liquid metal escaped.⁹⁵ The free flow of molten zinc damaged or destroyed equipment including furnace burners and floorboards in the area of the release.⁹⁶

The insurer denied coverage on the basis that the kettle failed due to “poor welding techniques.”⁹⁷ The insurer deemed the poor welding an “inherent vice and latent defect,” and therefore an excluded peril.⁹⁸ The parties hired experts to opine on the cause of the kettle failure.⁹⁹ At trial, rather than let the jury decide the case, the judge entered a judgment of non-suit against the policyholder based on the exclusions quoted above.¹⁰⁰

On appeal, the policyholder argued that even if the kettle failure was caused by an excluded peril, the ensuing loss clause reinstated coverage for the damage in the area near the kettle that subsequently occurred after the kettle failure when the molten metal escaped.¹⁰¹ The appellate court disagreed, stating:

We interpret the ensuing loss provision to apply to the situation where there is a “peril,” i.e., a hazard or occurrence which causes a loss or injury, *separate and independent* but resulting from the original excluded peril, and this new peril is not an excluded one, from which loss ensues. . . .

Here, there was no peril separate from and in addition to the initial excluded peril of the welding failure and kettle rupture.¹⁰²

Again, the anti-concurrent causation language was not part of the court’s analysis.

In short, under the interpretation of the ensuing loss clause adopted by the *Weeks* and *Acme* courts, in order for a loss caused at least in part by an excluded peril to be covered under an ensuing loss clause, a court or jury must determine that the causation chain of events and related damage can be segregated by separate, independent perils and that portions of the damage can be

⁹² *Acme Galvanizing Co., Inc. v. Fireman’s Fund Ins. Co.*, 270 Cal. Rptr. 405, 411 (Cal. Ct. App. 1990).

⁹³ *Id.* at 407.

⁹⁴ *Id.* (emphasis added).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 408.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 409.

¹⁰¹ *Id.* at 410.

¹⁰² *Id.* at 411.

attributed to each such peril even if the policy contains an anti-concurrent causation exclusion.

C. Some Courts Have Interpreted the Clause to Reinstate Coverage for an Otherwise Excluded Loss Where the Loss Is Caused in Part by a Non-Excluded Peril

Several courts have adopted a third approach to analyzing the issue, wherein the focus is on whether the loss at issue was caused at least in part by a covered peril even if the policy has anti-concurrent causation exclusionary language. If the loss was caused at least in part by a covered peril, then coverage for the loss is preserved by the ensuing loss clause regardless of whether an excluded peril also played a role in causing the loss.¹⁰³ The Supreme Court of Arizona's decision in *Roberts v. State Farm Fire & Casualty Company*,¹⁰⁴ is an example of such a case.

In *Roberts*, honeybees were constructing a hive in the attic of a home.¹⁰⁵ The homeowners contacted an exterminator to remove the bees.¹⁰⁶ A few days after the bees were eliminated, honey began dripping into the dining room.¹⁰⁷ The homeowners presented their insurer with a claim for the damage to the dining room, and the insurer denied coverage on the basis that the policy excluded coverage for damage caused by insects.¹⁰⁸

¹⁰³ See *Costco Wholesale Corp. v. Commonwealth Ins. Co.*, 45 F. App'x 646, 647 (9th Cir. 2002) (finding damage to foundation of building was covered notwithstanding faulty workmanship exclusion because the loss ensued from earth movement, a covered peril); *Blaine Constr. Corp. v. Ins. Co. of N. Am.*, 171 F.3d 343, 349–50, 354 (6th Cir. 1999) (explaining under Tennessee law, despite faulty workmanship exclusion, coverage for loss caused by faulty workmanship was reinstated under the ensuing loss exception because the exclusion was ambiguous); *Lake Charles Harbor & Terminal Dist. v. Imperial Cas. & Indem. Co.*, 857 F.2d 286, 287, 289 (5th Cir. 1988) (explaining under Louisiana law, exclusion in all-risk inland marine policy for mechanical breakdowns “unless an insured peril ensues” did not exclude coverage for catastrophic damage to insured's shiploader after worn out cable on shiploader snapped because such damage was an ensuing loss); *Jersey Ins. Co. of N.Y. v. Heffron*, 242 F.2d 136, 139 (4th Cir. 1957) (finding in favor of the policyholder, the court stated, “it is immaterial where in the chain of causation the [covered peril] occurs”); *Roberts v. State Farm Fire & Cas. Co.*, 705 P.2d 1335, 1337 (Ariz. 1985) (en banc) (finding damage caused by insects covered through the “ensuing loss” provision because damage done after bees were exterminated was a result of the leakage of honey from the bees' hive); *Rosenberg v. First State Ins. Co.*, 280 Cal. Rptr. 388, 393 (Cal. Ct. App. 1991) (excluding coverage in all risk builder's policy for faulty workmanship did not also exclude coverage for business interruption losses that ensued from faulty workmanship); *Husband v. Lafayette Ins. Co.*, 635 So. 2d 309, 312 (La. Ct. App. 1994) (wear and tear exclusion was not applicable to tenant's damage to home because ensuing loss clause was ambiguous and “tenant abuse” was not excluded); *Goldner v. Otsego Mut. Fire Ins. Co.*, 336 N.Y.S.2d 717, 720–21 (N.Y. App. Div. 1972) (finding water damage caused by an explosion was covered despite exclusion for water damage because ensuing loss clause was ambiguous); *Arnold v. Cincinnati Ins. Co.*, 688 N.W.2d 708, 722 (Wis. Ct. App. 2004) (explaining loss caused by rain leaking through damaged caulking covered under ensuing loss exception to faulty workmanship exclusion).

¹⁰⁴ *Roberts*, 705 P.2d 1335.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1336.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

The policy stated:

We insure for *all risks* of physical loss to the property . . . *except for loss caused by:*

. . . .

6. wear and tear; . . . wet or dry rot; contamination; . . . settling, cracking, shrinking, bulging, or expansion of . . . walls, floors, roofs or ceilings; birds, vermin, rodents, *insects* or domestic animals. . . . *Any ensuing loss from items 1 through 6 not excluded is covered.*¹⁰⁹

Based upon this language, the insurer argued the loss—honey damage caused by insects—was “clearly excluded from coverage by the terms of the policy.”¹¹⁰ The trial court agreed with the insurer.¹¹¹ The Arizona Court of Appeals affirmed.¹¹² The Supreme Court of Arizona, however, reversed.¹¹³

In reversing the lower courts’ rulings, the Supreme Court of Arizona first considered whether the ensuing loss clause was ambiguous and concluded it was not: “We note that the term ‘ensuing loss’ is nowhere defined in the policy. . . . [Nonetheless,] [w]e do not believe this language is ambiguous. It cannot be construed in more than one sense.”¹¹⁴

The court then observed that the homeowners were not seeking coverage for the damage in the attic caused by the bees before the bees were eliminated and considered whether the damage at issue occurred before or after the bees (i.e., the excluded peril) were gone, which the court considered dispositive of the coverage issue.¹¹⁵ The court concluded that the damage at issue occurred subsequent to the excluded peril because the bees were removed before the honey appeared in the dining room: “[T]he word ‘ensuing’ means ‘to take place afterward . . . to follow as a chance, likely, or necessary consequence: RESULT . . . to follow in chronological succession.’ ”¹¹⁶ According to the court, “[t]he plain import of this language is that the loss, due to honey seepage, is an ensuing loss and is *covered* by the policy, unless one of the other various exclusions applies.”¹¹⁷

In short, the honey damage in the dining room was covered under the ensuing loss clause simply because it occurred after the bees had been eliminated even though the honey damage unquestionably was caused by the bees, an expressly excluded cause of loss. Stated differently, even though the initial peril in the causation chain of events that caused the loss was an excluded peril, because the damage occurred subsequent to the excluded peril and the policy did not have a specific exclusion for the honey damage at issue, the ensuing loss clause brought the loss back within coverage. Thus, in this instance the ensuing loss clause resurrected coverage for losses that subsequently ensued

¹⁰⁹ *Id.* (some emphasis added).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1335.

¹¹² *Id.*

¹¹³ *Id.* at 1337.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1336–37.

¹¹⁶ *Id.* at 1337 (quoting *Roberts v. State Farm*, 705 P.2d 1352, 1353 (Ariz. Ct. App. 1985) and citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 756 (1969)).

¹¹⁷ *Id.*

from an otherwise excluded peril (i.e., damage caused by insects) because the ensuing damage was not expressly excluded.

