

CONFUSION ABOUT CAUSATION IN INSURANCE: SOLUTIONS FOR CATASTROPHIC LOSSES

Erik S. Knutsen*

ABSTRACT

The current state of the law with respect to concurrent causation in insurance produces unpredictable results. The insurance system may not reliably function in the wake of a large scale multi-causal disaster—a hurricane, earthquake, or terrorist strike—that causes widespread losses to many policyholders at once. When determining whether or not an insurance contract responds to a particular loss, courts, parties, and academics alike are challenged when forced to single out a particular causal trigger in a causal chain of events. To add to the complexity, insurers often attempt to contract around legal rules, with inconsistent success. This Article attempts to create a solution for solving concurrent causation disputes in insurance. Underpinning the proposed legal rules in this Article are the important analytic and conceptual differences between causation in tort and causation in insurance. The Article proposes the adoption of two distinct immutable legal rules for resolving concurrent causation insurance disputes.

The choice of legal rule necessarily depends on a sensible, predictable analysis of the various concurrent causes that brought about a potentially insured loss. Courts and parties need to be able to discuss the contractual relevance of various competing concurrent causes with reference to a contractual, not tort, context. The proposed analysis proceeds first by examining concurrent causes in a given loss scenario on two dimensions: the temporal and the sufficiency dimensions. Next, the analysis must also de-

* Assistant Professor, Queen's University Faculty of Law, Kingston, Ontario, Canada. The author would like to sincerely thank Tom Baker, Jeffrey Stempel, Dan Markel, Daniel Schwarcz, Hoi Kong, Wei Zheng, and Larry Garvin for comments and conversations about this Article. As well, thanks to the AALS Insurance Law Section for sponsoring a presentation for this Article. Thanks also to colleagues at Queen's Law who provided helpful commentary at the Queen's Law, Economics, and Public Policy Speakers series and to attendants at the 2009 Asia-Pacific Risk and Insurance Association Annual Conference in Beijing, China. The author would also like to thank Meghan Bolohan, Queen's Law '08, Ashley Brown, Queen's Law '09, and Andrea Bolieiro, Queen's Law '10 for helpful research assistance throughout various stages of this project.

termine the involvement and necessity of each cause in the end result loss claimed by the insured.

Finally, the analysis requires an examination of the sufficiency of the end result effect of the concurrent causes. The Article proposes two immutable legal rules based on whether or not a concurrently caused loss results from separate, discrete causes or reciprocal, indivisible causes. These two rules are aimed to longitudinally incentivize insurers to draft more efficient contractual language dealing with concurrent causation.

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When Hurricane Katrina struck and thousands lost their homes, was the loss caused by rain, winds, a storm surge, ineffective water barriers, or flooding? The answer to the question drives whether or not a person's property insurance covered the loss. What happens when causes come together concurrently to produce an ultimate end result? If some causes are covered by property insurance and others excluded, does the insurance policy pay? Does the insured homeowner get nothing? Answering whether or not one has insurance coverage for the loss is often even more complex a question, because causation drives insurance coverage. The cause of the loss triggers insurance policy coverage clauses and exclusion clauses. An insurance policy can provide coverage for losses caused by "fire" or "wind" or can exclude coverage for losses caused by "flood" or by "intentional acts" of the policyholder. Thus, whether or not a policyholder has coverage for a particular loss is a more complex inquiry when multiple causes combine together to produce a loss. And how does the insurance system function in the wake of a large scale multi-causal disaster—a hurricane, earthquake, or terrorist strike—that causes widespread losses to many policyholders at once? The current state of the law with respect to concurrent causation in insurance offers no predictable answers. In a world increasingly reliant on insurance as a loss distribution mechanism, that needs to change.

Complexity around insurance causation heightens when one speaks of coverage under liability insurance. Liability insurance provides coverage for behavior that causes losses (usually negligent behavior). Different kinds of tortious behavior can sometimes combine together to produce a loss. Negligent tortfeasors are often insured by their homeowners, commercial, or professional liability insurance. What if a loss occurs while a negligent tortfeasor simultaneously happens also to be negligently operating a motor vehicle? Assume the driver is insured by a standard automobile liability policy. Most non-automobile liability insurance policies exclude coverage for negligent acts involving an automobile. Do both the auto and non-auto insurance policies respond to the loss? Neither? What if someone was hurt by the negligence? Does that victim have no source of compensation if he or she sues the driver and the driver is held to have no insurance coverage for the accident?

These questions of concurrent causation are not only difficult to answer, they are expensive to answer. Different jurisdictions have different doctrinal rules for solving these insurance disputes. Most jurisdictions ask courts to find a dominant cause of the loss and determine coverage based on causal dominance.¹ Other jurisdictions take a more liberal approach,² granting coverage for a loss as long as one concurrent cause is covered by the insurance policy. Still others take a more conservative approach, denying coverage if one of the concurrent causes is an excluded cause in the policy. No jurisdiction currently recognizes that the solution may in fact lie in having different rules for different types of concurrently caused losses.

The problem is that the current legal rules produce unpredictable results. When determining whether or not an insurance contract responds to a particular loss, courts, parties, and academics alike are challenged when forced to single out a particular causal trigger in a causal chain of events. To add to the complexity, insurers often attempt to contract around the legal rules, with inconsistent success. Insureds and insurers cannot presently predict whether or not a concurrently caused loss will be covered by a certain insurance policy.

This Article attempts to create a solution for solving concurrent causation disputes in insurance. Underpinning the proposed legal rules in this Article are the important analytic and conceptual differences between causation in tort and causation in insurance. These differences are key to understanding not only the solution for solving concurrent causation disputes in insurance, but also for explaining insurance causation's problematic past history in the academy.

The Article proposes the adoption of two distinct immutable legal rules³ for resolving concurrent causation insurance disputes.⁴ The choice

1. Also called "efficient" or "effective" cause. This Article adopts the term "dominant" cause to demarcate the difference between causation in insurance and the tort concept of proximate cause. *See* 1 JEFFREY W. STEMPLE, STEMPLE ON INSURANCE CONTRACTS § 7.02 (3d ed. 2006); ROBERT H. JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 560-66 (4th ed. 2007); Mark D. Wuerfel & Mark Koop, "*Efficient Proximate Causation*" in the Context of Property Insurance Claims, 65 DEF. COUNS. J. 400, 405-07 (1998) (approximately three-fifths of American states utilize the dominant cause approach to concurrent causation).

2. Robert H. Jerry II was the first to categorize three possible approaches to concurrent causation in insurance. He dubbed them the dominant cause, conservative, and liberal approaches. *See* JERRY & RICHMOND, *supra* note 1, at 567-92. This Article adopts his nomenclature as it is a helpful functional descriptor for the three approaches, and adds a new fourth approach: apportionment. *See id.* See also Wuerfel & Koop, *supra* note 1, at 405-07, for a state-by-state catalogue of approaches to concurrent causation in insurance.

3. A default rule is a legal rule which is followed when there is no contractual term in a contractual setting to direct how the contract is to be applied or interpreted. The rule fills the gap in an incomplete contract. An immutable rule is a rule around which one cannot contract, such as a legislative provision. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989). Kenneth Abraham notes that insurance law doctrine contains few default rules beyond contractual interpretation rules, because standard form

of legal rule necessarily depends on a commercially sensible, predictable analysis of the various concurrent causes that brought about a potentially insured loss. To drive this initial analysis, courts should first determine the temporal and sufficiency dimensions of each cause.

The temporal dimension assists courts in explaining how the timing of the particular cause is relevant to the end loss suffered by the insured. Causes can be serial in nature, acting sequentially to cause a loss. Alternatively, causes can be parallel in nature, acting simultaneously to cause a loss. To determine relevance of a given set of causal factors, this Article proposes the novel concept of first assessing the particular causal involvement of a factor as an initial causal filter, through a concept borrowed from Jane Stapleton's notion of causal involvement in the tort context.⁵ Next, one determines the causal necessity of the factor but only as it relates to the end result loss. If the factor is behavior (as would be the case in a liability insurance context), then only the result of the behavior in relation to the loss, and not the behavior itself, is the subject of inquiry. When this initial inquiry is over, parties and courts have asked the right questions that fit with the contractual nature of insurance law and have avoided the problematic importation of tort causation concepts.

The sufficiency dimension is the second step in the analysis and drives the choice of immutable legal rule. If a loss results from discrete causes, each cause has resulted in some divisible, easily apportioned part of the whole insured loss. Parties disputing about losses resulting from discrete causes should adopt an apportionment approach to concurrent causation, dividing the various causes into proportions coinciding with each cause's relative effect on the resulting insured end loss. If a loss results from reci-

insurance contracts provide internal default rules within the contract. Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 TORT & INS. L.J. 777, 779 (2001). Abraham argues that immutable rules for concurrent causation are necessary to add to current insurance law doctrine because, at present, insurers are not sufficiently incentivized to provide for efficient and effective solutions for resolving disputes about concurrent causation within the language of current insurance policies. *Id.*

4. The simplest way to accomplish any changes in insurance dispute resolution may seem to be a re-drafting of standard insurance policies to adopt the new efficient rules. As will be discussed in detail below, there exist at present perhaps insurmountable disincentives for insurers to re-word standard form insurance contracts which have a history of judicial interpretation. One could instead propose common law default rules that operate in the absence of any contractual language to the contrary. Some jurisdictions have attempted this method but, as will be discussed later, insurers have merely contracted around the default rules. By contrast, one could propose an immutable rule, either in the common law or through legislation, around which one could not contract. While such a solution may seem drastic to some, the language of insurance contracts is fairly standardized and drafted with insurance industry input and control. As this Article argues, a set of immutable rules may, in fact, incentivize insurers to re-draft more commercially sensible coverage clauses for concurrent causation scenarios.

5. Jane Stapleton, *Choosing What We Mean By "Causation" In the Law*, 73 MO. L. REV. 433 (2008) (noting the analytic challenges with tort causation stem from difficulty in conceptually defining causation as an all-or-nothing construct when, often, one is instead attempting to define causal "involvement" on a continuum).

procal causes, parties should adopt a more liberal approach to concurrent causation, as each reciprocal cause is necessarily interdependent and indi-visible in its effect on the end result loss. Under the liberal approach, if a cause is covered by an insurance policy, the entire loss is covered, even if other excluded or non-covered causes additionally combined to produce the ultimate loss.

Part I of this Article explains how concurrent causation in insurance has become an increasingly important and expensive insurance law dispute. Part II lays the important foundation upon which the Article's proposed solution is built: causation in insurance law necessarily must proceed as a contractual analysis, not as a proximate cause analysis from tort. Part III explains the three contemporary approaches to concurrent causation as utilized among various jurisdictions, as well as apportionment, an as yet untried approach which exists solely in academic literature. Part IV explains how the current approaches do not fulfill the need for efficient legal rules for concurrent causation in insurance. Part V proposes an analytic framework for insurance causation through which the immutable rules will be constructed and also describes how parties and courts should be limiting the causal analysis by examining each cause's relation to the end result insured loss at issue in the case. Part VI describes the necessity for two distinct immutable rules: an apportionment rule for losses resulting from discrete causes, and a liberal rule for losses resulting from reciprocal causes. Part VII concludes.

