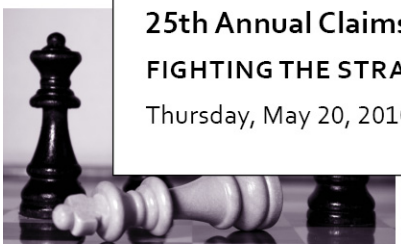

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# PROPERTY INSURANCE UPDATE


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## I. CONCURRENT CAUSATION

The concurrent cause rule holds that if two or more events cause a loss, with one being excluded under the policy terms and the other being covered, the policy should provide coverage for the loss. As a modification of the concurrent cause rule, some courts have developed the efficient proximate cause rule. This rule permits recovery for a loss caused by both a covered cause of loss and an excluded cause of loss if the covered cause was the efficient proximate cause, that is, either the dominant cause or the cause which set the other causes in motion that, in an unbroken sequence, produced the result for which recovery is sought. (It should be noted that there is no clear consensus on the precise definition of efficient proximate cause).

### A. Illinois Concurrent Causation Analysis

The state courts of Illinois have long followed the concurrent cause analysis. This issue, however, has never been addressed by the Illinois Supreme Court. The Seventh Circuit has more recently rejected that analysis, indicating that the importation of tort principles of proximate cause into the construction of insurance policies is inappropriate.

*Mattis v. State Farm Fire and Cas. Co.*, 118 Ill. App. 3d 612, 454 N.E.2d 1156, 73 Ill. Dec. 907 (5th Dist. 1983) - The Mattises had an all-risk homeowner's insurance policy that was invoked when they found structural damage to their home on approximately May 15, 1979. A policy provision excluded coverage for loss "caused by settling, cracking, shrinking, bulging, or expansion of walls," and State Farm relied upon this provision to deny coverage. The Mattises, however, argued that the cracked or bulged wall was not the cause of the loss, but that it resulted from the consolidation of backfill against the defectively designed or constructed north wall. State Farm argued that the entire damage resulted from a chain reaction caused by the bulging of the basement wall. The trial court held that if more than one cause creates a loss with one cause covered but other causes not covered, the loss will be within the coverage of an all risk policy.

The Appellate Court relied upon the trial court's finding that the proof established contributing causes and that one cause was inadequate or improper design or construction of the dwelling, which was not specifically excluded by the policy. Where a policy expressly insures against loss caused by one risk but excluded loss caused by another risk, coverage is extended to a loss caused by the insured risk even though the excluded risk is a contributory cause. "We agree with the trial court and conclude that a proximate and contributing cause of the loss to plaintiffs' dwelling was inadequate or improper design or construction of the dwelling."

*Crete-Monee School Dist. v. Indiana Ins. Co.*, No. 96C 0275, 2000 WL 1222155 (N.D. Ill. Aug. 22, 2000) - On January 18, 1994, seven schools in the Crete-Monee School District ("District") suffered major damage when large portions of their roofs were destroyed in sub-zero

temperatures by a phenomenon known as "shatter." The roofs were admittedly in poor shape and the District had just recently created a five-year plan for repair and replacement of the roofs.

Both parties agreed that two forces acted on the District's roofs to cause the shatter. First, the roofs were deteriorating and losing plasticizer. Second, the extreme cold on January 18, 1994 made the PVC membranes contract. The parties differed, however, on the proper application of Indiana's insurance policy to these facts. The District argued that the presence of a covered cause (weather) creates coverage as a matter of law even in the presence of an excluded cause (deterioration). Indiana argued that either the court or a jury must determine which cause was the 'efficient' or dominant cause and then determine coverage with reference to that cause alone (in Indiana's opinion, deterioration was the dominant cause and hence the loss excluded).

The court found that Illinois law supports the District's approach. The court cited the holding from *Mattis v. State Farm*: "Where a policy expressly insured against loss caused by one risk but excludes loss caused by another risk, coverage is extended to a loss caused by the insured risk even though the excluded risk is a contributory cause." Here the court held that the deterioration and temperature worked together to cause the roofs to shatter, and neither one of these causes could have independently caused the shatter. Because cold temperature was not expressly excluded in the policy, the loss is a covered loss despite the contribution of deterioration. The court also disposed of Indiana Insurance's argument by indicating that Illinois does not appear to use the efficient cause doctrine.