Another example of a case in which a court held the ensuing loss clause reinstated coverage for a loss that was caused in part by an excluded peril is *Lake Charles Harbor & Terminal District v. Imperial Casualty & Indemnity Company*.¹¹⁸ In *Lake Charles*, a cable snapped on a ship loader at a harbor terminal, which resulted in a heavy shuttle crashing into the interior of the loader and causing extensive damage to the loader.¹¹⁹ The cable broke because it was worn out.¹²⁰

The policyholder had purchased a policy that covered “all risks of direct physical loss or damage” unless otherwise excluded.¹²¹ The policy also contained an exclusion for losses caused by mechanical breakdown but also included the following ensuing loss clause: “This Policy DOES NOT INSURE AGAINST loss caused by . . . [m]echanical or machinery breakdown; unless an insured peril ensues, and then only for the actual loss or damage caused by such ensuing peril.”¹²²

Even though the loss arguably was caused by an excluded peril—mechanical breakdown—the district court held that the policy covered the loss.¹²³ The Fifth Circuit affirmed, noting that it was “a judgment refusing to give effect to an exclusion whose words, read literally, are meaningless.”¹²⁴

In reaching its decision, the Fifth Circuit rejected the insurer’s argument that the exclusionary language and ensuing loss clause were “plain and unambiguous.”¹²⁵

[T]he exclusion at issue here appears to be self-contradictory gibberish—it begins by excluding mechanical breakdowns from coverage, yet concludes by allowing compensation for all risks that ensue from such a breakdown. . . . Consequently, the insurers’ initial argument that the exclusion is plain and unambiguous is unconvincing, and the exclusion must be interpreted according to the applicable state law rules of construction.¹²⁶

The Fifth Circuit then applied Louisiana law regarding the interpretation of insurance policy language and construed the policy in favor of the policyholder:

Under Louisiana law, an insurance policy is construed against the insurers Doubts are resolved in favor of coverage. . . .

Whatever “ensuing peril” may mean, nothing in the policies indicates that catastrophic damage to a machine caused by its own mechanical breakdown cannot be included within the term. Therefore, once doubts are resolved in [the policyholder’s]

¹¹⁸ *Lake Charles Harbor & Terminal Dist. v. Imperial Cas. & Indem. Co.*, 857 F.2d 286 (5th Cir. 1988).

¹¹⁹ *Id.* at 287.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 287–88.

¹²⁴ *Id.* at 287.

¹²⁵ *Id.* at 288.

¹²⁶ *Id.*

favor, [the policyholder’s] assertion that the ship-loader accident was an insured ensuing peril must be accepted.¹²⁷

Finally, to support its decision, the Fifth Circuit also relied upon the reasonable expectations of the policyholder:

[The policyholder’s] insurance policies covered all risks except those explicitly excluded from coverage, and excluded coverage for mechanical breakdowns only when no “insured peril ensue[d].” [The policyholder] might reasonably have assumed that the catastrophic damage to its ship loader was an insured ensuing peril, and absent a clear and intelligible exclusion in the policies, the insurers cannot take shelter in ambiguities.¹²⁸

In essence, the Fifth Circuit held in *Lake Charles* that even though the cause of the loss itself (the cable breaking) was excluded, the loss that subsequently resulted from the excluded peril was covered under the resurrecting powers of the ensuing loss clause.

In addition to cases in which the courts have simply analyzed whether a covered peril followed an excluded peril, such as the *Lake Charles* and *Roberts* decisions, several courts have expressly considered and rejected the argument that a “separate and intervening” covered peril must cause the loss in order for coverage to be preserved by the ensuing loss clause.¹²⁹ An example of such a case is the Wisconsin Court of Appeals’ decision in *Arnold v. Cincinnati Insurance Company*.¹³⁰

In *Arnold*, various parts of a home were damaged by water, largely because of damage to caulking around windows during cleaning and staining of siding.¹³¹ The policy at issue provided coverage for “physical loss to property.”¹³² The policy also contained an exclusion for losses caused by faulty workmanship but had an exception to the exclusion for ensuing losses: “We do not insure for loss to property . . . caused by [faulty workmanship]. However, any ensuing loss to property . . . not excluded or excepted in this policy is covered.”¹³³

The insurer argued that in order for the ensuing loss clause to reinstate coverage, a “separate and independent peril” must have caused the damage.¹³⁴ The Wisconsin Court of Appeals rejected this argument, stating: “We conclude there is no basis in the policy language for limiting the cause of an ensuing loss to a ‘separate and independent peril.’ ”¹³⁵ The court further stated, there must be “a cause in addition to the excluded cause, but nothing in the policy language defines the nature of that cause as [the insurer] proposes . . .” and “. . . any loss caused to the interior of the house by rain in conjunction with the

¹²⁷ *Id.*

¹²⁸ *Id.* at 289.

¹²⁹ *See, e.g.*, *Arnold v. Cincinnati Ins. Co.*, 688 N.W.2d 708, 719 (Wis. Ct. App. 2004); *see also* *Eckstein v. Cincinnati Ins. Co.*, 469 F. Supp. 2d 455, 462 (W.D. Ky. 2007).

¹³⁰ *Arnold*, 688 N.W.2d 708.

¹³¹ *Id.* at 712–13.

¹³² *Id.* at 713.

¹³³ *Id.*

¹³⁴ *Id.* at 715.

¹³⁵ *Id.* at 719.

damaged caulking is an ensuing loss, and there is no exception or exclusion in the policy for loss caused by rain.”¹³⁶

Similarly, in *Eckstein v. Cincinnati Insurance Company*, the United States District Court for the Western District of Kentucky rejected the argument that coverage for a loss is preserved by an ensuing loss clause only when a covered peril causes a loss that is “separate” from a loss caused by an excluded peril.¹³⁷ In *Eckstein*, the policyholder’s home became uninhabitable due to toxic mold contamination.¹³⁸ Faulty construction of the house allowed water into the house, which, in turn, resulted in the toxic mold contamination.¹³⁹

The policies at issue contained exclusions for both mold and faulty workmanship.¹⁴⁰ The policies also contained ensuing loss clauses that provided: “[A]ny ensuing loss to property . . . not excluded or excepted in this policy is covered.”¹⁴¹

Not surprisingly, the insurer argued the mold contamination was excluded from coverage under the mold and faulty workmanship exclusions.¹⁴² The policyholder, on the other hand, argued the mold contamination was covered because it ensued from water damage, a covered peril, even though an excluded peril—faulty construction—allowed the water to enter the house.¹⁴³

In explaining its decision, the court first discussed the rules of policy interpretation:

“Interpretation of an insurance policy is a question of law” that the Court reviews de novo. In undertaking review, the Court must keep in mind that a “contract should be liberally construed” and that all doubts must be “resolved in favor of the insureds.” Also, all “exceptions and exclusions should be strictly construed” for the efficacy of insurance. “Under the ‘doctrine of reasonable expectations,’ an insured is entitled to all the coverage he may reasonably expect to be provided according to the terms of the policy.”¹⁴⁴

The court then applied these rules of policy interpretation to the ensuing loss clause and rejected the argument that the loss must ensue from a “separate” covered peril in order to be covered:

The Court finds that case law and the dictionary definition of ensue supports the [policyholder’s] argument. There is nothing in the policies to indicate that an ensuing loss must be the result of a separate cause from the excluded loss. To the contrary, the policies are clear that faulty construction losses are excluded, but losses taking place afterward, or as a result of faulty construction, are covered. . . . Such an interpretation is consistent with the reasonable expectations of the insureds.¹⁴⁵

¹³⁶ *Id.*

¹³⁷ *Eckstein v. Cincinnati Ins. Co.*, 469 F. Supp. 2d 455, 462 (W.D. Ky. 2007).

¹³⁸ *Id.* at 457–58.

¹³⁹ *Id.* at 458.

¹⁴⁰ *Id.* at 461.

¹⁴¹ *Id.*

¹⁴² *Id.* at 462.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 461 (quoting *K.M.R. v. Foremost Ins. Grp.*, 171 S.W.3d 751, 753 (Ky. Ct. App. 2005); and quoting *Hendrix v. Fireman’s Fund Ins. Co.*, 823 S.W.2d 937, 938 (Ky. Ct. App. 1991)).

¹⁴⁵ *Id.* at 462.

Finally, the court rejected the insurer’s argument that, even if the mold contamination was caused, in part, by the covered peril of water intrusion, the mold exclusion nonetheless should still apply, stating:

Water can damage a structure in a variety of ways. Typically, water causes damage to a structure by way of rot, decay, mold, and deterioration. . . . The Court adopts the rationale of the cases cited by the [policyholder] which hold that rot and mold is not excluded when it is the result of an otherwise covered event. . . . “[T]he loss that followed the water damage was caused by water damage.” It was not caused by mold damage. The policies here exclude loss caused by mold, rot, decay, etc. The policies do not exclude loss which is mold, rot, decay and the like. The mold exclusion would preclude coverage for mold occurring naturally or resulting from a non-covered event. But when mold ensues from water damage which is covered under the policy, the mold damage is covered despite the exclusion.¹⁴⁶

In sum, although there are some cases in which the courts have incorporated a “separate and intervening” cause test into the ensuing loss clause, there also are several cases in which the courts have rejected such tests, and instead, they have held a loss is covered so long as a covered peril played a role in causing the loss.¹⁴⁷

IV. THE FLAWS OF THE VARIOUS APPROACHES COURTS HAVE USED TO INTERPRET AND APPLY THE ENSUING LOSS CLAUSE

A. Problems with the “Efficient Proximate Cause” Test

As is discussed above, some courts have approached the ensuing loss clause analysis by attempting to determine whether the “efficient proximate cause” of a loss is a covered or an excluded peril.¹⁴⁸ Under this approach, if the initial event in a causation chain of events that leads to a loss is covered, then coverage for the claim is preserved by the ensuing loss clause even if excluded perils play a role in causing the loss.¹⁴⁹ Courts that have employed this approach have gone terribly astray for at least eight reasons.