I. WHAT IS CONCURRENT CAUSATION IN INSURANCE?

In insurance law, concurrent causation occurs when a loss is brought about by two or more potential causes. The cause, or causes, of a loss dictate whether or not a person who has an insurance policy (an insured) in fact has insurance coverage for that specific loss. The causation question is complicated in situations of concurrent causation because one cause of the loss may be covered by an insurance policy and another cause either not covered or specifically excluded from coverage.

Property insurance policies generally insure against property damage resulting from either exposure to enumerated events (i.e. specified perils like fire, theft, or water damage) or, as is more common for today's standard homeowners or commercial property insurance, the policy insures against "all risks" to the property. It can be thought of as "external force" insurance. The insurance indemnifies the property owner once the property is harmed in a specific fashion. Property insurance is "first party" insurance—it indemnifies the property owner directly for resulting losses to the property. To control the insurer's liability to indemnify the insured for only those risks the insurer wants to cover, the policy includes specific exclusions from coverage. Perhaps the insurer does not cover losses

caused by flood, for example. The factual matrix comprising a concurrently caused loss such as a hurricane or typhoon situation may include multiple covered, non-covered, and excluded causes of a single loss. It thus becomes difficult to determine whether or not the insurance policy pays for the loss when the property loss is caused by multiple causal factors.⁶

Liability insurance policies generally provide broad insurance coverage for damages an insured may be called upon to pay a third party as a result of the insured's actions. Automobile liability insurance, for example, provides indemnity to a driver if the driver's negligence brings about harm to a third party and the driver becomes liable to pay the third party some form of compensation. Liability insurance is often thought of as "tort" or "behavior" insurance for the insured. If the insured commits a tort and has to pay an entity because of her conduct, liability insurance indemnifies the insured so that the insured can then pay the entity. For this reason, liability insurance is third party insurance—it is a source of compensation for an injured third party. Some contractual exclusions to liability coverage, such as an exclusion for intentional or criminal conduct, are tailored to combat moral hazard and adverse selection.⁷ Other exclusions to coverage are what Tom Baker calls "market segmentation exclusions."⁸ These exclusions correspond, like a mirror-image, to contractual coverage clauses in separate types of insurance policies. The exclusions are designed to avoid double recovery among multiple insurance policies for the same type of loss. For example, the standard homeowners liability insurance policy excludes coverage for losses resulting from the use or operation of an automobile because automobile liability insurance coverage is a

6. The difficulties in resolving these types of property insurance disputes are often not made simpler in instances where concurrent causation causes total property destruction in jurisdictions which have valued policy laws. A valued policy law requires a property insurer to pay the full value of the policy limits under the insurance contract in the event of the total loss of an insured building. This is supposed to ease dispute resolution between insured and insurer; the insurer simply pays the total insured value of the building. However, overlapping coverage and exclusion clauses make the application of valued policy laws problematic when a small portion of the loss may be caused by one covered cause, and various other uninsured causes act together to produce the total loss. The insurer is required by statute to pay the cost of the entire insured property. See, e.g., Scott Edwards, *The Wind and the Waves: The Evolution of Florida Property Insurance Law in Response to Multiple-Causation Hurricane Damage*, 34 FLA. ST. U. L. REV. 541, 557-59 (2007) (demonstrating that a state's valued policy law, when applied to a concurrent causation situation, can create unfair results to insurers and insureds in large catastrophic events like hurricanes, which cause total losses through multiple causal factors).

7. Insurers face the twin problems of adverse selection and moral hazard. Adverse selection occurs when the insurance risk pools are drawn too broadly, creating incentives for low risk insureds to exit the pool and high-risk insureds to seek insurance. Moral hazard occurs when a fully insured individual acts less carefully because she is insured or, alternatively, inflates the extent of her insurance claim after a loss. See, e.g., Michael J. Trebilcock, *The Role of Insurance Considerations in the Choice of Efficient Civil Liability Rules*, 4 J. L. ECON. & ORG. 243, 244 (1988) (discussing adverse selection and moral hazard and the corresponding challenges to insurers).

8. TOM BAKER, INSURANCE LAW AND POLICY 455 (2d ed. 2008).

separate, commercially available type of insurance designed for auto-related losses.⁹

The definable scope of available coverage under liability insurance is, by nature, more broad and amorphous than that which is usually available under property insurance.¹⁰ The reason is simple: liability insurance covers an insured for any behavior which causes harm to a third party (and for which the insured is correspondingly expected to pay damages). There are innumerable ways that this could come about. There are also innumerable causal combinations of behaviors which could cause a loss to a third party. Often, causes act in concert.

It becomes a difficult, unpredictable, and expensive question to determine *ex ante*, when drafting the liability policy and its exclusions, whether or not a certain concurrently caused loss would possibly be covered by a liability insurance policy that is broadly drawn to catch all behavior except that behavior specifically excluded from coverage. This is so because the exclusionary labels for behavior—as opposed to the exclusionary labels for external forces acting on property—are broadly drawn when compared to exclusions in property insurance. For example, it is a relatively simple inquiry to determine the effect of a property insurance exclusion designed to exclude coverage for “water seepage.” Once one defines what “water seepage” actually means, the causation question is not expensive to answer. If water seepage caused the loss, then the exclusion may be triggered and coverage denied.

However, this is not the case in the liability insurance context. How does a standard market segmentation exclusion in a homeowners liability policy for “injury caused by use or operation of an automobile” apply to oust coverage if an insured is otherwise covered for all behavior but happens to be operating a vehicle at the time he negligently causes injury through some separate but additional act of negligence? For example, what if the insured was driving while holding an unsafely modified pistol which accidentally discharges and shoots the passenger when the vehicle drives over a bump in the road?¹¹ Does the homeowners liability policy cover the loss, or is that loss segmented to the automobile liability insurance market? Both acts—driving and modifying the pistol—appear necessary causes of the end loss. Thus, liability insurance exclusions are not as definable *ex ante* as those in property insurance because they are designed to catch a broad range of behavior. They are also not defined based on categorical

9. *Id.*

10. For example, the standard homeowners liability insurance coverage clause insures the policyholder for any liability or damage incurred as a result of his or her actions “anywhere in the world.” Rockwell Automation, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 544 F.3d 752, 759 (7th Cir. 2008); Sansalone v. Wawanese Mut. Ins. Corp., [2000] 1 S.C.R. 627 (Can.).

11. Somewhat similar facts occurred in *State Farm Mutual Auto. Insurance Co. v. Partridge*, 514 P.2d 123, 125–26 (Cal. 1973).

outside forces or discrete events acting upon some property. This unique quality of liability insurance proves important, as discussed later, when determining how to solve concurrent causation disputes in the liability insurance context.

A. Types of Insurance Disputes

There are two main types of insurance disputes which feature concurrent causation issues and which require some coherent doctrinal approach to enhance efficient dispute resolution.¹² The first and most common dispute is a simple coverage question: does an insurance policy provide coverage for a loss caused by two or more concurrent causes? These “coverage disputes” become complicated when one of the potential concurrent causes is a covered loss and the other potential concurrent cause is either not covered or, in fact, excluded from coverage by the insurance policy.

The second type of dispute is, at its heart, a loss distribution dispute among multiple insurers. It is a secondary question addressed only after the coverage disputes, if any, are solved. Loss distribution disputes add a level of complexity to the underlying coverage question: if a loss is caused by two or more concurrent causes, what happens if more than one insurance policy may potentially provide coverage for the same resulting loss? What if one cause is covered by one policy and another cause covered by another policy—which policy ultimately pays for the loss? Both? Neither? One or the other? These overlapping insurance disputes, or “loss distribution disputes,” are exceedingly expensive to answer because they involve multiple insurers with multiple competing interests.

For the remainder of this Article, it is helpful to refer to two consistent factual loss scenarios as examples which demonstrate common challenges for resolving various standard concurrent causation disputes. The first scenario is called the “Weathered House” scenario and involves discrete, serial concurrent causes in a property insurance context. Assume a house is insured by a standard “all risks” property insurance policy. The house is damaged in a large storm. High winds blow parts of the roof off, exposing the house contents to the elements. Rain then pours into the house, soaking the furniture and the internal structure of the house. The rain then turns to hail, which smashes breakable items within the house. The entire loss presents a serial causation issue. The wind alone caused some damage, as did the rain and hail alone. But each acted cumulatively,

12. Banks McDowell notes that insurance law disputes about causation usually involve issues of either concurrent causation or “dual coverage.” Because both coverage disputes and loss distribution disputes encompass concurrent causation concepts, this author chooses the terms “coverage dispute” and “loss distribution dispute” instead. Banks McDowell, *Causation in Contracts and Insurance*, 20 CONN. L. REV. 569, 570 (1988).

in sequence, to produce the ultimate loss. Assume the insurance policy covers loss caused by wind and rain, but excludes damage caused by hail. How, then, does one assess coverage for the loss?

The second example is called the “Work Site Cleanup” scenario and involves reciprocal, serial concurrent causes in a liability insurance context. This scenario is based on the facts of the Supreme Court of Canada *DerkSEN* case,¹³ although the insurance-related facts are common to this type of liability insurance dispute.¹⁴ In that case, there were two potential causes of the loss: negligent work site cleanup and negligent operation of an automobile. Both causes acted simultaneously to produce the loss. The insured did not properly load a heavy construction sign base into his vehicle.¹⁵ Instead, he rested it on an air compressor that was being towed by his vehicle. He then moved the compressor with his vehicle. The sign base somehow became dislodged and flew through the air, into an oncoming school bus. Tragically, one child was killed and three others were seriously injured. Assume an insured has coverage for work-related accidents under a commercial general liability policy. If the policy excludes coverage for use and operation of a vehicle (which nearly all commercial liability policies do), how, then, does one assess coverage for the loss? Part of the loss was caused by a covered cause (negligent cleanup) and part was caused by an excluded cause (negligent automobile operation).¹⁶ This case has added relevance in that the liability insurance acts as a gatekeeper for available accident compensation for the injured child accident victims. Without the negligent driver’s insurance coverage, the children have no source of recovery.