*Spearman Industries, Inc. v. St. Paul Fire and Marine Ins. Co.,* 138 F. Supp. 2d 1088 (N.D. Ill. 2001) - Plaintiff Spearman Industries owned the Lake Bluff Racquet Club, which was insured by St. Paul Fire and Marine Insurance Company. In January of 1999, Chicago experienced a severe storm that involved about twenty-two inches of snow, sixty mile-per-hour winds, and below-zero temperatures. During the storm, the roof sustained damage and as a result, Spearman filed a claim.

The parties agreed that a portion of the roof was covered by the insurance policy. However, the parties disputed whether the insurance policy covered the damage to the rest of the roof, worth over $200,000. Spearman maintained that the entire roof was damaged solely by the storm and, thus, all the roof damage was covered by the policy. Meanwhile, St. Paul maintained that a portion of roof damage was caused or worsened by pre-existing wear and tear, deterioration, or defective installation, design, maintenance or repair, and thus the damage to the remainder of the roof was excluded under the policy. Spearman's motion for summary judgment in this regard was denied.

On Spearman's motion to reconsider before the Appellate Court, Spearman submitted that the court denied its motion for summary judgment due to a mistaken notion that there is no precedential support in Illinois law for Spearman's position regarding the importation of proximate cause principles into the construction of an insurance contract. Spearman cited *Mattis v. State Farm* in support of its position.

This court, however, found that *Mattis* was not controlling law. In its discussion, it points out that the Illinois Supreme Court has not resolved the dispute of whether proximate cause analysis is applicable in the context of insurance contracts. The Seventh Circuit, on the other hand, has previously addressed this issue in *Transamerica Ins. Co. v. South,* 125 F. 3d 392 (7th Cir. 1997):

> Illinois case law on the interpretation of insurance exclusions was confusing, with disparate results reached in similar cases. Since that time, Illinois law has been clarified immensely by two recent Illinois appellate court decisions. *Oakley Transport, Inc. v. Zurich Insurance Co*., 271 Ill. App. 3d 716, 208 Ill.Dec. 177, 648 N.E.2d 1099 (1 Dist. 1995); *Allstate Insurance Co. v. Smiley*, 276 Ill. App. 3d 971, 213 Ill.Dec. 698, 659 N.E.2d 1345 (2 Dist. 1995). We believe the approach of these courts is likely to be followed by the Illinois Supreme Court. These two cases conclude that the importation of tort principles of proximate cause into the construction of insurance policies is inappropriate.

Rather, the court suggests that policies should be interpreted in accordance with contract principles, so as to give effect to the intent of the parties. Therefore, policies should be construed according the plain meaning of the terms. Accordingly, the court denied Spearman's motion for reconsideration because there remains a genuine issue of material fact as to the cause of damage to the roof.

### B. Anti-Concurrent Causation Clause

The insurance industry, however, has developed its own answer to the issue of concurrent causation: the anti-concurrent causation clause. This clause, found in standard property policies, attempts to keep excluded causes of loss excluded so that even if two causes of loss occur simultaneously, the loss due to the excluded cause of loss is not covered, regardless of the circumstances. Most anti-concurrent causation clauses read similarly to this: "We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

*Corban v. United Services Auto. Ass'n*, 20 So. 3d 601 (Miss. 2009) - The Corbans lived on East Beach Boulevard, Long Beach, Mississippi, several hundred feet from the Mississippi Gulf Coast. This property was insured by two policies, a homeowner's policy and a flood policy, each procured from USAA. The Corbans' property suffered significant damage during Hurricane Katrina and they sought indemnity for their losses. The Corbans received the full amount recoverable under the flood policy and sought additional recovery under the homeowner's policy. This policy excluded loss caused by flooding with an accompanying anti-concurrent causation clause ("ACC") which read: "We do not insure for loss caused directly or indirectly by any of the following [flooding]. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." Accordingly, USAA determined that

the majority of the damage was caused by flooding and paid for only the small portion of damage determined to have been caused by the wind.