First, applying the “efficient proximate cause” test to the ensuing loss clause is completely inconsistent with the rules of insurance policy interpretation. There is no language—ambiguous or unambiguous—in the ensuing loss clause that supports interpreting the clause to be an *entré* into the “efficient proximate cause” test. The courts that have done so have simply ignored the rules of policy interpretation and constructed their own standard that is completely divorced from the policy language and insurance law.¹⁵⁰ Further, to the extent the language is ambiguous, rules of policy interpretation—*contra proferentem*, the reasonable expectations doctrine, and construction of the policy as a whole—dictate that the ambiguities should be construed in favor of coverage

¹⁴⁶ *Id.* at 462–63 (quoting *Home Ins. Co. v. McClain*, No. 05-97-01479-CV, 2000 WL 144115, at * 4 (Tex. Ct. App. Feb. 10, 2000) and citing *Flores v. Allstate Texas Lloyd’s Co.*, 278 F. Supp. 2d 810 (S.D. Tex. 2003)).

¹⁴⁷ See *supra* Part III.C and notes 103–04.

¹⁴⁸ See *supra* Part III.A.

¹⁴⁹ See *supra* Part III.A.

¹⁵⁰ See cases cited *supra* in note 56.

instead of in a way that creates an additional tort causation standard for the policyholder to satisfy in order to recover.¹⁵¹

Indeed, more than sixty years ago in his dissent in *Standard Oil Company of New Jersey v. United States*,¹⁵² Justice Frankfurter cogently explained why incorporating tort causation principles into contractual insurance disputes is inappropriate:

Unlike obligations flowing from duties imposed upon people willy-nilly, an insurance policy is a voluntary undertaking by which obligations are voluntarily assumed. Therefore the subtleties and sophistries of tort liability for negligence are not to be applied in construing the covenants of a policy. It is one thing for the law to impose liability by its own notions of responsibility, and quite another to construe the scope of engagements brought and paid for. . . . The law does not play an unreal metaphysical game of trying to find a single isolatable factor as the sole responsibility to which is to be attributed a loss against which insurance has been bought. As a matter of experience and reason such losses are invariably the resultant of a combination of factors.¹⁵³

To amplify one of Justice Frankfurter's points, insurance policies are "voluntary [contractual] undertakings" drafted by insurers, who are well compensated for assuming the risks of loss of their policyholders through the receipt of premiums and substantial investment income that is earned from premiums between the time premiums are received and claims are paid.¹⁵⁴ Consequently, it is inappropriate and unnecessary for courts to create an additional burden for policyholders to satisfy in order to recover by incorporating tort concepts such as "efficient proximate cause" into policies, particularly when the insurers themselves did not do so when they drafted the policy language.

Similarly, more than eighty years ago in *Palsgraf v. Long Island Railroad Company*,¹⁵⁵ Judge Andrews recognized that the idea that a single cause in a causation chain of events is *the* "proximate cause" of an accident is a fiction:

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend[s] in each case upon many considerations Any philosophical doctrine of causation does not help us. . . . You may speak of a chain, or, if you please, a net.¹⁵⁶ An analogy is of little aid. Each cause brings about future events. Without each the future would not be the

¹⁵¹ See *supra* Part II.

¹⁵² *Standard Oil Co. of N.J. v. United States*, 340 U.S. 54 (1950).

¹⁵³ *Id.* at 66 (Frankfurter, J., dissenting).

¹⁵⁴ See, e.g., Eliot Martin Blake, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401, 422–23 (1988) ("Insurers do not simply hang onto premiums, of course; they invest them for the time period between payment of premiums and payment of losses. . . . The role of investment income in the [insurance] industry is particularly important. Studies have concluded that investment income allows the industry to remain profitable as a whole even with significant negative underwriting losses.").

¹⁵⁵ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

¹⁵⁶ Judge Andrews is referring to this well-known quote of Lord Shaw:

To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment

same. Each is proximate in the sense it is essential. But that is not what we mean by the word. Nor[,] on the other hand[,] do we mean sole cause. There is no such thing.

....

... What we ... mean by the word “proximate” is that, because of convenience, [because] of public policy, [because] of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. ...

....

... It is all a question of expediency. There are no fixed rules to govern our judgment. ... This is rather rhetoric than law. There is[,] in truth[,] little to guide us other than common sense.¹⁵⁷

Even insurers have acknowledged that there is not a single “cause” of a loss. Michael Bragg, assistant counsel at State Farm Insurance Companies, wrote the following in 1985:

[E]very event has an infinite number of causes; and second, each cause can be described in an infinite variety of ways. Although these statements are beyond serious philosophic challenge, they seem far removed from the practical considerations faced daily by policy drafters, underwriters, and claims persons. The demanding careers of such professionals leave little time to ponder Aristotle’s or Bacon’s notion of causation. ...

....

... Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability. Thus, we discover that: “proximate cause has a different meaning in insurance cases than it has in tort cases. In tort cases the rules of proximate cause are applied for the single purpose of fixing culpability, and for that reason the rules reach back of both the injury and the physical cause to fix the blame on those who created the situation in which the physical laws of nature operated; in insurance cases the concern is not with the question of culpability or why the injury occurred, but only with the nature of the injury and how it happened.”¹⁵⁸

....

... Thus, the “cause” of loss in the context of a property insurance contract is totally different from that in a liability policy. This distinction is critical to the resolution of losses involving multiple causes.¹⁵⁹

In short, the idea that there is a single cause of a loss is a fiction and tort causation principles should not be applied to property loss claims.

as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

... The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.

Lanasa Fruit S.S. & Importing Co. v. Universal Ins. Co., 302 U.S. 556, 562–63 (1938) (quoting Lord Shaw in *Leyland Shipping Co. v. Norwich Union Fire Ins. Soc’y*, [1918] A.C. 350, 368–71 (House of Lords)).

¹⁵⁷ *Palsgraf*, 162 N.E. at 103–04 (Andrews, J., dissenting).

¹⁵⁸ Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385, 385–86 (1985) (quoting 43 AM. JUR. 2D *Insurance* § 463 (2d ed. 1982)).

¹⁵⁹ *Id.* at 387.

Second, applying the “efficient proximate cause” test to the ensuing loss clause is inconsistent with the original purpose of the clause.¹⁶⁰ The ensuing loss clause originally was created to ensure that a loss is covered if it was caused at least in part by a covered peril.¹⁶¹ Indeed, the clause was created to avoid the application of tests such as the efficient proximate cause test to insurance claims.¹⁶²

Third, although insurers have drafted anti-concurrent causation exclusions that insurance claims handlers often cite when denying coverage in concurrent causation situations,¹⁶³ many policies with anti-concurrent causation exclusions also contain an ensuing loss clause.¹⁶⁴ Thus, the correct interpretation and application of such language cannot be to simply apply the anti-concurrent causation exclusion and *ignore* the ensuing loss clause. To the contrary, the ensuing loss clause is intended to address situations where a loss is caused, at least in part, by a covered peril. Thus, when the ensuing loss clause is ignored, a key part of the policy is impermissibly rendered superfluous.¹⁶⁵ Instead of ignoring the ensuing loss clause due to its conflict with anti-concurrent causation exclusions, the rules of policy interpretation dictate that, in circumstances where a policy contains inconsistent terms that render the policy language ambiguous, the court should resolve the ambiguities in favor of the policyholder.¹⁶⁶

Fourth, courts cannot even agree on when or how to apply an “efficient proximate cause” test in insurance cases.¹⁶⁷ Although not in the context of the ensuing loss clause, courts in numerous states have used some version of “efficient proximate cause” in insurance cases while courts in numerous other states have either rejected it or declined to enforce policy provisions that arguably give rise to it.¹⁶⁸ This lack of consensus by the courts only leads to confusion and uncertainty by policyholders and insurers alike regarding the concept and how it works.

¹⁶⁰ See *supra* Introduction for a discussion of the genesis of the ensuing loss clause.

¹⁶¹ See *supra* Introduction for a discussion of the genesis of the ensuing loss clause.

¹⁶² See *supra* Introduction for a discussion of the genesis of the ensuing loss clause.

¹⁶³ See, e.g., David P. Rossmiller, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond*, in NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW 43, 79 (2007).

¹⁶⁴ For example, the policy language quoted above in Part I, in *Blaine Construction Corp.*, contains an anti-concurrent causation clause and an ensuing loss clause. *Blaine Constr. Corp. v. Ins. Co. of N. Am.*, 171 F.3d 343, 346 (6th Cir. 1999).