13. *DerkSEN* v. 539938 Ont. Ltd., [2001] 3 S.C.R. 398 (Can.). The *DerkSEN* case was, at heart, a loss distribution case. The contest was between both an automobile liability insurer and a commercial liability insurer. The auto policy provided coverage only for losses arising out of the “ownership, use or operation” of an automobile. The commercial general liability policy covered losses resulting from an insured’s negligence, but excluded coverage for losses caused by “ownership, use or operation” of an automobile. *Id.*

14. The insurance-specific facts in *Dersken* are similar, though not identical, to *Waseca Mutual Insurance Co. v. Noska*, 331 N.W.2d 917 (Minn. 1983). In that case, the driver of a pick-up truck shoveled a pile of recently burned ashes into the back of his truck in an attempt to clean up. He thought the flame was out. While he drove his vehicle, some embers relit in the back of his truck, and flew out, causing a fire. Was the fire loss caused by the negligent driving, in which case his automobile insurance policy would provide coverage? Or was the fire loss caused by the negligent ash cleanup, in which case his homeowners insurance policy would provide coverage? What if his homeowners policy excluded coverage for negligent acts involving an automobile? Do both policies respond? Neither? What if someone was hurt by the ensuing fire? Does the victim have no source of compensation if he or she sues the driver and the driver is held to have no insurance coverage for the accident? This case raises the identical coverage and loss distribution questions as *DerkSEN*.

15. Thus the act was deemed a separate, non-auto related cause of the accident. *DerkSEN*, 35 S.C.R 398.

16. *Id.*

B. A Word About Insurance Contract Interpretation

It is important to keep in mind throughout this Article that courts in different jurisdictions employ varying interpretive rules when assessing the meaning of insurance contracts. While this may have an effect on how a court deciphers the meanings of words within an insurance contract, it should not affect the adoption of a helpful cross-jurisdictional framework for concurrent causation, as the causal analysis is separate from the interpretive exercise that searches for contractual meaning for coverage. Whether or not a particular insurance policy covers loss caused by “flood” is the contractual interpretation question. Whether or not “flood” somehow actually will be the legal trigger for insurance coverage is the question relevant to concurrent causation.

Nevertheless, the contractual interpretation question is relevant at some point as to whether or not one is even considering the relevance of a particular cause of a loss. Most American courts see insurance contracts as contracts of adhesion. They construe insurance contracts *contra proferentem*, as against the insurer, to redress the perceived imbalance of power between the insurer who drafts the policy and the insured who has little to no ability to bargain for the terms of the contract.¹⁷ Most American courts also interpret coverage clauses broadly and exclusion clauses narrowly. A few American jurisdictions apply some form of the reasonable expectations doctrine, which interprets policies so as to give effect to the reasonable expectations of an insured (and, in some cases, an insurer as well).

By contrast, unlike many American courts, English courts do not interpret an insurance policy *contra proferentem* unless the policy is ambiguous.¹⁸ English courts also do not apply the reasonable expectations doctrine, nor do they interpret coverage and exclusion clauses differently.¹⁹ They instead adhere to a traditional view of insurance as contractual bargain between two parties. Canadian courts fall between American and

17. There is a broad array of viewpoints on American insurance contract interpretation. See, e.g., Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531 (1996); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006); James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995 (1992); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970); Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543 (1996); Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037 (1991).; Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075 (2010).

18. See John Lowry & Philip Rawlings, *Proximate Causation in Insurance Law*, 68 MOD. L. REV. 310, 317(2005) [hereinafter Lowry & Rawlings, *Proximate Causation*] (noting that English courts adhere to an insurance contract as “bargain” theory of interpretation, less protective of the insured than most American states). See also JOHN LOWRY & PHILIP RAWLINGS, INSURANCE LAW: DOCTRINES AND PRINCIPLES 220–22 (2d ed. 2005) [hereinafter LOWRY & RAWLINGS, INSURANCE LAW].

19. *Id.* at 220–222.

British courts in terms of strict adherence to a contractual approach to interpretation and a balancing of rights of insured over the insurer.²⁰ In Canada, ambiguity is the gatekeeper to the more insured-friendly interpretive tools found in many American states, like the reasonable expectations doctrine and *contra proferentem*. Therefore, the differing interpretive tools among various jurisdictions both within and outside the United States may affect how a court might read a particular coverage clause, and thus reach a different result on similar facts. However, the differing approaches to insurance contract interpretation are not a barrier to adopting a cohesive and portable legal framework for concurrent causation in insurance because the causal inquiry is separate from the interpretive question. In essence, the causal inquiry follows a court's determination of insurance coverage within the bounds of the insurance policy wording.

II. CAUSATION IN INSURANCE IS DIFFERENT THAN TORT CAUSATION

Causation in insurance law is different than causation in tort law.²¹ This difference needs to be recognized when crafting efficient legal rules for solving insurance causation disputes. There is a remarkable temptation to reach for tools from tort law when assessing issues of insurance causation. A major source of temptation stems from the fact that the word “causation” is the same as a fundamental step in tort law’s negligence analysis—the determinations of cause-in-fact and proximate cause. Another is the very notion that liability insurance uses the tort system as a filter through which liability insurance coverage is triggered. The tort system is thus integral to the operation of the insurance system. Yet the two systems examine the causation question for fundamentally different purposes. In tort, it is to assess fault for wrongdoing. In insurance, it is to determine when the operative terms of a contractual bargain come into play. How one adopts tools for solving disputes about concurrent causation in insurance ultimately first depends upon what causation in insurance law means.

Causation in tort ties the responsibility of the tortfeasor’s substandard behavior to the actual loss suffered by the injured plaintiff.²² It operates in

20. This Canadian hybrid approach to insurance contract interpretation first calls for solving the interpretive question using standard contractual interpretation principles. However, coverage clauses are interpreted broadly, exclusions narrowly. If the contract is ambiguous, then the court looks to *contra proferentem* and the reasonable expectations of *both* insured and insurer alike in determining meaning. See CRAIG BROWN, INSURANCE LAW IN CANADA (1991); BARBARA BILLINGSLEY, GENERAL PRINCIPLES OF CANADIAN INSURANCE LAW 136–45 (2008).

21. Indeed, Banks McDowell differentiates between tort and insurance concepts of causation. Tort causation he calls “liability causation” because the inquiry focuses on fault-based concepts of liability. Contract causation he calls “damage causation” because the inquiry focuses on whether or not a particular contractual indemnity payout is triggered. See McDowell, *supra* note 12, at 576–78. See also JERRY & RICHMOND, *supra* note 1, at 578–80; STEMPLE, *supra* note 1, § 7.01.

22. Jeffrey Stempel notes that, unlike insurance causation, tort causation “encompass[es] socially imposed regulation of relationships.” See STEMPLE, *supra* note 1, § 7.01, at 7–6.

a fault-based system where causation is the bridge between the tortfeasor's act and the fault, or blame.²³ Regardless of one's positivist viewpoint on the tort system,²⁴ causation attempts to link blameworthy conduct with responsibility for loss. Cause-in-fact analysis asks whether or not a defendant's breach of the applicable standard of care is a de facto cause of the plaintiff's harm. Proximate cause analysis is designed precisely to determine whether or not the isolated cause-in-fact will actually be deemed the legally responsible cause. If the cause is too far down the causal chain of events, it will not be a legally responsible cause. The tort system's twin goals of compensation and deterrence drive the fault-based inquiry. Courts and scholars soundly agree that proximate cause analysis in tort is a murky, unpredictable legal doctrine.²⁵

Insurance law, however, uses causation for a different, and arguably much simpler, task. In insurance law, fault of "the cause" is irrelevant.²⁶ The cause may often not even be human behavior, as is the case with, for example, a property insurance claim for weather damage to a house. Even if a cause of an insured loss is human behavior—a breach of the applicable standard of care via the tort system—in the insurance law context, the causation question is not asked to determine fault of the tortfeasor but instead is merely asked to determine whether or not the mere happening of the behavior triggers insurance coverage within the language of the policy. The question is not "who is to blame and why" but merely "what happened." Insurance causation therefore bears little resemblance to the poli-

23. See, e.g., H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) [hereinafter WEINRIB, PRIVATE LAW]; John C. P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007); Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031 (2003); Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941 (2001); Ernest J. Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989) [hereinafter Weinrib, *Special Morality*].

24. For corrective justice standpoints on the law of torts, see WEINRIB, PRIVATE LAW, *supra* note 22; Weinrib, *Special Morality*, *supra* note 22; Richard Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435 (1985). For law and economics standpoints on the law of torts, see Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980); Steven Shavell, *Uncertainty Over Causation and the Determination of Civil Liability*, 28 J.L. & ECON. 587 (1985); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

25. The literature about the inherent mystery of proximate cause is vast. See Leon Green, *Forecastability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); Gerald Dworkin, *Risk and Remoteness—Causation Worse Confounded*, 27 MOD. L. REV. 344 (1964); John C. P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 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 (2001); Jane Stapleton, *Choosing what we mean by "Causation" in the Law*, 73 MO. L. REV. 433 (2008).

26. Indeed, contractual breach is traditionally conceived of as a strict liability damages system. George M. Cohen has, however, provided a unique opposing proposition: a fault-based economic theory of contract damages designed to illuminate why contractual damages are often non-compensatory and how various traditional damages interests operate. See George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225 (1994).

cy-laden proximate cause analysis of tort law. The causation inquiry is only important as it relates to insurance coverage. It is essentially a question that merely asks whether or not the “topic” of a contractual right is going to be in play.²⁷ It is a “payout” question, not a “blame” question. As Banks McDowell notes, the causation analysis in insurance is almost the reverse of tort.²⁸ One first asks if the loss is the type for which the insurer agreed to indemnify. Next one looks at causation, but only as an occurrence as related to insurance coverage (and not fault). Finally, one looks at the scope of coverage (or extent of liability).

For example, Jane Stapleton argues that it is incorrect to use information about comparative insurability among potential tortfeasors in a tort lawsuit as an influencing factor when assessing relative tort liability among those tortfeasors.²⁹ The problem is this: the inquiry forces a court to determine why the court is providing compensation through tort law, which is a dangerous move away from the corrective justice and deterrence aspects of tort law and a move toward a reductionist viewpoint about the cheapest method of insuring individuals and distributing risks. In short, one should not see tort as insurance, according to Stapleton.³⁰ The two systems are different and operate in a completely separate normative framework. This Part of this Article is effectively attempting to prove Stapleton’s argument by doing so in reverse, from the contractual standpoint backward to tort. While insurance may be the backbone of the tort system, it is not the tort system. It is a contractually driven loss-spreading mechanism.

To that end, analogies to the tort system’s conceptions and jurisprudence of cause-in-fact and proximate cause are unhelpful and often extremely misleading in an insurance law context. Courts³¹ and commenta-

27. Jeffrey Stempel notes that insurance causation is a much narrower type of analysis than tort causation, largely because the very contractual language of the insurance policy itself acts as a limiter on causation. STEMPPEL, *supra* note 1, § 7.01, at 7–7.

28. McDowell, *supra* note 12, at 576.

29. See Jane Stapleton, *Tort, Insurance and Ideology*, 58 MOD. L. REV. 820, 831–32 (1995).

30. *Id.* at 831.