The circuit judge found that the water damage exclusion and the ACC clause were unambiguous and therefore, coverage under the policy for any damage caused by water as defined in the policy or caused concurrently or sequentially by wind and water in combination was barred. The Mississippi Supreme Court began its analysis by looking at the language of the ACC clause. The court concluded that the 'in any sequence' language in the policy cannot be used to divest the insureds of their right to be indemnified for covered loss. Once the duty to indemnify arises by a covered loss, it cannot be extinguished by a successive cause or event. The same applies in reverse; loss caused by an excluded peril is not changed by a subsequent covered peril or event.

Therefore, "[o]nly when facts in a given case establish a truly 'concurrent' cause, i.e., wind and flood simultaneously converging and operating in conjunction to damage the property, would we find, under Mississippi law, that there is an 'indivisible' loss which would trigger application of the ACC clause." The court found that based on the evidence presented thus far, the same loss with multiple causes was not at issue here. For that reason, a finder of fact must determine what losses, if any, were caused by the wind, and what losses, if any, were caused by flood.

If the property suffered damage from wind, and separately was damaged by flood, the insured is entitled to be compensated for those losses caused by the wind. Any loss caused by flood damage is excluded. If the property first suffers damage from the wind, resulting in a loss, whether additional flood damage occurs is of no consequence, as the insured has suffered a compensable wind-damage loss. Conversely, if the property first suffers damage from flood, resulting in a loss, and then wind damage occurs, the insured can only recover for losses attributable to wind.

*Builders Mut. Ins. Co. v. Glascarr Properties, Inc*., 688 S.E.2d 508 (N.C. 2010) - In August of 2007, Defendant learned that vandals had broken into the insured property at issue and left water taps running, causing extensive damage. Defendant submitted a claim under the policy for damage arising from the vandalism in October of 2007, which was paid and settled by Builders Mutual. Later, the defendant discovered mold in the house, allegedly caused by the vandals' water damage, and submitted an additional claim for mold remediation. Plaintiff denied the claim and filed a declaratory action. The trial court ruled in favor of the plaintiff, finding that the policy did not contain coverage for mold remediation. On appeal, the trial court's decision was affirmed.

The policy included an anti-concurrent causation clause that read in pertinent part: "We will not pay for a 'loss' caused directly or indirectly by any of the following [mold]. Such 'loss' is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the 'loss.'" The reviewing court found that in this case, the plain language of the policy unequivocally excludes payment for losses caused "directly or indirectly by" mold, and this exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the 'loss.'"

The defendant argued that because the policy covered claims arising from vandalism, it also covered losses caused by mold, provided that the mold itself was caused by a covered cause of loss. In support of this position, however, the defendant cited only cases in which the policy did not contain an ACC clause that specifically excluded coverage for certain types of loss, regardless of the interplay between covered and non-covered losses.

*Bishops, Inc. v. Penn Nat. Ins.,* 984 A.2d 982 (Pa. 2009) - Bishops' claim arose out of sewer and drain back-up followed by extensive flooding of its business premises on September 17, 2004, during Hurricane Ivan. Because of the significant rainfall, Bishops' place of business was damaged due to water and sewage back-up. Subsequent to the initial back-up of sewage, the rainfall also caused outside flood waters to rise and enter Bishops' building. The Bishops' basic policy contained the following relevant provisions:

> B. Exclusions
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> ***
>
> g. Water
>
> ***
>
> (3) Water that backs up or overflows from a sewer, drain or sump

Bishops had also purchased the Penn Pac Endorsement which specifically provides for additional coverage for the back-up of sewers and drains. Penn National acknowledged the Penn Pac Endorsement but declined to extend coverage, asserting that the damage Bishops suffered was caused concurrently by generalized flooding, which is excluded as a covered cause of loss under the basic policy. The Superior Court of Pennsylvania found in favor of Bishops and held that the ACC clause was inapplicable in conjunction to the Penn Pac Endorsement.