¹⁶⁵ As is discussed above, one of the rules of policy interpretation is that all provisions of the policy should be given effect if possible. See Part II.C.

¹⁶⁶ See *supra* Part II.A.

¹⁶⁷ See Lavitt, *supra* note 57, at 16; see also 7 COUCH ON INSURANCE, *supra* note 16, § 101:43 (“The concept of proximate cause is as ubiquitous in insurance law as it is in tort law. Courts have failed to reach a consensus on the concept definition of proximate cause.”).

¹⁶⁸ See Lavitt, *supra* note 57, at 16–17; see also Mark D. Wuerfel & Mark Koop, “Efficient Proximate Causation” in the Context of Property Insurance Claims, 65 DEF. COUNS. J. 400, 405–07 (1998) (listing states that have adopted or rejected efficient proximate causation in insurance cases); Randall L. Smith & Fred A. Simpson, *Causation in Insurance Law*, 48 S. TEX. L. REV. 305, 366 (2006) (noting that Florida and Texas have not adopted efficient proximate cause in insurance cases); Julie A. Passa, Comment, *Property Insurance: Adopting the Efficient Proximate Cause Doctrine, But Saying No to Contracting Out of It*, 79 N.D. L. REV. 561, 572 (2003) (noting that “California and Washington preclude parties from contracting out of the efficient proximate cause doctrine”).

Fifth, when courts incorporate an “efficient proximate cause” test into the ensuing loss clause, they mistakenly have acted as though they need to fill some gap in the policy language because the policy language fails to address the situation at issue. Take, for example, situations such as Hurricane Katrina’s destruction of homes by multiple causes—wind (a covered peril) and tidal surge (an excluded peril)¹⁶⁹—but the policy language at issue apparently did not contain an ensuing loss clause or other policy language that dictated whether the loss was covered. Judicially created standards to address concurrent causation claims are only defensible when the policy does not contain an ensuing loss clause that addresses how a loss that is concurrently caused by a covered peril and an excluded peril should be handled.¹⁷⁰ Unlike such cases, where an ensuing loss clause is present there is no policy language gap for the courts to fill because the ensuing loss clause dictates the outcome. Indeed, the ensuing loss clause dictates how the dispute should be resolved in such cases, and the courts do not need to wade into the briar patch of attempting to fill a void created by the absence of applicable policy language.

Sixth, applying tort concepts such as “efficient proximate cause” to insurance cases, which are contract disputes, is inappropriate. Tort causation is a fault-based inquiry designed to assign blame.¹⁷¹ In insurance law, on the other hand, fault should not be part of the contractual coverage analysis.¹⁷² Instead, in insurance cases, one should only look at the causation issue to determine whether or not the policy at issue covers the loss.¹⁷³ It is a question of contract, not of fault.¹⁷⁴ Indeed, whether insurance covers a loss is not a question of

¹⁶⁹ One commentator has attempted to explain the different scenarios in which the concept of “concurrent causation” may be invoked versus the concept of “efficient proximate cause.” According to the commentator, unlike situations where a causation chain of events that involves both covered and excluded perils results in a loss (e.g., situations in which the ensuing loss clause may be implicated and in which some courts may be tempted to apply the “efficient proximate cause” test in determining whether the loss is covered), “concurrent causation” arises in situations where “two events of independent origin combine to cause a loss that would not have occurred unless both events had taken place.” 3 NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE, *supra* note 16, at § 31.06[4][c][i] (citing *Luneau v. Peerless Ins. Co.*, 750 A.2d 1031, 1036 (Vt. 2000) (“The doctrine of concurrent causation . . . requires two independent risks, one of which is excluded by the policy and one of which is included.”)). Other commentators may not agree with this alleged distinction. See, e.g., Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 962 (2010); Lavitt, *supra* note 57, at 6.

¹⁷⁰ Numerous law review articles have been written regarding Hurricane Katrina and concurrent causation. See, e.g., Knutsen, *supra* note 169 at 959; Lavitt, *supra* note 57, at 1.

¹⁷¹ See, e.g., Knutsen, *supra* note 169, at 968–69.

¹⁷² See Banks McDowell, *Causation in Contracts and Insurance*, 20 CONN. L. REV. 569, 576–77 (1988); Knutsen, *supra* note 169, at 969.

¹⁷³ Professor Malcolm Clarke similarly has argued that the causation inquiry should be limited by the language actually used in the insuring agreement or exclusions. Professor Clarke bases his argument on the fact that insurance causation is a purely contractual inquiry. Thus, the only causes in play should be those mentioned in the contract of insurance. See MALCOLM CLARKE, *POLICIES AND PERCEPTIONS OF INSURANCE LAW IN THE TWENTY-FIRST CENTURY* 184 (2005).

¹⁷⁴ See Knutsen, *supra* note 169, at 969; see also STEMPEL ON INSURANCE CONTRACTS, *supra* note 18, § 7.01, at 7–6; McDowell, *supra* note 172, at 576–77.

morality or blameworthiness.¹⁷⁵ Insurance policies do not contain any language requiring or allowing for the determination of whether a loss is covered to turn on whether there was a breach of a standard of care by someone.¹⁷⁶ Thus, using tort concepts to decide coverage issues transforms what should be a contractual analysis into a fault analysis.

Seventh, using a tort standard¹⁷⁷ such as the “efficient proximate cause” test to decide insurance coverage questions leads to inconsistent and unpredictable results.¹⁷⁸ Under such a test, when a judge or jury is forced to choose a single event in a causal chain of events that started the causal chain of events that led to the loss,¹⁷⁹ the fact finder implicitly is invited to conduct an inquiry into a “justice”-based outcome that affects the predictability of the result.¹⁸⁰ Indeed, using such malleable tests has led to demonstrably inconsistent results over time in cases with similar fact patterns.¹⁸¹

¹⁷⁵ Professor Jeffrey W. Stempel similarly has noted that, unlike insurance causation, tort causation “tends to encompass socially imposed regulation of relationships.” See *STEMPEL ON INSURANCE CONTRACTS*, *supra* note 18, § 7.01, at 7–6.

¹⁷⁶ Courts that have applied tort concepts to property insurance claims likely have done so because, unlike the property insurance context, in the liability insurance context, the underlying liability of the policyholder is determined by applying causation tests such as the efficient proximate cause test. See, e.g., Rossmiller, *supra* note 163, at 62; see also Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 710 (Cal. 1989) (“Liability and corresponding coverage under a third-party insurance policy must be carefully distinguished from the coverage analysis applied in a first-party property contract. Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability.”) (quoting Bragg, *supra* note 158, at 386). Thus, courts mistakenly have transferred tort concepts and rules from the liability insurance context to property insurance cases.

¹⁷⁷ For decades, law review articles have been written regarding the unpredictable results that flow from tort standards like the “efficient proximate cause test.” Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1408 (1961); see Gerald Dworkin, *Risk and Remoteness—Causation Worse Confounded*, 27 MOD. L. REV. 344, 344 (1964); John C.P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315, 1315 (2003); Richard W. Wright, *Once More Into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1072 (2001); see also Jane Stapleton, *Choosing What We Mean by “Causation” in the Law*, 73 MO. L. REV. 433, 433 (2008).

¹⁷⁸ See, e.g., Knutsen, *supra* note 169, at 971; Michael J. Trebilcock, *The Role of Insurance Considerations in the Choice of Efficient Civil Liability Rules*, 4 J.L. ECON. & ORG. 243, 258 (1988) (arguing that using such an approach is a “random form of judicially administered wealth redistribution”); see also CLARKE, *supra* note 173, at 185–87; ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 560–66, 578–80 (4th ed. 2007); *STEMPEL ON INSURANCE CONTRACTS*, *supra* note 18, § 7.02, at 7-10–7-18; Lavitt, *supra* note 57, at 32–33; Richard A. Fierce, *Insurance Law—Concurrent Causation: Examination of Alternative Approaches*, 10 S. ILL. U. L.J. 527, 545 (1985).

¹⁷⁹ Other commentators are also critical of using the efficient proximate cause test in the insurance context. See CLARKE, *supra* note 173, at 185–87 (trying to choose a single cause leads to unpredictable and inconsistent results and too much “judging”); JERRY & RICHMOND, *supra* note 178, at 560–66, 578–80; *STEMPEL ON INSURANCE CONTRACTS*, *supra* note 18, § 7.02, at 7-10–7-18; Fierce, *supra* note 178, at 545 (asserting that any approach leading to predictable results is better than the unpredictable “hocus-pocus” of the efficient proximate cause test); Lavitt, *supra* note 57, at 1 (arguing against the efficient proximate cause test approach because it produces different results in different jurisdictions).

¹⁸⁰ See Knutsen, *supra* note 169, at 974.