31. This concern was echoed by the United States Supreme Court in the marine insurance case of *Standard Oil Co. v. United States*, 340 U.S. 54, 66 (1950): “[t]he subtleties and sophistries of tort liability for negligence are not to be applied in constraining the covenants of [an insurance] policy.” An early juridical example of the “contractual” view of causation is Justice Cardozo’s decision in *Bird v. St. Paul Fire & Marine Insurance Co.*, 120 N.E. 86 (N.Y. 1918), a case about marine insurance and a fire. Cardozo’s causation analysis called for a recognition of the reasonable expectations of the parties to the contract. *Id.* at 87. The thinking in this decision was likely a pre-cursor to the evolution of the reasonable expectations doctrine as it exists in insurance law today. For a helpful contextual analysis of the importance of this decision to insurance law, see Peter Nash Swisher, *Insurance Causation Issues: The Legacy of Bird v. St. Paul Fire & Marine Ins. Co.*, 2 NEV. L.J. 351 (2002) [hereinafter Swisher, *The Legacy of Bird v. St. Paul Fire*]. For a recent example of courts recognizing the need to separate tort from insurance causation, see, e.g., *Allstate Insurance Co. v. Smiley*, 659 N.E.2d 1345, 1354 (Ill. App. Ct. 1995).

tors³² have cautioned against borrowing tort concepts of causation when dealing with insurance disputes as the concepts, when transported, create more problems than they often solve. The tools of tort were created specifically for fault-based inquiry. Using those same tools in insurance settings changes the contractual analysis in a fundamental way.³³ It opens the door for morality-based decision patterns which produce illogical and unpredictable results in a contractual sphere.³⁴ The proximate or dominant cause approach to insurance causation, discussed in full later,³⁵ advocates choosing the most “blameworthy” cause. It borrows heavily from proximate cause analysis in tort. There is a marked tendency in cases that adopt a dominant cause approach to implicitly assess relative “blame” or “fault” to a certain cause of a loss in a way other than as one of a faultless series of potential insurance coverage triggers. Coverage decisions then get made with reference, implicitly or explicitly, to the cause with the greatest relative blameworthiness. Read any insurance policy. No clause grants an insured coverage rights based on which loss trigger was most at fault in the moral sense of the word. The policies grant coverage based on the mere existence of a causal event that brought about a “happening” in reality. That is as lofty as “cause” is put in the insurance world.

Unfortunately, in cases of competing concurrent causes, there are few if any tools to which courts can turn.³⁶ Often, the result is an importation of proximate cause principles of tort and the underlying morality issues that come with that. Causation principles in contract law generally are

32. See, e.g., STEMPLE, *supra* note 1, § 7.01, at 7-7; 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, 32033 (2008) (though Lavitt eventually advocates a return to a “but for” tort-like analysis for concurrent causation).

33. Daniel J. Bussel notes that, in cases of concurrent breach of contract, some courts inappropriately import tort concepts of joint and several liability into contract law in order to solve contractual disputes. See Daniel J. Bussel, *Liability for Concurrent Breach of Contract*, 73 WASH. U. L.Q. 97, 107–119, 122 (1995) (citing the following reasons that such behavior is inappropriate: (1) unlike tortfeasors and victims, parties in a contract choose each other; (2) tort injury addresses primarily personal injury and property destruction, while contract addresses economic loss tied to performance of the contract; (3) tort law serves an inherent distributive function that contract law does not).

34. In fact, Michael Trebilcock argues that the current insurance system is a “random form of judicially administered wealth redistribution” that does little or nothing to foster efficiency, corrective justice, or distributive justice concerns. Trebilcock, *supra* note 7, at 258.

35. See *infra* Part III.B.

36. One very interesting and elegantly simple solution to causation in insurance, articulated by Malcolm Clarke, is to limit the causation inquiry to only those possible causes that are actually mentioned by the policy in either coverage or exclusion clauses. Any other causes are outside of the spectrum of inquiry. Clarke anchors this idea in the notion that insurance causation is a purely contractual inquiry. The only causes in play are those mentioned by the contract of insurance. This approach, in practice, appears to lead to a liberal approach to causation as a default rule when a covered cause combines to produce a loss with a non-covered but not excluded cause. See *infra* Part III.C. Because only the covered cause is in play in the analysis, coverage must attach, even in the presence of an alternate, competing cause, simply because the covered cause is stipulated in the policy. See MALCOLM CLARKE, *POLICIES AND PERCEPTIONS OF INSURANCE LAW IN THE TWENTY-FIRST CENTURY* 184 (2005).

relegated to questions about the link between breach of the contract and reasonably foreseeable loss.³⁷ There is little to fill the gap between tort and contract causation. This is likely why past academic attempts to provide some tools for insurance causation analysis have repeatedly led to an adoption of proximate cause principles borrowed from tort law.³⁸ And when courts import the tort principles into insurance, the results are unpredictable and costly to litigate.³⁹

III. CONTEMPORARY APPROACHES TO CONCURRENT CAUSATION IN INSURANCE

Courts presently utilize three possible approaches to solving concurrent causation disputes in insurance: the conservative, liberal, or dominant cause approach.⁴⁰ A fourth possible approach, apportionment, has been described only in academic literature to date but has not yet been adopted by courts. What follows is a brief explanation of each approach. The explanation will set the stage for proposed reforms as to how concurrent causation disputes are solved.

A. *The “Conservative” Approach*

The purest form of the conservative approach to concurrent causation holds that if one cause in a causal chain is excluded from insurance coverage, the entire loss must be excluded from coverage, even if other causes may be covered by the policy. In other words, if there are two concurrent causes and one cause is covered by the policy and one excluded, the exclusion takes precedence and the loss is not covered. A minority of states,⁴¹ as well as Britain,⁴² generally apply the conservative approach in solving concurrent causation insurance disputes.

37. See RESTATEMENT (SECOND) OF CONTRACTS §§ 351–52.

38. See *infra* Part V.A. See also JERRY & RICHMOND, *supra* note 1, at 574–77; EDWIN W. PATTERSON, ESSENTIALS OF INSURANCE LAW 226–71 (2d ed. 1957); William C. Brewer, Jr., *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141 (1961).

39. McDowell, *supra* note 12, at 585.

40. JERRY & RICHMOND, *supra* note 1, at 567–92.

41. See, e.g., California (for first party property insurance only): Julian v. Hartford Underwriters Ins. Co., 110 P.3d 903, 912 (Cal. 2005) (rain-induced landslide loss excluded by broad weather-related exclusion); CAL. INS. CODE § 530 (West 2005): “An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.” (codifying the dominant cause approach as a default rule if the insurance contract is silent as to concurrent causation). See also N.D. CENT. CODE. § 26.1-32-03 (2009) for North Dakota’s statutory response to insurance causation, which provides: “When a peril is excepted specially in an insurance contract, a loss which would not have occurred but for that peril is excepted although the immediate cause of the loss was a peril which was not excepted.” See also W. Nat. Mut. Ins. Co. v. Univ. of N.D., 643 N.W.2d 4, 12 (N.D. 2002); Maryland: N. Assurance Co. of Am. v. EDP Floors, Inc., 533 A.2d 682 (Md. 1987); Michigan: Vanguard Ins. Co. v. Clarke, 475 N.W.2d

The classic example of this approach is the British case of *Wayne Tank*.⁴³ A factory that used liquid wax suffered a fire resulting from two possible causes: failure to install proper equipment (an excluded cause) and employee negligence in leaving the factory unattended (a covered cause). The English appellate court held that, even if a dominant cause was determined,⁴⁴ the exclusion would trump the covered peril because a specifically excluded cause acted concurrently with a covered cause. Exclusions therefore trump coverage under the conservative approach to concurrent causation.

A conservative approach to concurrent causation is generally synonymous with a view that insurance contracts are contracts bargained for between insurer and insured.⁴⁵ This approach makes the exclusion paramount. Perhaps the exclusion may be seen as defining the limits of coverage, especially in a policy with a broad coverage grant like liability insurance.⁴⁶ The insurer drafted an exclusion to define what was not an accepted risk. The insured purchased the policy with that exclusion and assented to it. Therefore, the exclusion should be upheld because, to do otherwise, is to render the exclusion meaningless.

The conservative approach gets more confusing if, among the concurrent causes, there is a covered cause plus a non-covered but non-excluded cause. A court applying the approach then has to decide whether to grant coverage, apportion the payout for each cause, use a dominant cause ap-

48 (Mich. 1991), followed by *Hayley v. Allstate Ins. Co.*, 686 N.W.2d 273 (Mich. Ct. App. 2004), and *Iroquois on the Beach, Inc. v. Gen. Star Indem. Co.*, 550 F.3d 585 (6th Cir. 2008); *Nebraska: Lydick v. Ins. Co. of N. Am.*, 187 N.W.2d 602 (Neb. 1971) (cattle driven off by windstorm fell through ice and drowned; drowning caused by ice collapse, an excluded cause). *But see Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. Co. of Neb.*, 528 N.W.2d 329, 333 (Neb. 1995) (windstorm-borne virus infects pigs and windstorm held to be the “proximate cause” of the harm); *Washington: Krempl v. Unigard Sec. Ins. Co.*, 850 P.2d 533, 535–36 (Wash. Ct. App. 1993) (concurrent causes “arising out of” excluded event not independent).

42. *See, e.g., Leyland Shipping Co., Ltd. v. Norwich Union Fire Ins. Soc'y, Ltd.*, [1918] A.C. 350 (H.L.); *Wayne Tank and Pump Co. Ltd. v. The Emp'rs' Liab. Assurance Co. Ltd.*, [1973] 3 All E.R. 825 (C.A.) [hereinafter *Wayne Tank*]; *Midland Mainline Ltd. v. Eagle Star Ins. Co. Ltd.*, [2004] EWCA Civ. 1042 (C.A.) (finding that a business interruption caused by two concurrent causes, one of which was excluded (wear and tear), resulted in the exclusion of the entire loss). *See also* RAOUL P. COLINVAUX, COLINVAUX'S LAW OF INSURANCE, 118–19 (Robert Merkin ed., 8th ed. 2006); Malcolm A. Clarke, *Insurance: The Proximate Cause in English Law*, 40 CAMBRIDGE L.J. 284 (1981); LOWRY & RAWLINGS, INSURANCE LAW, *supra* note 18 (describing how the adoption of the conservative approach in British courts can be explained by the differences between American and British insurance contract interpretation principles).

43. *Wayne Tank*, [1973] 3 All E.R. 825 (C.A.).

44. Lord Denning MR and Roskill LJ held that the dominant cause of the loss was the defective equipment, an excluded peril. However, if both causes were seen as co-dominant, as Cairns LJ held, all three judges agreed the exclusion cause would still take effect and oust coverage. *Id.*

45. Malcolm Clarke appears to prefer the conservative approach to concurrent causation as best adhering to the “insurance contract as bargain” nature of insurance law. *See* CLARKE, *supra* note 34, at 185. This is likely synonymous with the British tradition in interpreting insurance policies as contracts, as noted in note 18, *supra*.