The court found it significant that the Penn Pac Endorsement covered damage caused by sewer and drain back-up without qualification. Significantly, this language removed Exclusion B.1.g.(3) of the basic policy as a bar to coverage for damage caused by sewer and drain back-up and made no effort to restate the language that bars coverage on the ground of concurrent causation by another excluded cause of loss. "[W]e can discern no reason why an insured who purchased the Penn Pac Endorsement in reliance on the sewer and drain back-up it provided might not conclude, quite reasonably, that the elimination of 'Exclusion B.1.g.(3)' should not include elimination of the concurrent cause language as it applies to sewer and drain back-up."

The court also focused on the equitable reasons that called for finding coverage for Bishops' loss. The insured purchased additional coverage ostensibly to make up for the deficiencies in the basic policy only to find its claim denied not by virtue of any limitation on the coverage it bought, but because ancillary language in the basic policy barred coverage for another excluded loss. "Such a result strikes us as a variant of the 'sleight of hand' we rejected in *Betz*, allowing an insurer to create the appearance of coverage using an amendatory endorsement tailored to cover a stated risk only to deny coverage when that risk comes to fruition by citing language not suggested by the endorsement."

## II. MATERIAL MISREPRESENTATION

*Seneca Specialty Ins. Co. v. West Chicago Property Co., LLC*, No. 08-12335, 2010 WL 431734 (E.D. Mich. Feb. 2, 2010) - West Chicago was formed by Mike Kaskorkis, Aboud Kaskorkis, and Faouk Kenaya for the purpose of purchasing a building in Detroit, Michigan. In August of 2004, West Chicago leased the Building to Jel Sert, who remained in the building for approximately a year. From October 16, 2005, until the Jel Sert lease expired on September 1, 2006, the building was vacant, although Jel Sert continued to pay rent, maintain insurance coverage, and pay a former employee to regularly inspect the building.

On July 17, 2006, the building suffered theft and vandalism resulting in loss and damage of approximately $75,000. Jel Sert made a claim for the loss through a policy it maintained through Liberty Mutual. Of the $75,000 total loss to the building, Jel Sert paid for approximately $5,000 in repairs itself and paid $70,000 directly to West Chicago. West Chicago subsequently arranged for the building to be repaired in anticipation of a new tenant.

The new tenant moved into the building in October 2006, but fell behind on the rent and was evicted in March 2007, leaving the building vacant. In May 2007, Kenaya discovered damage due to vandalism/theft. A claim and this suit followed.

On August 21, 2006, West Chicago applied to Seneca for vacant building insurance through the Danno Insurance Agency, who submitted the application to Seneca on behalf of West Chicago. The insurance application was prepared by Danno Insurance Agency and signed by Mike Kaskorkis as an authorized representative of West Chicago. The application indicated that there had been no claims, losses, or occurrences giving rise to a claim within the last five years. Kaskorkis also signed a "Vacant Property Supplement" that indicated that no property owned by the insured suffered any loss during the past 36 months.

Seneca moved for summary judgment seeking to rescind the insurance policy based on material misrepresentations made in West Chicago's application for insurance. In Michigan, it is well settled "that where an insured makes a material misrepresentation in the application for insurance . . . the insurer is entitled to rescind the policy and declare it void *ab initio*."

West Chicago contended that the inaccuracies were not misrepresentations justifying rescission because they were not made intentionally. In support of this argument, West Chicago pointed to language in the insurance contract stating that Seneca may void the contract if West Chicago makes any intentional misrepresentations. The court found that this argument failed because Seneca's right to void the contract *ab initio* in cases of unintentional misrepresentation existed completely separate from the terms of the contract itself. The contract's statement that Seneca can void the contract at any time in cases of intentional misrepresentation was merely an additional right of rescission that was being granted to Seneca; it did not indicate that it would provide the exclusive grounds for rescission.