¹⁸¹ Compare, e.g., *Duensing v. State Farm Fire & Cas. Co.*, 131 P.3d 127, 135–37 (Okla. Civ. App. 2005) (finding the “earth movement” exclusion clause ambiguous and inapplica-

Finally, the uncertainty associated with using tort causation tests in insurance disputes increases the costs of litigation because it makes it harder to settle such cases. Settlements are largely driven by the parties being able to predict the outcome of the dispute.¹⁸² If the outcome is not predictable, then the likelihood of the parties finding the common ground necessary to settle is reduced.¹⁸³ The failure to settle, in turn, increases the amount of time the judge and the parties must spend on the case.¹⁸⁴ It also increases the amount of time such cases remain on a court’s docket.¹⁸⁵ In short, using standards that consume greater amounts of the courts’ and parties’ resources yet result in inconsistent and unpredictable outcomes is costly and inefficient.

For these reasons and others, one law professor colorfully advocated that the “efficient proximate cause” test be eliminated from insurance coverage disputes:

The “doctrine of efficient proximate cause” is a misshapen organism that inched out of [an] old swamp, bearing several vestigial appendages of causation theory that should have fallen into desuetude long ago. The time has come to recognize the dégringolade of the Doctrine. There is no persuasive logical or compelling reason to retain it.¹⁸⁶

In plainer words, the “efficient proximate cause” test simply has no place in insurance coverage disputes because the resolution of such disputes should be based upon (1) contract terms and (2) the well-established rules that govern how the contract terms should be interpreted. The contract terms and rules governing their interpretation can resolve insurance disputes without the incorporation of malleable and unpredictable tort concepts into insurance contracts.

B. Problems with the “Separate and Intervening Cause” Test

In insurance cases, the “separate and intervening cause” test suffers from many of the same problems as the “efficient proximate cause” test. As an initial

ble where the dominant cause of loss was erosion of soil under a house), *with Davis-Travis v. State Farm Fire & Cas. Co.*, 336 F. App’x 770, 774 (10th Cir. 2009) (finding the “earth movement” exclusion clause unambiguous and applicable where the dominant cause of loss was movement of soil under a house). *See also* Lavitt, *supra* note 57, at 17 (“The Doctrine is anything but economically ‘efficient.’ Nationwide irregularity created by a patchwork of conflicting and confused state precedents grows more and more complex, as courts and juries unpredictably select from competing conditions the most important single reason for a loss.”).

¹⁸² *Cf.* Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 60 (1996) (“The trials that occur, nonetheless, are primarily in cases in which the parties remain so far apart in their predictions of the decision on liability that they are willing to gamble on a jury’s notoriously unpredictable verdict.”).

¹⁸³ *Id.*

¹⁸⁴ Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 2 (1991) (“[I]f . . . a plaintiff values a case too high or the defendant too low, settlement becomes difficult or impossible. At a minimum, this prolongs negotiations and unnecessarily consumes the parties’ and lawyers’ time and resources. At worst, matters that should have been settled proceed to trial, placing heavy burdens on the court system and the parties.”).

¹⁸⁵ *Id.*

¹⁸⁶ Lavitt, *supra* note 57, at 62–63.

matter, like the “efficient proximate cause” test, the “separate and intervening cause” test is completely inconsistent with the purpose of the ensuing loss clause, which is to eliminate causation disputes and to ensure that losses caused at least in part by a covered peril remain covered even if an excluded peril played a role in causing the loss.¹⁸⁷

Further, the “separate and intervening cause” test is not based upon policy language. The words “separate and intervening” do not appear in the ensuing loss clause.¹⁸⁸ Consequently, like the “efficient proximate cause” test, the “separate and intervening cause” test is a legal construct of the courts rather than a contractual mandate of the terms of policies. Rather than mandating the creation of new tests or hurdles for policyholders to clear in order to get coverage when policy language is vague, the rules of policy interpretation dictate that the ambiguities should be resolved in favor of the policyholder.¹⁸⁹ The rules of policy interpretation also dictate that the reasonable expectations of the policyholder regarding the coverage the policyholder expects to receive when buying a policy should be fulfilled and that the terms of the policy should be construed as a whole with the purpose of the insurance in mind.¹⁹⁰ In short, the creation by courts of the “separate and intervening cause” test, when policy language does not support such a test, violates the rules of policy interpretation.

Moreover, the “separate and intervening cause” test, like the “efficient proximate cause” test, invites a metaphysical debate regarding which event in a chain of events caused a loss and whether a covered peril occurred before or after an excluded peril.¹⁹¹ For example, in the *Roberts*¹⁹² case discussed above, the bees in the attic of the house created the honey that seeped into the ceiling of the dining room and caused damage.¹⁹³ Damage caused by insects such as bees was excluded from coverage.¹⁹⁴ Was the seeping honey from the bees a “separate and intervening” cause of the loss that was different from the damage caused by the excluded peril (i.e., the bees)? It arguably was not “separate” because the bees created the honey. Was the seeping honey an “intervening” cause of the loss? Arguably, it was not. It was simply one step in the causation chain that commenced when the bees started creating a hive. Yet, in order for the court to find coverage for the claim, the court in essence held that the honey damage was a separate, covered loss simply because the bees were gone by the time the damage caused by the honey manifested.¹⁹⁵ Thus, the court resorted to metaphysics in order to conclude the loss was somehow separate from the bees.

In addition, as noted by a California court, allowing insurers to deny coverage for any losses in which the loss was caused in part by an excluded peril that occurred subsequent to a covered peril “would be giving insurance companies carte blanche to deny coverage in nearly all cases.”¹⁹⁶ Indeed, because

¹⁸⁷ See *supra* Part III.C.

¹⁸⁸ See cases cited *supra* in notes 56, 80, and 103.

¹⁸⁹ See *supra* Part II.A.

¹⁹⁰ See *supra* Part II.B–C.

¹⁹¹ See *supra* notes 156–58.

¹⁹² *Roberts v. State Farm Fire & Cas. Co.*, 705 P.2d 1335 (Ariz. 1985).

¹⁹³ *Id.* at 1336.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1337.

¹⁹⁶ *Howell v. State Farm Fire & Cas. Co.*, 267 Cal. Rptr. 708, 715 n.6 (Cal. Ct. App. 1990).

nearly all losses have multiple causes and causation tests are so malleable, allowing insurers to deny coverage any time an excluded peril occurred later in the causation chain of events or any time an excluded peril contributed in some small way to causing the loss would impermissibly make insurance illusory in many instances.¹⁹⁷

Another problem caused by applying the “separate and intervening cause” test in insurance cases is that the test makes outcomes much more unpredictable. If the outcome of a dispute is unpredictable, then what are the chances that the policyholder or the insurer can accurately predict how a court or jury will decide the case? Two of the primary purposes of contracts are to allow the parties to understand their respective obligations and to predict the results in the event of a breach by one of the parties.¹⁹⁸

Because the malleability of the “separate and intervening cause” test, like the “efficient proximate cause” test, makes the results of its application unpredictable, cases in which either of those two tests is used are less likely to settle.¹⁹⁹ The failure of cases to settle where the facts are not really in dispute creates inefficiencies in the legal system because the cases proceed through discovery, motion practice, and trial at great expense to the parties, courts, and jurors.²⁰⁰ For example, it is costly for the parties to debate causation under the “separate and intervening” test because they typically need to retain experts who have dueling opinions, which will be the subject of discovery and then trial. Such cases also create an incentive for the parties and experts to create factual disputes regarding causation even though the facts themselves may not be in dispute because the policyholder must identify a “separate and intervening” cause of the loss that is covered under the policy, while the insurer must argue to the contrary. This creation of a factual dispute regarding causation, in turn, makes it unlikely that the trial court will be able to resolve the case on a

¹⁹⁷ See *supra* notes 42, 52 and 181 and accompanying text.

¹⁹⁸ See, e.g., MICHAEL HUNTER SCHWARTZ & DENISE RIEBE, *CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK* 5 (2009) (“[P]redictability promotes our free market economy by providing certainty for those involved in exchanging goods and services. If a merchant knows the legal consequences of her negotiating efforts or of the language she selects for her contracts, she can act accordingly. This predictability encourages people to enter into contracts, secure in the knowledge that those contracts will be enforced.”); Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 *Nw. U. L. REV.* 749, 751 (2000) (“Long-term contracts raise a straightforward, but seemingly intractable problem: in the long term events are so hard to predict, that parties will not be able to allocate future obligations and payments in a way that maximizes the value of their contract.”).

¹⁹⁹ See *supra* notes 182–85 and accompanying text.

²⁰⁰ See *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) (“Settlement agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts. In addition to the conservation of judicial resources, the parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial.”) (internal citation omitted); *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1486 (11th Cir. 1994) (“We favor and encourage settlements in order to conserve judicial resources.”); see also *Miller v. State Farm Mut. Auto. Ins. Co.*, 155 P.3d 1278, 1281 (Mont. 2007) (“The declared public policy of this State is to encourage settlement and avoid unnecessary litigation. . . . Settlement eliminates cost, stress, and waste of judicial resources.”).

motion for summary judgment.²⁰¹ Consequently, causation tests like the “separate and intervening cause” test and “efficient proximate cause” test force the parties to trial, which as noted above, is inefficient.