46. *Wayne Tank*, [1973] 3 All E.R. 833 (C.A.).

proach, or deem a non-covered cause equivalent to an excluded cause. The most logically consistent approach in a jurisdiction which applies a conservative approach to concurrent causation would be to also deny coverage for a loss resulting from a covered plus a non-covered cause, for all the same contractually-based reasons that the jurisdiction would deny a loss resulting from a covered plus an excluded cause. However, Britain, a jurisdiction with a conservative approach to concurrent causation, does not do this.⁴⁷ It instead takes a pro-coverage approach in these instances, because the insurance contract did not specifically exclude the non-covered concurrent cause. Yet, the problem with this argument is that the policy also did not denote the insurer's agreement to cover the non-covered cause either. Perhaps the all-or-nothing analysis of insurance coverage boxes the court into this anomalous result.

B. The "Dominant Cause" Approach

The most prevalent approach to deciding concurrent causation insurance disputes is the dominant cause, or proximate cause, approach.⁴⁸ Yet this approach is also the most responsible for the haphazard, unpredictable jurisprudence surrounding concurrent causation in insurance.⁴⁹ The reason is simple: choosing one cause in a causal chain of events as *the* dominant cause often invites equity-based "justice" concerns to creep in and affect predictability of the result.

The dominant cause approach borrows heavily from tort law's doctrine of proximate cause. It requires a court to search among the possible concurrent causes and choose a dominant or proximate cause. If that cause is a covered cause, the loss is covered. If that cause is an excluded or non-covered cause, the loss is not covered. The dominant cause is said to be the cause which had the greatest effect on bringing about the loss.⁵⁰ It is

47. See, e.g., JJ Lloyd Instruments Ltd. v. N. Star Ins. Co. Ltd. (The "Miss Jay Jay"), 1 Lloyd's Rep. 32 [1987] (C.A.) (noting that when adverse sea conditions (a covered cause) are combined with defective boat design (policy silent as to coverage or exclusion) to damage a ship, coverage was allowed because no explicit exclusion excepted coverage).

48. See, e.g., W. Nat'l Mut. Ins. Co. v. Univ. of N.D., 643 N.W.2d 4, 12 (N.D. 2002); STEMPLE, *supra* note 1, § 7.02, at 7-12; Joseph Lavitt, *supra* note 32, at 15-16.

49. See, e.g., CLARKE, *supra* note 34, at 185-87 (explaining that the unpredictability of the "common sense" approach to choosing "a" cause leads to haphazard results and too much "judging"); JERRY & RICHMOND, *supra* note 1, at 560-66, 578-80; STEMPLE *supra* note 1, § 7.02, at 7-10 to 7-18. Richard A. Fierce, *Insurance Law—Concurrent Causation: Examination of Alternative Approaches*, 10 S. ILL. U. L.J. 527, 544-45 (1985) advocates that any approach, even the conservative approach with all its problems, is better than the unpredictable "hocus pocus" of the dominant cause approach. Joseph Lavitt, *supra* note 30, argues against the dominant cause approach because efficient proximate cause doctrine produces different results in different jurisdictions for property insurance disputes.

50. See JERRY & RICHMOND, *supra* note 1; STEMPLE, *supra* note 1. The approach stems from the 1917 British decision of *Leyland Shipping Co. Ltd. v. Norwich Union Fire Insurance Society Ltd.*, [1918] A.C. 350, 369 (H.L.) (appeal taken from K.B.), where the House of Lords held, per Lord

not necessarily the last cause in the chain.⁵¹ It is the most “responsible” cause. Forcing a court to choose the most “responsible” cause prompts a court to confuse causation principles in tort and contract law. Most often, the dominant cause approach leads to the most “responsible” cause being deemed based on who the court wants to be “responsible” for bearing the loss, not necessarily the factual cause of the loss. Nevertheless, this is the predominant approach to concurrent causation in the United States. It is also used in Britain,⁵² in combination with the conservative approach. It featured largely in Canadian insurance jurisprudence until the Supreme Court of Canada adopted the liberal approach in *DerkSEN*⁵³ in 2001.

The dominant cause approach is likely so deceptively attractive to courts because it offers a sense of decisive choice with a dash of equity: choose the cause most “at fault” for the loss.⁵⁴ There is a perception that only the insurer who has agreed to underwrite the main causative risk will be saddled with the cost of covering the loss. Being able to determine coverage disputes by saying “that is the cause that most brought about the loss” carries with it a profound sense of finality and fairness. But its application has been anything but fair on a systemic level. The reason is simple: courts are not consistent in choosing a dominant cause.

Answers to the dominant cause question differ based on how the factual story leading up to the loss is told. “Dominance” is often in the eye of the beholder. There is little consistency among jurisdictions and even among the same courts with similar fact patterns in cases over time.⁵⁵ This has created a tortured pattern of litigation because litigants cannot reliably

Shaw, that the proximate cause is the cause which is “proximate in efficiency.”

51. Although that approach has certainly been employed as well. *See, e.g.*, *Bird v. St. Paul Fire & Marine Ins. Co.*, 120 N.E. 86 (N.Y. 1918); *Pan Am. World Airways v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974).

52. *Wayne Tank*, [1973] 3 All E.R. 825 (C.A.).

53. *DerkSEN v. 539938 Ontario Ltd.*, [2001] 3 S.C.R. 398 (Can.).

54. Peter Nash Swisher argues that the dominant cause approach is probably the best middle ground approach to concurrent causation in insurance, rather than a liberal or conservative rule, as neither is consistent with the reasonable expectations of the parties. *See Swisher, The Legacy of Bird v. St. Paul Fire*, *supra* note 29, at 370-71. The dominant cause approach, according to Swisher, is the best option to apply if a fact-finder can indeed isolate a dominant cause. *Id.* If no cause can be isolated as the dominant cause, Swisher argues for a pro-coverage liberal rule to be applied. *Id.* at 371. This concept is similar to Robert H. Jerry’s dual-approach strategy. *See JERRY & RICHMOND*, *supra* note 1, at 574-78. Robert H. Jerry argues for a dominant cause approach as a default rule where the dominant cause is discernable. *Id.* If it is impossible to choose a dominant cause, Jerry advocates switching to the liberal approach. *Id.* at 578. The problem with leading with a dominant cause approach, as Swisher and Jerry propose, is that it continues to invite the hair-splitting causal inquiry that creates such inefficiencies in the first place. Perhaps there will be few times when a court would admit that it is “impossible” to find a dominant cause in a given factual scenario.

55. *Compare Duensing v. State Farm Fire & Cas. Co.*, 131 P.3d 127 (Okla. Civ. App. 2005) (“earth movement” exclusion clause ambiguous and not triggered when dominant cause of loss was erosion of sand fill under house) *with Davis-Travis v. State Farm Fire & Cas. Co.*, 336 Fed. App’x. 770 (10th Cir. 2009) (“earth movement” exclusion clause unambiguously triggered when dominant cause of loss is movement of subgrade earth under home).

predict coverage in concurrent causation cases where the dominant cause approach will be applied.

C. The "Liberal" Approach

The liberal approach to concurrent causation is the reverse of the conservative approach: in the case of a contest among causes, the insured wins. If one cause in the causal chain is a covered cause, the entire loss is covered under the liberal approach. This rule operates whether the dispute is a coverage dispute or a loss distribution dispute. Only a minority of states⁵⁶ and Canada⁵⁷ adhere to the liberal approach to concurrent causation. Like the conservative approach, it is a simple legal rule to apply. The question remains as to whether it is a costly legal rule to maintain. On a systemic level, arguably it is not.

The liberal approach was first invoked in California in an insurance causation case called *Partridge*.⁵⁸ The insured, Partridge, had filed down the trigger of his .357 magnum pistol so it would fire at the slightest touch. Partridge was holding the pistol in his lap while riding as a passenger in a truck. The truck struck a bump and the pistol discharged, injuring the driver. The contest for payment of the loss was between two third party liability insurers: Partridge's homeowners liability insurance policy and an automobile liability policy.⁵⁹ Because the loss was held to be concurrently caused both by Partridge's negligence in filing down his pistol trigger and the negligence in driving, both insurance policies were called upon to cover the loss.⁶⁰

56. The following states have adopted some permutation of the liberal approach to concurrent causation: (1) Florida: *Wallach v. Rosenberg*, 527 So. 2d 1386, 1387-88 (Fla. Dist. Ct. App. 1988); (2) Minnesota: *Waseca Mut. Ins. Co. v. Noska*, 331 N.W.2d 917 (Minn. 1983), followed by *State Farm Ins. Co. v. Seefeld*, 481 N.W.2d 63, 65 (Minn. 1992); (3) Missouri: *Cawthon v. State Farm Fire & Cas. Co.*, 965 F. Supp. 1262, 1269 (W.D. Mo. 1997); (4) New Jersey: *Salem Group v. Oliver*, 607 A.2d 138, 140 (N.J. 1992); (5) Tennessee: *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 887-88 (Tenn. 1991), followed by *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901, 906-07 (W.D. Tenn. 2001); (6) Wisconsin: *Lawver v. Boling*, 238 N.W.2d 514, 520 (Wis. 1976). Other states recognize the liberal approach to concurrent causation, but only where the concurrent causes are completely independent of one another, each capable of causing some loss: (1) Florida: *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1330 (11th Cir. 2005); (2) Ohio: *U.S. Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.*, 716 N.E.2d 1201, 1205-06 (Ohio Ct. App. 1998); (3) Texas: *Guar. Nat. Ins. Co. v. N. River Ins. Co.*, 909 F.2d 133, 137 (5th Cir. 1990); *Bituminous Cas. Corp. v. Maxey*, 110 S.W.3d 203, 215 (Tex. App. 2003); (4) Vermont: *Vt. State Farm Mut. Auto. Ins. Co. v. Roberts*, 697 A.2d 667, 669-70 (Vt. 1997). The Supreme Court of Canada adopted the liberal approach for Canadian insurance cases in *Derkzen*, 3 S.C.R. 398. California also applies the liberal approach, but for third party liability insurance cases only. See *State Farm Mut. Auto. Ins. Co. v. Partridge*, 514 P.2d 123, 125 (Cal. 1973); *Garvey v. State Farm Fire and Cas. Co.*, 770 P.2d 704, 714 (Cal. 1989); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903 (Cal. 2005). That state applies a dominant cause approach for first party property insurance cases.

57. *Derkzen*, 3 S.C.R. 398.

58. *Partridge*, 514 P.2d 123.

59. *Id.* at 126.

60. *Id.* at 132.

The California Supreme Court has since relegated the liberal approach to concurrent causation to only cases of third party liability insurance in which concurrent causation is featured.⁶¹ First party property insurance losses follow the dominant cause approach. The reasoning as to why the California Supreme Court created this split is informative for defining a set of legal rules for concurrent causation disputes. First party insurance, unlike third party insurance, allows the insurer and insured to more surgically control both coverage and exclusionary language. The nature of property insurance is such that it covers losses which produce an effect on a tangible thing (e.g. weather damage to a home). Concurrently caused losses in property insurance are most often sequentially caused losses, in which one or another cause can more often be separated out as to its “responsible” effect. However, concurrently caused losses in the liability insurance context are more complex. It is often impossible to separate out the causes. Therefore, California is unique in that its courts only apply the liberal approach to concurrent causation for liability insurance disputes. As will be discussed below, there is merit to the California Supreme Court’s observations about the applicability of a liberal approach to concurrent causation for certain insurance cases where losses are caused by reciprocal, indivisible causes.