*Brawner v. Allstate Indem. Co.,* 591 F.3d 984 (8th Cir. 2010) - As of May 2006, Jon and Renea Brawner resided at 10 Dakota Drive in Conway, Arkansas. Their house burned in a fire on May 18, 2006. Allstate denied coverage and the Brawners filed suit.

Regions Bank held a first mortgage on the property, which was guaranteed by the Veterans Administration. At the time of the fire, the Brawners had failed to make a mortgage payment since December 1, 2005. As a result, before the house burned, Regions initiated a foreclosure proceeding. The house was to be sold in a foreclosure sale on May 22, 2006.

Before the fire, Regions Bank retained a law firm to pursue the foreclosure. Beginning with letters dated March 14, 2006, the law firm sent notices of the foreclosure through both certified and first class mail to several addresses and addressees. Most of these notices were returned undelivered, but five were not. In addition to the mailings, the law firm published notice of the default in the Arkansas Democrat-Gazette newspaper and posted the notice at the Faulkner County Courthouse.

During investigation of the fire, the Brawners indicated that they had an agreement to sell the house to Jon's business associate for $160,000 cash, the closing of the sale was imminent, the VA had permitted them to defer their recent mortgage payments until the time of the sale, they were only a few months in arrears on their mortgage payments, and they had no knowledge of the foreclosure at the time of the fire.

At trial, Allstate presented evidence of several false and misleading statements made by the Brawners with regard to the extent of their arrears in mortgage payments. Allstate also presented sufficient evidence that suggested the purported sale of the house for $160,000 was a sham and that the VA had no agreement with the Brawners to defer their mortgage payments. The jury found for Allstate on the misrepresentation defense. On appeal, the court affirmed this decision by holding that, "The Brawners' assertions on May 22 that they were only a couple of months in arrears, that they had secured a cash deal to sell the house, and that, because of the sale, the mortgage payments were deferred suggested that their financial worries regarding the insured property were minimal. A jury reasonably could conclude that significant discrepancy existed between these misrepresentations and the truth, and that the misrepresentations could have hindered Allstate's investigation of the fire."

## III. INCREASE IN RISK

*U.S. Bank, N.A. v. Tennessee Farmers Mut. Ins. Co.*, 277 S.W.3d 381 (Tenn. 2009) - On February 12, 1999, Jessica Hill purchased a house in Tennessee, financed by U.S. Bank. Tennessee Farmers issued the homeowner a personal fire and extended coverage insurance policy on the premises. The policy contained a standard mortgage clause, under which Tennessee Farmers agreed to protect the bank's interest in the property and also agreed that the protection afforded the bank under the policy would not be lost due to acts of the insured homeowner, breach of warranty, increase in hazard, change of ownership, or foreclosure if the bank had no knowledge of these conditions. In turn, the bank was required to notify Tennessee Farmers of "any increase in hazard" of which the bank had knowledge. The policy does not specifically require notification of foreclosure proceedings.

After the homeowner became delinquent on her payments, the bank began foreclosure proceedings by notifying the homeowner of its intent to foreclose on the house. No notification of foreclosure was given to the insurance company. Before the foreclosure process was complete, the homeowner filed for bankruptcy, which stayed the foreclosure proceedings. Thereafter, the house was destroyed by fire apparently caused by methamphetamine production. The insurance company refused to pay the insurance proceeds to the bank on the theory that the commencement of foreclosure proceedings constituted an increase in hazard of which the bank was required to notify the insurance company under the policy. The Supreme Court of Tennessee held that commencement of foreclosure proceedings does not constitute an increase in risk of hazard and therefore, no notice was required to be given to the insurance company.

The court looked to a similar case in which the court ruled that neither the existence of the undisclosed mortgage nor notice of foreclosure invalidated the insurance coverage. It reasoned that foreclosure proceedings were the remedy of the mortgagee for nonpayment of the debt and the remedy is an "incident of the mortgage and a result that is brought about by the existence of the mortgage." Also, in similar cases involving standard mortgage clauses requiring notice of an "increase in hazard," courts have found that the plain meaning of those words do not include an event such as a foreclosure proceeding, but rather, refer to physical conditions on the insured property posing a more hazardous risk to the property. Finally, this court recognized that a different result has been reached where policy language specifically provides that foreclosure proceedings void the policy or require notification of such proceedings. In this case, however, there was no such language.