In short, if a standard such as the “separate and intervening cause” test is used, then the parties are compelled to debate metaphysical causation issues, which results in the creation of factual disputes, which, in turn, results in the dispute being tried because the trial court cannot dispose of a case in which there are material facts in dispute.²⁰² In addition to creating inefficiencies in the legal system, the “separate and intervening cause” test is premised upon the fiction that losses are caused by a single peril or that the causes of the loss can be neatly segregated.²⁰³ Thus, the “separate and intervening cause” test suffers from many of the same flaws and inefficiencies as the “efficient proximate cause test.”

C. Problems with Attempting to Apportion the Loss Between Covered and Excluded Perils

A third option for concurrent causation cases that has been proposed by Professor Knutsen and other legal scholars is to apportion the loss between covered and excluded causes of the loss.²⁰⁴ Such a proposal, however, fails to consider the ensuing loss clause. Although apportionment may have some atmospheric appeal due to the perception that it is a “fair” solution (i.e., neither the insurer nor the policyholder bears the entire loss), apportionment is not consistent with the purpose of the ensuing loss clause, the language in the ensuing loss clause, the rules of policy interpretation, or the purpose of insurance (i.e., the transfer of a risk of loss from the policyholder to an insurer).

As is discussed above, the ensuing loss clause was created to ensure that losses caused at least in part by a covered peril are covered even if an excluded peril also played a role in causing the loss.²⁰⁵ Thus, one of the very purposes of the ensuing clause when it originally was created was to clarify that apportionment between covered and excluded perils is neither required nor appropriate because the entire loss is covered.

Further, nowhere in the ensuing loss clause is “apportionment” mentioned. Because the question being answered is a question of contractual interpretation,²⁰⁶ the answer ultimately should be based upon the policy language, not a

²⁰¹ See *Alabama v. North Carolina*, 130 S. Ct. 2295, 2308 (2010) (“[S]ummary judgment is appropriate where there ‘is no genuine issue as to any material fact’ and the moving party is ‘entitled to judgment as a matter of law.’ ” (quoting FED. R. CIV. P. 56(c) and citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986))); *Montgomery v. Barrow*, 692 S.E.2d 351, 353 (Ga. 2010) (“[T]he moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law.”); *UT Med. Grp. v. Vogt*, 235 S.W.3d 110, 119 (Tenn. 2007) (“[A] grant of summary judgment is appropriate only when (1) there is no genuine issue with regard to the material facts . . . and (2) based on undisputed facts, ‘the moving party is entitled to a judgment as a matter of law.’ ”) (quoting TENN. R. CIV. P. 56.04).

²⁰² See cases cited *supra* note 201.

²⁰³ See *supra* notes 156–57, 159, and 161 and accompanying text.

²⁰⁴ See, e.g., Knutsen, *supra* note 169, at 1010-12.

²⁰⁵ See *supra* Introduction.

²⁰⁶ See discussion *supra* Part IV.A.

court’s or jury’s sense of fairness. Thus, because apportionment is not grounded in the policy language, it cannot be the correct way to resolve disputes regarding the meaning of contract language.

Apportionment also would be inefficient to apply in practice because, as discussed above regarding the problems with the “separate and intervening cause” and “efficient proximate cause” tests, it often is difficult to segregate the different causes of a loss in a causation chain of events.²⁰⁷ For example, in the hypothetical leaking roof scenario discussed in the Introduction, what percentage of the damage to the floors and walls is due to the faulty installation of the roof versus the rain? Even if more facts were provided, the question likely cannot be answered in an intellectually honest way because there would be no damage in the absence of either the rain or the faulty installation of the roof. Consequently, if the loss were to be apportioned between covered and excluded causes, the parties would need to hire experts to debate how many covered versus excluded causes of the loss occurred and the amount of the loss that should be attributed to each such cause, just as they would under the “separate and intervening cause” test. This would lead to unnecessary litigation expenses and, most likely, an arbitrary result.²⁰⁸

In addition, because such a debate essentially is a factual dispute regarding the amount of recoverable damages, most courts would be unable or unwilling to resolve such disputes through summary judgment motions practice.²⁰⁹ For the same reasons, the likelihood that the parties would be able to settle would decrease because each party would have trouble properly predicting the outcome of the causation debate.²¹⁰ Thus, apportionment suffers from many of the same problems as the “efficient proximate cause” and “separate and intervening cause” tests and would lead to inefficiencies in the resolution of disputes and increase the costs of the parties, courts and jurors.

V. A PROPOSED INTERPRETATION OF THE ENSUING LOSS CLAUSE THAT NOT ONLY IS BASED UPON THE ORIGINAL PURPOSE OF THE CLAUSE AND THE RULES OF POLICY INTERPRETATION BUT ALSO PROVIDES CONSISTENT, PREDICTABLE RESULTS AND THE EFFICIENT RESOLUTION OF DISPUTES

Having discussed the problems with apportionment and the two leading causation tests that some courts have used when interpreting and applying ensuing loss clauses, is there a better way? Yes. Simply stated, the original purpose of the ensuing loss clause, the policy language in the clause, and the existing rules of policy interpretation all dictate that if a covered peril plays any role in the causation chain of events that leads to a loss, then the loss should be covered regardless of whether the policy contains an anti-concurrent causation exclusion. Such a result not only is dictated by the rules of policy interpretation and the fact that insurers are well compensated for assuming the risk of their

²⁰⁷ See discussion *supra* Parts IV.A–B.

²⁰⁸ See *supra* notes 177–81, 198–201 and accompanying text.

²⁰⁹ See *supra* note 201 and accompanying text.

²¹⁰ See *supra* notes 182–185 and accompanying text.

policyholders' losses,²¹¹ but also should lead to consistent and predictable outcomes and the efficient resolution of claims.²¹²

A. The Original Purpose of the Clause and Application of the Rules of Policy Interpretation to the Policy Language

There should be little debate that ensuing loss clauses are, at best, ambiguous. Consider again the language of a common ensuing loss clause: "This policy does not insure loss or damage caused directly or indirectly by any Peril excluded. . . . [U]nless loss or damage from an insured Peril ensues and then only for such ensuing loss or damage."²¹³

As an initial matter, the phrase "ensuing loss" is not defined. Not surprisingly, because it is undefined, courts have interpreted the term inconsistently.²¹⁴ This point alone supports an argument that the clause is ambiguous.²¹⁵ Nonetheless, when policy terms are not defined, courts often turn to dictionaries to understand the common meaning of the terms.²¹⁶ One common dictionary, the American Heritage Dictionary, defines the term "ensue" as: "1. To follow as a result. 2. To take place subsequently."²¹⁷ Both of these definitions refer to a sequence of events, with the emphasis on one event following another event. Thus, under a literal application of the dictionary definition of the term "ensue" used in the ensuing loss clause, a loss is covered so

²¹¹ See *supra* note 154.

²¹² In recent years, some commentators have opined that because policies contain standardized language drafted by insurers, when policy language is interpreted courts should keep in mind that policies are risk-spreading instruments that are necessary to society and should be viewed as akin to private statutes, products, or "things" rather than as only non-negotiated contracts. See Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 McGEORGE L. REV. 203, 205–06 (2010); Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1491, 1495 (2010); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813, 816 (2009); see also Schwarcz, *supra* note 49, at 1397–98. Although this Article does not rely upon such non-traditional approaches to interpreting and applying the ensuing loss clause, it is notable that these non-traditional ways of interpreting policy language, which would examine the origins of the ensuing loss clause and the purpose of insurance generally (i.e., the transfer of risk from policyholders to insurers), support the interpretation of the clause and conclusion set forth in this Article. See discussion *supra* Part III.C.

²¹³ *Blaine Constr. Corp. v. Ins. Co. of N. Am.*, 171 F.3d 343, 346 (6th Cir. 1999). See also cases cited *supra* notes 56, 80, and 103.

²¹⁴ See *supra* notes 56, 80, and 103 and accompanying text.

²¹⁵ When policy terms are undefined and courts have reached conflicting results regarding the meaning of the policy language, common sense suggests the policy language is ambiguous. See *supra* Part II.A.

²¹⁶ See *N. Am. Specialty Ins. Co. v. Corr. Med. Servs.*, 527 F.3d 1033, 1041 (10th Cir. 2008) ("To ascertain the ordinary meaning of [an undefined term in an insurance policy], Missouri courts often refer to the standard dictionary definition."); *Valley Forge Ins. Co. v. Swiderski Elecs.*, 860 N.E.2d 307, 316 (Ill. 2006) (noting that where policies do not define a term, the court will look to the dictionary definition of the term to afford it its plain, ordinary and popular meaning); *Telecomms. Network Design v. Brethren Mut. Ins. Co.*, 5 A.3d 331, 335 (Pa. Super. Ct. 2010) ("Words of common usage in an insurance policy are to be construed in their natural, plain, and ordinary sense, and we may inform our understanding of these terms by considering their dictionary definitions.").