D. The “Apportionment” Approach

The final possible approach to concurrent causation in insurance, apportionment, has not yet been adopted in any jurisdiction, but has been suggested in scholarly literature.⁶² This approach involves apportioning percentage responsibility to each cause in the causal scenario that had some role in bringing about the loss. The coverage question can then be asked on a “per-cause” basis. Insureds are then indemnified according to the percentage responsibility of each concurrent cause in the factual matrix. In the Weathered House example, assume wind is responsible for 20% of the ultimate loss, rain responsible for 20% of the ultimate loss, and hail responsible for 60% of the ultimate loss. If wind and rain are covered causes, and hail is an excluded cause, the insured is indemnified for 40% of the ultimate loss by the property insurer. Sixty percent of the loss was caused by an excluded peril, so the insured should rightfully not be indemnified by the insurer for that proportion of the loss.

61. See, e.g., *Garvey*, 770 P.2d 704, 714; *Julian*, 110 P.3d 903, 912.

62. Richard A. Fierce first suggested an apportionment approach to concurrent causation, an analysis borrowed from comparative negligence doctrine. Fierce, *supra* note 47 at 544–45. The notion was again posited by Mark Umeda in *Concurrent Proximate Causes in Insurance Disputes: After Garvey, What Will Policyholders Expect?*, 29 SANTA CLARA L. REV. 423, 453–56 (1989) and in Canada by Anthony J. Saunders, *Proximate Cause in Insurance Law—Before and After Derksen*, 32 ADVOC. Q. 140, 166 (2006).

Apportionment is akin to a comparative negligence analysis in tort,⁶³ where various tortfeasors are assessed percentage contributions of fault.⁶⁴ Such an analysis in the insurance law sphere is routinely undertaken to determine payout contribution among competing insurers but only *after* coverage determinations have taken place. This is particularly common in loss distribution disputes. Fact finders must then determine which insurers pay how much.⁶⁵ It therefore raises the question: why not move the same approach to the front end of the dispute and use it to assist in solving certain concurrent cause cases?

IV. THE NEED FOR EFFICIENT LEGAL RULES FOR CONCURRENT CAUSATION INSURANCE DISPUTES

A new set of legal rules is necessary to efficiently solve issues about concurrent causation in insurance. This Part details why, by carefully examining the costs and benefits of each of the four possible approaches to concurrent causation. What form the new legal rules should take and why is left to the next Part.

Concurrent causation cases are the most costly, inefficient, tortured and unpredictable of insurance cases. They also appear remarkably frequently in the litigation system. Settlement is therefore unlikely, owing to the unpredictable nature of the outcomes. It is difficult for insurers and insureds alike to arrange their insurance and indeed, their very conduct, around shifting standards for resolving these disputes. Different jurisdictions approach the problem of concurrent causation in different ways. Even within jurisdictions, various approaches provide little doctrinal guidance to courts, insurers, and insureds faced with determining coverage questions about concurrently caused losses. The major efficiency problems with contemporary approaches to concurrent causation include issues of jurisprudential consistency, inefficient pleading problems, inefficient counsel involvement, and a potential offloading of liability to a secondary insurance market: the insurance brokers.

63. See Fierce, *supra* note 47, at 544.

64. See, e.g., David W. Robertson, *Love and Fury: Recent Radical Revisions to the Law of Comparative Fault*, 59 LA. L. REV. 175 (1998); Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977 (2003).

65. There is often language in insurance policies which dictate cost-sharing priorities. Commonly called "other insurance" clauses, most of these clauses deem the policy "secondary" insurance and require other insurers to pay out the loss first on a "primary" basis. A contest among "other insurance" clauses often ensues. A variety of loss distribution principles have been created in insurance law to deal with this loss-sharing among competing insurers.

A. The Cost of Inconsistency

1. Why Consistency Costs Matter

There is no question among courts and academics that concurrent causation insurance cases across jurisdictions, and even within jurisdictions, produce wildly unpredictable results and are jurisprudentially inconsistent.⁶⁶ For example, the California Supreme Court has shifted to three perceptibly different doctrinal approaches to concurrent causation from 1973 to 2005.⁶⁷ This creates serious cost consequences in a variety of ways.

First, there are increased information costs in litigating concurrent causation disputes in insurance, as compared to cases where the cause of the loss is a single cause.⁶⁸ Information costs here comprise the costs of obtaining the facts to determine the causation situation in dispute. Someone has to get the evidence about the causal story. The more complex the story, the more costly it is to get the evidence and sort through it. Fact-finding becomes a serious cost in these cases because there is a marked incentive to search through the chain of causal events to find either a covered (for the insured) or excluded (for the insurer) cause. If one is litigating in a jurisdiction which requires litigants to choose a dominant cause, there is often a costly inquiry to determine that question as well. Expert evidence often becomes necessary in order to determine the cause and effect of various causal factors acting together to produce the loss. Often, experts will have to disentangle causal factors in forensic fashion. This is expensive.

Second, there are increased complexity costs in litigating such cases. Complexity costs are those costs which are incurred due to the fact that a

66. See McDowell, *supra* note 12, at 585 (noting the predictability problems and increased litigation costs of insurance causation disputes); Lavitt, *supra* note 30 (explaining that proximate cause analysis produces different results in different jurisdictions, even though the facts and insurance policy wording are similar case-to-case).

67. In 1973, the California Supreme Court adopted a liberal approach to concurrent causation in *State Farm Mutual Auto. Insurance Co. v. Partridge*, 514 P.2d 123 (Cal. 1973), where the Court held that a loss was covered by an insurance policy, even if other, excluded causes combined to produce the loss. *Id.* at 131. In 1989, the Court restricted the liberal approach to only cases involving liability insurance with *Garvey v. State Farm Fire and Casualty Co.*, 770 P.2d 704, 714 (Cal. 1989). The dominant or proximate cause approach was adopted for property insurance cases involving concurrent causation. In 2005, the Court further narrowed the application of concurrent causation in a property insurance case by upholding an exclusion clause to oust coverage in a concurrently caused loss scenario when a covered cause combined with an excluded cause to produce a loss. *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 912 (Cal. 2005).

68. In cases where the cause of the loss is a single cause, the jurisprudential inquiry is one of contract interpretation only—is the loss that flows from the cause a loss that is covered under the insurance policy? The dispute is then a simple one, one about interpretation of the coverage provisions of the insurance contract, not whether or not there exist factual elements which even bring the insurance contract into play.

certain dispute is more complex to process, over and above the norm for solving a standard insurance contract dispute. Such costs include those additional costs that are beyond mere informational or fact-finding costs. They include the cost in a coverage dispute for discerning meaning in an insurance contract when faced with a concurrent causation factual pattern and dueling possibilities for coverage or exclusion of the loss. They also include the cost of determining which of one or more competing insurance policies will cover an insured loss in a loss distribution dispute. The interaction of the fact pattern with the insurance policy coverage language and concomitant exclusionary language makes for a more complicated dispute. It makes for protracted litigation. Because the legal rules for concurrent causation lead to unpredictable end results, litigants are therefore incentivized to lead evidence of long chains of complex causal events and multiple hypothetical causal scenarios (some plausible, some implausible) in the hopes of either tagging or avoiding coverage under an insurance policy.

Third, there are increased administration costs, flowing from the complexity and information cost increases.⁶⁹ It is far more costly to push complex insurance litigation through the civil justice system when litigants are unable to predict outcomes. The cases stay in the system and get to court. This results in costly delay, increased court time, increased resources to move the cases through the system, and increased procedural wrangling. The incentive to settle is low because the players do not have concrete information about how a court will assess a concurrent causation scenario. Cases about concurrent causation therefore stay in the justice system and drain resources precisely because it is impossible for litigants to predict outcomes.

Finally, on a systemic level, the consistency costs are highly inefficient. Case law consistency is mutable with the wind, it seems. Courts cannot utilize haphazard legal principles to come to internally consistent decisions. The current doctrinal rules utilized by courts permit different courts to see similar causal situations differently. Even repeat players such as insurers and insurance lawyers cannot enjoy heightened informational positions when predictability of results is so low. It is difficult for national and international insurers to settle cases or even set premiums with regard to concurrent causation cases when the doctrinal rules to resolve these disputes produce inconsistent results. Different pressure is leveraged on an insured who is at the cusp of litigation or who cannot even predict whether or not her policy will cover a concurrently caused loss. Not being able to consistently predict how the coverage or loss distribution dispute will un-

69. See, e.g., Trebilcock, *supra* note 7, at 243–44 (calling for administrative efficiency in insurance liability rules to contain decision and error costs).

fold puts the insured in a difficult informational position with respect to litigation decisions. Gaps in insurance coverage can result, or at best, cannot be predicted. The result is wasteful, risky, and inefficient litigation.

Insurers, insureds, and their counsel cannot reliably predict a court's response to coverage in a concurrent causation situation. Add to this the confusion created by mixing fault-based tort principles of causation with principles of contract law and a simple coverage case becomes a quagmire of mixed up doctrine. The overflowing inefficient result is surely felt in the insurance market.

2. How Consistency Costs Play Out

Consistency costs are the most serious problem with the dominant cause approach because of the all-or-nothing nature of insurance coverage. In cases where losses are caused by reciprocal, indivisible concurrent causes, it is actually impossible to find a dominant cause. The approach does not work for this subset of cases because both causes are necessary to bring about the loss: without both, the loss would not have occurred. Choosing "dominance" in an impossible to answer situation therefore becomes an exercise of something other than application of a legal rule. Therein lies the source of inconsistency among these types of concurrent cause situations. Justice McLachlin of the Supreme Court of Canada cautioned against the very unproductive "metaphysical debate" that surrounds the dominant cause approach to concurrent causation.⁷⁰ In the "Work Site Cleanup" scenario, how can the "dominant cause" be negligent automobile operation when, without the negligent work site cleanup, there would be no loss at all? The vehicle would have harmlessly passed by the school bus without the deadly sign base plate resting on the towed air compressor. Similarly, without the negligent work site cleanup, the sign base plate would not have ended up on the cross-member of the compressor. That alone is not sufficient to produce the loss. The vehicle needed to be in operation in order to propel the sign base at the school bus. These causes are, in effect, co-dominant.

In cases where losses are caused by discrete, divisible causes, it is at least more theoretically possible to find a dominant cause, but the information, complexity, and administrative costs in litigating that question are unusually high. This leads to extraordinary consistency costs. The causation question usually becomes one of proportionality: dominance equating to responsibility for the largest proportion of the damage. That may not be an obvious answer in most cases. It may certainly not even be a consistent answer among courts adjudicating the same fact pattern. In the "Wea-

70. C.C.R. Fishing Ltd. v. British Reserve Ins. Co., [1990] 1 S.C.R. 814, 823 (Can.).

thered House" example, what is the dominant cause? Is it the wind which took the roof off and allowed the rain to come in? Is it the rain which soaked a greater proportion of the insured's property? Or is it the hail, which is an excluded cause but which also smashed the insured's property, thereby causing the greatest dollar amount of damage? Regardless of the answer, the route to get there is expensive in information and complexity costs and lacks predictability.