## IV. CONTAMINANTS

*Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co.*, 472 F.3d 33 (2d Cir. 2006) - Parks Real Estate owned a building at 90-100 John Street in New York City which was insured by St. Paul. On September 11, 2001, as a result of the World Trade Center collapse, a

cloud of noxious particulate matter spread throughout the downtown New York City area where the insured building is located. The particulate matter apparently penetrated the building and settled in its mechanical and electrical system. The court determined this damage was properly considered contamination for purposes of the contamination exclusion clause in the policy and St. Paul was entitled to deny coverage for the loss claimed by Parks. The court also found that the dominant efficient cause of the loss was not the collapse of the World Trade Center but the infiltration of the building by the particulate matter created by the collapse.

The exclusion at issue reads: We will not cover loss or damage caused by or made worse by any kind of contamination of . . . products or property covered by this insuring agreement. The word "contamination" was not defined.

The Appellate Court found that the word "contamination," as used in the St. Paul policy, was ambiguous because the common definition of the term that the trial court employed – the introduction of a foreign substance that injures the usefulness of the object or a condition of impurity resulting from the mixture or contact with a foreign substance – would allow the contamination exclusion in the policy to be applied in a limitless variety of situations. Because of the virtually boundless array of possible applications of the term contamination in the contamination exclusion provision, the court held that the parties should be allowed to introduce evidence of what was intended by the use of this ambiguous term. Therefore, the case was remanded since a question of material fact pertaining to the meaning of the term contamination under the policy remained for resolution by the trier of fact.

In terms of the efficient cause of the loss, the Appellate Court agreed with the trial court in that the actual contact between the particulate and property was the efficient cause rather than the actual collapse of the World Trade Center.

*Ocean Partners, LLC v. North River Ins. Co.*, 546 F. Supp. 2d 101 (S.D.N.Y. 2008) - Ocean Partners owned a building near the World Trade Center that was insured by North River Insurance Company. The building was impacted by materials ("WTC particulate") generated from the collapse of the twin towers on September 11, 2001, and, subsequently, Ocean Partners submitted a claim to North River for its property damage. North River moved for summary judgment alleging that coverage was not available because of a pollution and/or collapse exclusion.

North River argued that the efficient cause of the loss was the collapse of the World Trade Center and therefore the loss was excluded from coverage under the collapse exclusion. This argument was rejected as it was foreclosed by the holding in *Parks Real Estate,* which held the efficient cause was the contact between the particulate and the building rather than the collapse of the twin towers.

North River argued that the damage at issue was caused by or resulted from dispersal of pollutants insofar as the policy's definition of "pollutant" includes the word contaminant. In light of the holding in *Parks Real Estate,* this court found that the term "contamination" in the present

case was intended to exclude WTC particulate, and that such determination should be made by the trier of fact. The court rejected North River's argument that its expert's referral to the WTC particulate as a "contaminant" or "contamination" in his report constitutes proof that the WTC particulate is, in fact, a contaminant and thus an excluded pollutant.

## Scott G. Salemi

*- Partner*

Prior to joining Heyl Royster, Scott served as Senior Assistant State's Attorney in Rockford, Illinois, and later as an Assistant Illinois Attorney General, assigned to a statewide trial assistance division. Scott is an accomplished trial lawyer, having tried significant litigation to verdict throughout Illinois. Scott joined the firm in its Rockford office in January of 2003 and became partner in 2007.

Scott concentrates his practice in the defense of complex civil litigation, with an emphasis on civil rights, medical malpractice and first-party and third-party property cases.

**Professional Associations**

- Illinois Association of Defense Trial Counsel
- Illinois State Bar Association
- American Bar Association
- Winnebago County Bar Association

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