²¹⁷ THE AMERICAN HERITAGE COLLEGE DICTIONARY 467 (4th ed. 2004) (internal cross reference omitted).

long as it “follows” as a consequence of a covered peril. Whether or not an excluded peril is also part of the causation chain of events that leads to the loss is simply irrelevant. Such an interpretation is certainly reasonable, which is all that a policyholder must show in order for its interpretation to prevail.²¹⁸

Putting aside the interpretation of the clause offered above, the internal inconsistency in the “ensuing loss” clause also demonstrates the clause’s ambiguity. The anti-concurrent causation exclusionary language in the clause initially says a loss is excluded if it is caused “directly or indirectly” by an excluded peril. One could argue that the words “directly or indirectly” mean that any loss caused in part by an excluded peril is not covered. Yet, later in the clause, it says there is coverage if a loss ensues from a covered peril. The Fifth Circuit aptly described this contradictory ambiguity in the ensuing loss clause in the *Lake Charles* case as “self-contradictory gibberish.”²¹⁹ The court then noted “the insurers’ initial argument that the exclusion is plain and unambiguous is unconvincing.”²²⁰

The fact that the anti-concurrent causation language purports to take coverage away for any loss caused directly or indirectly by an excluded peril, but then the ensuing loss clause reinstates coverage in the same breath if a loss ensues from a covered peril, makes the provision internally inconsistent and thus, ambiguous. Under *contra proferentem*, courts should resolve this ambiguity in favor of the policyholder.²²¹

Construing the ambiguities in anti-concurrent causation exclusions that contain an ensuing loss clause in favor of the policyholder does not include creating or incorporating tort causation tests such as the “efficient proximate cause” or the “separate and intervening cause” test into the policy. Instead of resolving ambiguities in favor of the policyholder, those tests create an additional hurdle for policyholders. Resolving the ambiguities in anti-concurrent causation exclusions that contain an ensuing loss clause in favor of the policyholder means the policyholder should only need to prove that the loss ensued from (i.e., followed) a covered peril in order to recover under the policy regardless of whether excluded perils also may have been in the causation chain. Stated differently, unless a loss is caused solely by excluded perils, the loss should be covered.

Similarly, the “reasonable expectations” doctrine also dictates that the ensuing loss clause should be interpreted broadly in favor of coverage.²²² The primary reason a policyholder buys “all risk” property or homeowners insurance is to obtain broad protection against losses. Indeed, “all risk” policies, by name and purpose, cover all types of damages and losses except for losses expressly excluded.²²³ Consequently, a homeowner who purchases an “all risk” policy reasonably expects that it will be covered for nearly all types of damages and losses. Because losses are often caused by many perils—excluded perils

²¹⁸ See *supra* Part II.B.

²¹⁹ *Lake Charles Harbor & Terminal Dist. v. Imperial Cas. & Indem. Co.*, 857 F.2d 286, 288 (5th Cir. 1988).

²²⁰ *Id.*

²²¹ See *supra* Part II.A.

²²² See *supra* Section II.B.

²²³ See *supra* note 16.

and covered perils—to interpret the ensuing loss clause narrowly would allow the anti-concurrent causation exclusion to swallow the “all risk” coverage and would impermissibly render the coverage provided illusory.²²⁴ Thus, if an insurer intends to carve out coverage for some risks, then, as the drafter of the policy language, the insurer needs to make sure it does so clearly and unambiguously.²²⁵ As commonly worded, anti-concurrent causation exclusions that contain an ensuing loss clause fail to do so.

Further, the doctrine that requires interpretation of the provisions in “all risk” property and homeowners policies as a whole, instead of in parts, also favors a broad reading of ensuing loss clauses. Indeed, ensuing loss clauses would be essentially meaningless if any loss caused in part by an excluded peril was not covered simply because the excluded cause of loss (1) started the causation chain of events that resulted in the loss (under the “efficient proximate cause” test set forth in *McDonald v. State Farm Fire & Casualty Company*)²²⁶ or (2) occurred just prior to the damage (under the “separate and intervening cause” test set forth in *Weeks v. Co-Operative Insurance Companies*).²²⁷ “All risk” policies are intended to provide the broadest available transfer of risk from the policyholder to the insurer.²²⁸ Ensuing loss clauses reinforce that “all risk” policies are intended to cover *all risks* unless the perils causing the loss are (1) expressly excluded and (2) the only causes of the loss. Thus, interpreting the ensuing loss clause to mean that coverage is provided for an otherwise excluded loss if a covered peril plays a role in causing the loss is consistent with the purpose of “all risk” policies for which the insurers did, after all, receive a premium.

Finally, this interpretation is also consistent with the original intent and purpose of the clause when it was created. The ensuing loss clause was originally created to ensure that losses that resulted from fires (a covered peril) following earthquakes (an excluded peril), remained covered despite an anti-concurrent causation exclusion.²²⁹ Thus, the ensuing loss clause was intended to make clear that losses that ensue from covered perils are covered even if excluded perils are also involved in the causation chain of events that led to the loss.

B. Public Policy Considerations

Public policy also favors interpreting the ensuing loss clause to provide coverage for an otherwise excluded loss if a covered peril plays a role in causing the loss. As an initial matter, no obvious public policy considerations favor interpreting the ensuing loss clause narrowly so as to preclude coverage for otherwise covered losses. Nor do insurer concerns such as adverse selection²³⁰

²²⁴ See *supra* notes 42, 52, and accompanying text.

²²⁵ See *supra* note 18.

²²⁶ *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1004 (Wash. 1992).

²²⁷ *Weeks v. Coop. Ins. Cos.*, 817 A.2d 292, 296 (N.H. 2003).

²²⁸ See *supra* note 16.

²²⁹ See *supra* Introduction.

²³⁰ Adverse selection in the insurance context is “the disproportionate tendency of those who are more likely to suffer losses to seek insurance against those losses.” Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward*

or moral hazard²³¹ come into play in typical ensuing loss cases. There is no empirical evidence that suggests that policyholders purchase policies that contain ensuing loss clauses in order to avoid anti-concurrent causation exclusions. Indeed, most policyholders do not even read their policies or know what specific provisions are contained in them.²³²

On the other hand, public policy favors the enforcement of contracts, such as insurance policies, in accordance with their terms and the rules of insurance policy interpretation.²³³ Indeed, as one court correctly noted, “[t]here is more than one public policy. One such policy is that an insurance company which accepts a premium for covering all liability for damages should honor its obligation.”²³⁴ Because insurers draft the language contained in their policies, they can simply state in the insurance policies, in clear terms, the specific types of claims that are not covered, particularly when one considers that the policyholder who purchases “all risk” insurance is buying coverage for “all risks” except those expressly excluded.²³⁵ If the insurer fails to do that, as they have in the context of the ensuing loss clause, then public policy favors enforcing the

a New Vision of Compensation for Illness and Injury, 93 COLUM. L. REV. 75, 102 n.82 (1993); see also MARK S. DORFMAN, INTRODUCTION TO RISK MANAGEMENT AND INSURANCE 95 (8th ed. 2005) (describing the difficulty underwriters have in determining the risk of insuring persons more likely to suffer a loss than other insureds paying the average rate); EMMETT J. VAUGHAN & THERESE M. VAUGHAN, ESSENTIALS OF INSURANCE: A RISK MANAGEMENT PERSPECTIVE 25 (1995) (noting how adverse selection accumulates bad risks, which disrupts underwriters’ predictions about future losses).

²³¹ Moral hazard is the tendency of a policyholder to take fewer precautions when insured. See Adam F. Scales, *The Chicken and the Egg: Kenneth S. Abraham’s “The Liability Century,”* 94 VA. L. REV. 1259, 1263 (2008) (reviewing KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (2008)*) (“Moral hazard is the tendency to take fewer precautions in the presence of insurance. Adverse selection is the tendency of riskier people to gravitate towards unsuspecting insurance pools, eventually raising premium rates and causing less risky people to exit. A great deal of insurer behavior is designed to combat, or at least manage, these problems.”) (citing ABRAHAM, *supra*, at 45–48). Another commentator defines related “moral hazard” as when “[a] person who deliberately causes a loss . . . [or] exaggerates the size of a claim to defraud an insurer.” See DORFMAN, *supra* note 230, at 480.

²³² See, e.g., KEETON & WIDISS, *supra* note 47, § 6.3, at 634.

²³³ Sch. Dist. for the City of Royal Oak v. Cont’l Cas. Co., 912 F.2d 844, 848–49 (6th Cir. 1990) (explaining that public policy favors enforcing the terms of insurance policies and “common sense suggests that the prospect of escalating insurance costs and the trauma of litigation, to say nothing of the risk of uninsurable punitive damages, would normally neutralize any stimulative tendency the insurance might have.”). See *Nw. Nat’l Cas. Co. v. McNulty*, 307 F.2d 432, 444 (5th Cir. 1962) (Gwin, J., concurring) (noting the public policy favoring the enforcement of contracts); *Union Camp Corp. v. Cont’l Cas. Co.*, 452 F. Supp. 565, 568 (S.D. Ga. 1978) (“Exercise of the freedom of contract is not lightly to be interfered with. It is only in clear cases that contracts will be held void as against public policy.”).