The costs of error are high when using the dominant cause approach to arrive at an inefficient answer. In coverage disputes, the all-or-nothing approach of choosing a dominant cause forces an insurer to cover all of a concurrently caused loss when only perhaps one cause was agreed upon in the policy to be covered. Alternatively, the result could be that the insurer pockets a premium for a potentially covered loss from which the insurer escapes liability. Because the loss was a concurrently caused loss, the deemed dominant cause may not be covered, but the secondary cause contributing to the loss would normally be covered, if operating alone. No coverage would result in this situation.

The dominant cause approach therefore creates unpredictability in application and inefficient market effects on insurance. This has resulted in increased information expenses, increased administrative and complexity costs, and very high error costs. The end result is unfairness in this particular doctrinal rule's operation. The rule does provide artificial solace in that choosing a "responsible" cause as the dominant cause can create the perception that justice is being done. But the dyadic nature of the "one or the other" effect of the dominant cause approach ignores the whole problem of a concurrently caused loss: there is more than one cause at work. Choosing one cause over another in a case where the loss is caused by reciprocal concurrent causes where each is necessary to cause the ensuing loss is akin to being wrong one hundred percent of the time. The dominant cause approach is, for all these reasons, the most inefficient of the four possible approaches to concurrent causation in insurance.

There are, however, some obvious consistency cost efficiencies to the conservative and liberal approaches to concurrent causation. First, they are remarkably predictable low-cost legal rules to apply.⁷¹ For the conservative approach, if any one event in a causal chain is excluded by the policy, then coverage is excluded for the entire loss. For the liberal approach, as long as one cause is covered, the entire loss is covered. There are low information and administrative costs in applying these rules. All a court must do is examine the causal elements in question and determine which, if any, are excluded from coverage or instead trigger coverage.

71. The value of the conservative approach lies in its predictability, according to Fierce, *supra* note 47, at 545. The insurance contracts are written as either allowing no recovery or total recovery—an "all-or-nothing" contract. *Id.*

There are, on its face, apparently no complexity costs beyond the initial determination of the causal elements. Consistency costs are also lowest under these two approaches.

Yet, something feels inherently wrong with the conservative approach.⁷² The insured contracted for coverage. The insurer contracted to provide coverage, but also to avoid coverage in certain specified events. Why should an insurer benefit from the fact that a normally covered event will now not be covered because an excluded cause is operating somehow in concert with that typically covered cause? The application of this legal rule digs at one's sense of fairness because, in an all-or-nothing equation of insurance coverage, this approach errs on the side of nothing.

The conservative approach raises the specter of causal remoteness, which hearkens dangerously back to the baggage of proximate cause analysis in tort law. Which causes would be deemed concurrent? How far back can one trace causal events, particularly in cases with serial, sequential concurrent causes, in order to deem an excluded cause *the* cause which ousts coverage? What is a legally "responsible" cause to which a court can look in order to direct the coverage question? The answer likely lies in something akin to tort law's proximate cause analysis. As indicated in the beginning of this Article, a return to causation analysis from tort law imports a number of information, administrative, complexity, and certainly consistency costs into insurance law. These additional inefficiencies eclipse the cost-savings of applying a seemingly simple legal rule.

There are some obvious benefits to the liberal approach. First, its application enjoys comparatively low information, complexity, and administrative costs.⁷³ One only has to examine the various causes at work in a given loss. If one concurrent cause is covered, the loss is covered. The inquiry stops. There are strong predictability reasons for such a legal rule. There are virtually no complexity costs beyond ascertaining the various causes in play in a factual scenario. This is a marked savings particularly for losses caused by reciprocal, indivisible causes, which are most expensive and unpredictable to solve. The liberal approach avoids the "metaphysical debate" about causation.

In loss distribution disputes, multiple overlapping insurance policies may be triggered under this approach. This removes the dispute from an inquiry about interpreting responsibility among causes to instead one of true loss distribution. The dispute is then not between insured and insurers, but between insurers themselves as to how to ratably share the loss to

72. Peter Nash Swisher argues that the conservative approach goes against the reasonable expectations of the insured, a cornerstone interpretive concept in many American jurisdictions. See Swisher, *The Legacy of Bird v. St. Paul Fire*, *supra* note 31, at 369.

73. See, e.g., Fierce, *supra* note 47, at 544 (noting that the liberal approach is more expensive but has greater certainty costs).

be indemnified.⁷⁴ This is a more efficient dispute, as many insurance contracts either have provisions for loss sharing or, alternatively, the jurisdiction's legal rules about overlapping insurance coverage take effect to resolve the issue.

However, the liberal approach does create efficiency and fairness issues.⁷⁵ The approach to concurrent causation has the potential to frustrate exclusionary language in a policy. It may be too pro-coverage.⁷⁶ If an insurer has explicitly excluded a certain loss, the liberal approach may still require that insurer to indemnify the insured for the loss. In effect, coverage trumps exclusionary language.

This approach may fit more reasonably in those American jurisdictions and Canada that apply insurance contract interpretation rules built to counter the perceived imbalance between the insurer who drafted the policy and the insured who, unable to bargain over its terms, purchased the policy. For example, if a jurisdiction interprets coverage clauses broadly and exclusion clauses narrowly, the liberal approach to concurrent causation gives true credence to this maxim at the causation analysis stage. The approach also best fits with the *contra proferentem* and reasonable expectations doctrines, both of which favor an insured in interpreting insurance policies.

The liberal approach perhaps promulgates a fairer result in instances where two necessary concurrent causes produce the loss and neither on its own is sufficient to cause some harm. However, one can arrive at the opposite result in instances of sequential causation with independent causes. Where there may be one cause among the sequential causes that is seen as more "responsible" for the damage, if that cause is an excluded cause, there may still be coverage because a secondary or tertiary sequential cause, seen as a "minor" or "less responsible" cause, will be covered under the policy. This result smacks of unfairness for the insurer who articulated a desire not to cover a loss, only to have that excluded loss occur, and still have to indemnify the insured.

The liberal approach is not perfect. The ultimate question is whether or not the efficiencies gained in information, complexity, administration, and consistency cost reductions are instead offloaded into the insurance marketplace in terms of increased payouts for insurers and corresponding

74. Jeffrey Stempel notes that, if a tort arises from two concurrent causes, there is no reason why both insurers should not pro-rate the cost of indemnity, barring any contractual language indicating otherwise. *See STEMPTEL, supra* note 1, § 22.12, at 22–86.1.

75. In addition, Robert H. Jerry notes that the liberal approach invites a view that causes are somehow acting independently, even if they are not, in fact, independent. A division between serial and parallel causes solves this problem. *See JERRY & RICHMOND, supra* note 1, at 566–68.

76. Peter Nash Swisher notes that the insurer probably never contractually intended to provide such broad coverage as a liberal approach to concurrent causation "creates." *See* Swisher, *The Legacy of Bird v. St. Paul Fire, supra* note 31, at 369.

increases in insurance premium costs for insureds. There is a strong argument that the best way to solve that issue is to have those costs funneled into the insurance marketplace to fund creative loss distribution efforts, rather than have those costs wasted in decreased systemic efficiency.

There are also median-level consistency costs associated with the apportionment approach. There are comparatively moderate information, complexity, consistency, and administrative costs in assigning percentage responsibility for concurrent causes.⁷⁷ Sorting out these issues requires additional evidence and court time. There will likely be disputes about the various proportions themselves. For losses caused by sequentially sufficient causes especially, there will be complexity costs in determining proportionate responsibility among the various causes that happen in sequence. How does one arrive at a number in the “Weathered House” example? What numerical percentage corresponds to each cause? Does one use the estimated dollar value damage amount as the guidepost in a serial causation situation? Or perhaps instead the proportion of the cause which affected a greater amount of the property? (i.e. did rain touch more of the property than the hail, even though hail did more monetary damage?) This numerical exercise will also likely be completely different for each case, varying with the facts. Perhaps, over time, case precedents will, by analogy, prove helpful, but the initial run of cases would prove unpredictable.

For losses caused by reciprocal, indivisible concurrent causes, it is likely impossible to assign anything but an equally ratable share of responsibility on a per cause basis. To do otherwise is too costly an exercise. What is the percentage of negligent driving responsible for the ultimate loss in the “Work Site Cleanup” scenario? Thirty percent? Forty percent? Imagine the myriad of evidentiary permutations that would be required to exactly answer that question. Instead, one would expect in that case that a fact-finder would take the most efficient route and split the concurrent cause responsibility down the middle: 50% to each of the two causes. Apportionment is therefore likely inapplicable for co-dominant causation cases. The cost is too great (and perhaps an exercise in logical futility) to put a numerical value on a reciprocal, indivisible cause.

The one benefit to apportionment in loss distribution cases is that applying apportionment at the coverage determination stage also answers the loss distribution question among competing insurers. So there is a definite cost-savings. Apportionment is thus perhaps best suited to discrete, divisible causation cases and particularly those disputes involving loss distribu-

77. See, e.g., Fierce, *supra* note 47, at 544 (explaining that there is higher uncertainty and litigation costs with the apportionment approach that is outweighed in the tradeoff for greater recognition of reasonable expectations of both insured and insurer); Umeda, *supra* note 62, at 454055 (noting the potential for the approach to incentivize frivolous claims if causal thresholds for “responsibility” are not clearly set).

tion questions. The comparative causal factors can at least be notionally separated in sequence. The numerical exercise of assigning percentage responsibility is costly to perform, but likely results in the fairest result to the insurer and insured alike.

Comparatively, the most consistent and arguably least costly approaches to apply, on a systemic scale, are the liberal and apportionment approaches (although they are not without their own internal consistency issues as well). The dominant cause approach suffers from the potential to swing on a case-by-case basis to over-compensation or under-compensation. The conservative approach consistently denies coverage in an unfair manner and suffers further inconsistency by hearkening toward a proximate cause tort analysis where “cause” equates to unpredictable “fault.”

B. Offloading Indemnity Cost to Other Insurance Markets

1. Why Insurance Offloading Matters

The cost of any gaps in insurance coverage created in a case by a jurisdiction’s approach to concurrent causation may actually instead be offloaded to insurance brokers who sold the policies to the insured consumer. A simple example will illustrate. Assume an insured purchases a commercial liability insurance policy from an insurance broker and thinks she has complete coverage for all liability surrounding her business enterprise. The insured subsequently suffers a loss resulting from concurrent causes. One cause of the loss is covered by the policy, the other cause is excluded. The legal rule applicable in the insured’s particular home jurisdiction happens to deem the excluded cause the dominant cause of the loss and deny coverage. Alternatively, the applicable legal rule denies coverage for losses caused by a concurrent, excluded loss. The insured is left with no coverage, even though a covered loss was partly the cause of the loss. There is a gap in coverage for concurrently caused losses. This is likely something the insured did not expect. There could be two reasons why this gap occurs. One is an intentional creation by the insurance market, and the other is a true gap in coverage available on the market.