²³⁴ *Creech v. Aetna Cas. & Sur. Co.*, 516 So. 2d 1168, 1174 (La. Ct. App. 1987).

²³⁵ See *Royal Oak*, 912 F.2d at 849 (“Had the company wished to exclude coverage for intentional religious discrimination in employment, it could and should have said so.”); *Univ. of Ill. v. Cont’l Cas. Co.*, 599 N.E.2d 1338, 1350–51 (Ill. App. Ct. 1992) (“[T]he insurer is an informed contracting party with no inferiority in bargaining position and should not be allowed to escape from the contract it freely entered into. . . . This court will not rewrite [a] policy to create an exclusion.”); *Indep. Sch. Dist. No. 697 v. St. Paul Fire & Marine Ins. Co.*, 495 N.W.2d 863, 868 (Minn. Ct. App. 1993) (“The carrier is, of course, free to expressly provide an exclusion for such conduct in the future.”).

terms of the policy in favor of coverage.²³⁶ To do otherwise would create a risk that policyholders could lose the reasonably expected coverage they bought, an expectation of coverage that is consistent with the original purpose of the ensuing loss clause and insurance generally.

In short, public policy dictates requiring insurers to honor the contracts they enter.²³⁷ Insurers draft the “all risk” property and “all risk” homeowners policies in which the anti-concurrent causation exclusions and ensuing loss clauses appear. If insurers do not want to cover certain types of losses, then the policies should clearly state such losses are not covered. The rules of insurance policy interpretation dictate that the anti-concurrent causation exclusion should be interpreted narrowly while the ensuing loss clause should be interpreted broadly. Thus, if courts follow these rules, as public policy requires, then losses caused in part by a covered peril should be covered.²³⁸

C. *Consistent and Predictable Outcomes*

Interpreting the ensuing loss clause to preserve coverage for otherwise excluded losses where a covered peril plays a role in causing the loss also should lead to consistent and predictable results. Although insurers may be required to pay claims that they would otherwise choose to litigate under an apportionment standard or the “efficient proximate cause” and “separate and intervening cause” tests, the outcome of disputes in which an insurer chooses to contest the payment of a claim under this proposed interpretation should be fairly predictable because the dispute would be decided under a bright-line rule that favors a finding of coverage. Consequently, insurers would be incentivized *not* to litigate claims they likely would lose; insurers would want to avoid incurring wasteful litigation costs.

In addition to reducing the incentive to litigate, this predictability in the outcome of disputes would be beneficial to insurers because it would allow them to reserve for claims more accurately and to establish with more certainty the amount of premiums needed to cover claims and be profitable.²³⁹ Thus, this predictability should result in cost savings for insurers, policyholders, and courts as fewer cases are litigated and tried.

D. *Efficient Resolution of Claims*

Interpreting the ensuing loss clause to provide coverage for an otherwise excluded loss if a covered peril plays a role in causing the loss also should lead to the efficient resolution of claims. By creating a bright-line rule such as the

²³⁶ See *supra* note 233 and accompanying text.

²³⁷ See *supra* notes 18 and 38.

²³⁸ See *supra* notes 18 and 38.

²³⁹ See, e.g., *Sanchez v. Lindsey Morden Claims Servs., Inc.*, 84 Cal. Rptr. 2d 799, 802 (Cal. Ct. App. 1999) (“Insurance is a highly uncertain and risky endeavor, because it requires accurate predictions about the occurrence and cost of future events. Insurers are able to define and limit the risks, and to set premium levels commensurate with the risks, using complex and nuanced contracts (policies.)”); Nancy R. Page, Comment, *Risky Business: Consumer Protection in the Insurance Industry*, 23 HARV. J. ON LEGIS. 287, 291 (1986) (“Predicting claims and pooling risks is the business of insurance. When accurate prediction is no longer possible, some liability markets become theoretically too risky for insurance.”).

one proposed in this Article, the parties should not need to retain experts to engage in metaphysical debates regarding which cause in the causation chain of events was the “initial” cause or whether a “separate and intervening” covered peril that occurred after an excluded peril resulted in a loss. Nor should the courts and parties need to conduct trials regarding the amount of the loss that should be apportioned among the various causes of the loss. Further, to the extent the parties cannot agree on whether a covered peril played a role in causing the loss, the court in many instances nonetheless should be able to resolve the dispute through summary judgment because, assuming the facts are not in dispute, resolution of the dispute should be a question of law—the application of the court’s interpretation of the policy language to the facts of the case.²⁴⁰ Thus, fewer trials should be needed, and, in many cases, the parties should be able to settle without retaining experts or even involving the courts.

CONCLUSION

In recent years, parties have overlooked the ensuing loss clause when analyzing coverage for losses caused by multiple perils when the policy at issue contains an anti-concurrent causation exclusion. Moreover, even when the clause has been considered, many courts have misunderstood and misapplied the clause. The courts’ difficulties in applying the clause are due principally to the courts’ failure to understand the origins of the clause and incorrect application of the rules of policy interpretation to the clause. Instead of applying the rules of policy interpretation to the clause, some courts have incorporated tort causation concepts such as the “efficient proximate cause” test or the “separate and intervening cause” test into the clause.²⁴¹ In doing so, such courts have turned what should be a contractual analysis into a fault analysis that is not based upon policy language.²⁴² Further, by applying highly malleable tort causation tests to the ensuing loss clause, the results in such cases have been inconsistent and unpredictable.²⁴³ Inconsistent and unpredictable outcomes in insurance disputes lead to inefficiencies in the legal system because it is harder to settle cases that have inconsistent and unpredictable outcomes, which in turn increases the parties’ and courts’ litigation costs.²⁴⁴

Applying the well-established rules of policy interpretation such as *contra proferentem* to the ensuing loss clause, as well as public policy considerations, leads to the conclusion that any loss that results, at least in part, from a non-excluded peril is covered regardless of whether an excluded peril also played a

²⁴⁰ See *Private Bank & Trust Co. v. Progressive Cas. Ins. Co.*, 409 F.3d 814, 816 (7th Cir. 2005) (“We are presented with a question of insurance policy interpretation, which is a question of law”); *In re Frederick Petroleum Corp.*, 912 F.2d 850, 852 (6th Cir. 1990) (noting that a question of policy interpretation is a question of law); *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010) (“This case presents a question of insurance policy interpretation, which is a question of law”); *Farmers Home Mut. Fire Ins. Co. v. Bank of Pochahontas*, 129 S.W.3d 832, 835 (Ark. 2003) (“Whether the policy language is ambiguous is a question of law to be resolved by the court.”).

²⁴¹ See *supra* note 56 and accompanying text.

²⁴² See *supra* Parts IV.A–B.

²⁴³ See *supra* Parts IV.A–B.

²⁴⁴ See *supra* Parts IV.B.

role in causing the loss. The term “ensuing loss” is not defined in the clause, and the anti-concurrent causation exclusionary language is internally inconsistent with the ensuing loss clause language. One part of the provision says that losses caused “directly or indirectly” by certain perils are excluded from coverage, but another part of the clause says that if a loss nonetheless “ensues,” then the loss is covered. Under the doctrine of *contra proferentem*, these inconsistencies and ambiguities should be construed in favor of the policyholder.²⁴⁵

Such an interpretation is also consistent with the original intent of the clause and the rules of policy interpretation that provide that (1) policies should be construed as a whole with the purpose of the insurance in mind, and (2) the policyholder’s reasonable expectations should be fulfilled.²⁴⁶ “All risk” property and homeowners policies cover all risks of loss except those losses caused by perils that are expressly listed in the policies.²⁴⁷ Thus, a policyholder who purchases the broadest coverage available reasonably expects the coverage provided by the policy will be very broad. The policyholder also reasonably expects to not be required to hire experts to engage in a philosophical debate regarding which cause in a chain of events was the most important, or last, cause that led to a loss when it seeks coverage for the loss.

Finally, adopting this interpretation should also lead to more predictable and consistent outcomes in insurance disputes that involve the ensuing loss clause because it creates a bright-line standard for the parties and courts to apply. Under this interpretation, courts should be able to efficiently resolve such disputes as a matter of law in most instances without the need for juries to attempt to determine which peril was the most important in causing the loss or whether the loss can be segregated or apportioned among separate perils.²⁴⁸ This predictability also should make insurance claim disputes easier to settle, which, in turn, should reduce the parties’ and courts’ litigation costs.²⁴⁹ In short, simply applying the well-established rules of policy interpretation to the ensuing loss clause, instead of tort causation concepts and standards, should lead to more predictable and consistent outcomes and the efficient resolution of disputes that involve the ensuing loss clause.

²⁴⁵ See *supra* Part II.A.

²⁴⁶ See *supra* Part II.B.

²⁴⁷ See *supra* note 16 and accompanying text.

²⁴⁸ See *supra* Parts V.C–D.

²⁴⁹ See *supra* Parts V.C–D.