The intentional gap in coverage stems from market segmentation of insurance policies.⁷⁸ Different insurance policies are designed to cover different losses.⁷⁹ The available products in the insurance market are segmented based on pools of risks for similarly situated insureds. Homeown-

78. For an excellent discussion of market segmentation exclusions and their effect on the insurance market, see BAKER, *supra* note 8, at 455–62.

79. See, e.g., Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 105–07 (2001) (describing how modern insurance markets have fragmented into product lines based on aggregate risk pools).

ers liability insurance is thus a separate risk pool from that of automobile liability insurance, and so the products are drafted and marketed as two separate policies. Insureds who both drive and own a home therefore purchase two different policies and pay two different premiums based on two separate differential risk ratings.

To maintain the market segmentation of the products, insurers use market segmentation exclusions. A loss which triggers coverage in one policy is explicitly excluded in another. For example, as has been mentioned, the coverage grant in a standard automobile policy provides coverage for losses arising from use or operation of an automobile. A homeowners policy has a correspondingly worded exclusion clause, such that that policy's coverage grant explicitly does not cover losses arising from use or operation of an automobile. Consumers are expected to purchase separate automobile insurance which is available on the market.

However, as can be uniquely the case with concurrently caused losses, an insured can have multiple overlapping insurance policies and be faced with the argument from insurers that none of the policies respond to the loss as each cancels the other out with coverage clauses and corresponding market segmentation exclusions. This creates a true market gap because the policies were drafted as signifiers as to which policy bears the loss, not as clauses from which to escape contractual indemnity obligations. Additionally, insureds that face coverage gaps created by market segmentation exclusions therefore must face the argument that there was another product available in the market that the insured could have purchased to fill the gap.

The second gap created by some concurrent causation loss scenarios reveals a true gap in insurance coverage available on the market. Today's insurance policies are remarkably comprehensive, and marketed as such. A standard homeowners insurance policy grants coverage for an insured's actions anywhere in the world. "All risks" property insurance is also standard coverage, having replaced enumerated risks coverage as the policy of choice in today's market. An insured's coverage expectations are thus very high. Insureds expect full coverage for property and liability losses. Yet there are some losses for which there is no corresponding insurance coverage. In a concurrent causation loss scenario, an exclusion in a policy can often create an unexpected gap in coverage when a covered clause combines with an excluded cause. It is difficult for an insured facing a concurrently caused loss to have *ex ante* foreseen the precise concomitant set of events that might lead to loss of coverage. The result is a lack of available coverage for an insured, even if that insured wanted to purchase coverage for such a situation. The market simply has no solution.

The insured can then sue the broker in negligence for failing to provide adequate insurance or failing to advise the insured of a potential gap in coverage. The insured expected "full coverage." The loss initially cov-

ered by the insured's insurer (who collected a premium for underwriting at least part of this risk) then becomes the subject of a suit against the broker. The broker's own liability insurance is therefore triggered to respond to the "gap" in coverage, if the broker is found negligent in procuring suitable insurance.

Scenarios such as this result in a double inefficiency: a gap in available coverage plus the saddling of liability to a party who was not the primary cause of the loss, but the cause of the lack of indemnity for the loss. This may place greater strain on the brokers' insurance market with a corresponding inefficient enrichment of the primary insured's insurer who sold a policy and took a premium for a loss that, but for the fact of concurrent causation, may have been partly covered by an insurance policy.

2. How Insurance Offloading Plays Out

Insurance offloading under the dominant cause and conservative approaches create inefficient market gaps in coverage. The liberal approach avoids any issues with gaps in coverage created by the conservative and dominant cause approaches. In fact, this is a pro-coverage approach. As long as one cause in the causal chain is covered, the loss is covered. The benefit to an apportionment approach is that it is capable of acknowledging both coverage and exclusionary language in insurance policies, thereby avoiding complete gaps in coverage. Insurers indemnify insureds only for what the parties contracted, and on a rationally proportional basis. Unlike the all-or-nothing qualities of the conservative and dominant cause approaches, apportionment allows for at least some recovery in concurrent causation situations. Unlike the liberal approach, apportionment avoids the problem of insurers indemnifying for losses which they specifically agreed not to indemnify. Apportionment is a "split the difference" methodology, neither pro-insurer nor pro-insured in aggregate result.

On a practical level, the conservative approach has the greatest potential to frustrate coverage language within the policy: it denies coverage in all reciprocal, indivisible concurrent causation situations, creating gaps in insurance coverage that no current product on the market can fill. Recall that the coverage grant for both all-risks property and liability policies is generally remarkably broad "all risks" insurance. Similarly, liability insurance coverage typically insures against liability stemming from the insured's actions anywhere in the world. It is most often "behavior" insurance, or tort insurance. Like all-risks property coverage, liability insurance coverage supports the general assumption that coverage is granted. For what could be broader than "all risks" or indemnity for anything anyone does in the world?

Yet, the all-or-nothing methodology of the strict conservative approach means that, in disputes about concurrent causation, the insured

always loses. Disputes about concurrent causation only exist because one potentially excluded cause is in the mix. If, every time that occurs, coverage is denied, the very purpose of the broad coverage grant is frustrated. Insureds may be misled as to the scope of their coverage, because concurrent causation scenarios are difficult for insurance consumers to reliably predict. Insurers may be escaping contractual liability for losses they actually agreed to pay because of the happenstance of a second non-covered cause in the factual matrix. Such an approach may, in fact, increase costly litigation behavior as it incentivizes insurers to search for a concurrent excluded (or perhaps non-covered) cause in the hopes of ousting coverage. Most factual scenarios leading to a loss have multiple causal factors. So the cost savings in the conservative approach being a simple, predictable legal rule may be lost not only in increased litigation costs but in an unfair pocketing of premiums by insurers who are essentially then writing contracts which are only enforceable in non-concurrent causation situations. That fact is surely not brought to the insured's attention in any insurance policy wording.

The conservative approach therefore creates serious market gaps in insurance products. The gap issue is more problematic in liability insurance markets than in property insurance markets. First, no insurer markets concurrent causation insurance.⁸⁰ In fact, as will be explained below, most policies are rife with anti-concurrent causation language. Anti-concurrent cause clauses are really just contractual embodiments of the conservative approach to concurrent causation. A pair of simple examples will demonstrate how the conservative approach leads to uninsured gaps which create market inefficiency through losses for which insurer liability for risk is initially accepted but subsequently dodged.

The first example involves property insurance and concurrent causes with discrete, divisible contributions to the resulting end loss. Imagine a house is insured under a property policy for all risks except earth movement. During the night, an earth tremor causes damage to the house such that portions of its roof become unsecured. This allows rain to get into the home, further damaging the home and its contents to a greater degree. Under the conservative approach to concurrent causation, because the excluded cause—earth movement—combined with the covered cause—rain—to produce the loss, the insured has no coverage.⁸¹

The insured paid a premium and is absolutely insured for rain damage but because that cause combined in sequence with an excluded cause, the insurer can deny coverage. The insured thought she had coverage for rain

80. Though there is certainly no reason why an endorsement for such could not be marketed, with a corresponding premium increase.

81. The complexity and information costs are increased when the scenario adds more than two possible concurrent causes, like the "Weathered House" example (wind plus rain plus hail).

damage. The insurer agrees. However, the insurer can argue that it chose not to cover anything related to earth movement. The exclusion trumps coverage. The insured cannot purchase anything to circumvent this. The covered risk of rain in the “all risks” coverage has actually been converted to a covered risk of “rain only.” It is an extra-contractual modification. This makes it difficult for the insured to arrange her insurance accordingly, *ex ante*. However, the insurer pockets a premium even though the bulk of the risk that caused the loss, rain, is a covered peril.

An example using liability insurance and reciprocal, indivisible concurrent causes further demonstrates that there are particularly troubling gap problems with so-called “tort insurance” and the conservative approach. Take the “Work Site Cleanup” scenario, an insurance dispute about loss distribution but with imbedded coverage issues as well. Assume an insured is covered by a standard commercial liability policy which covers for all negligent acts but excludes those losses caused by negligent use and operation of an automobile. The resulting loss in this example, the injury and death of the school children on a bus, is caused by two concurrent reciprocal causes: negligent automobile operation and negligent work site cleanup.

In this instance, the insurer again has agreed to cover one of the two competing causes of the loss. But the loss could not have even been brought about without the second excluded cause operating in conjunction. Neither operating alone is sufficient. The insured loses coverage because a covered cause combined with an excluded cause to produce the loss. The exclusion trumps the coverage clause. The problem with liability insurance is that a loss caused by negligent conduct is very often a combination of mutually dependent concurrent causes. It is difficult to predict under what potential circumstances there might be a cause which might trigger an exclusion. The insured in this causation situation paid for broad, comprehensive tort insurance but had the misfortune of having one cause of the loss characterized as an excluded cause. No coverage results.

Again, there is no market product for insureds who wish to protect themselves in the wake of concurrently caused losses. The unpredictable gaps created by the increased incidence of coverage denial may eventually offload some or all of the risk of concurrently caused losses not to insurers but insurance brokers instead. This creates an inefficient doubling of the insurance market as the brokers are forced to take up the secondary slack. Brokers may face liability lawsuits for selling insurance products with gaps to unsuspecting insureds. The simple defense to these types of suits is that no product currently exists on the market to fill the gaps. That may not be enough to contain the litigation costs of insureds who asked their brokers for “full coverage” only to have no coverage in a concurrently caused loss scenario.

The liability context adds an additional inefficiency to the scene: whatever third party was expecting compensation from the insured's indemnity proceeds (in the "Work Site Cleanup," the schoolchildren) is now left with nothing because of the application of the conservative approach in a concurrently caused loss scenario. So aside from the wealth-protection mechanism that is arguably a secondary role of liability insurance, the victim injured by the insured is also left with no source of compensation. The insurer pockets the premium for the very loss that was partially caused by the covered cause, but, because of the all-or-nothing conservative approach which favors exclusions over coverage, the wealth distribution mechanisms of insurance in the tort system fail to be deployed. The insurance market does not efficiently account for end results through application of the conservative approach, which has the real potential to frustrate promised-for coverage.

Finally, the greatest difficulty with the conservative approach to concurrent causation is that it never works for loss distribution disputes in concurrent causation cases. If an insured has two potentially overlapping insurance policies, the conservative approach essentially cancels out both policies when a loss is resulting from concurrent causes. Again, consider the "Work Site Cleanup" example. In that case, there was a contest between an auto and commercial liability policy. If negligent work site cleanup is covered and automobile negligence excluded by the commercial liability policy, then the loss is excluded under the commercial liability policy, using the conservative approach. The auto exclusion trumps the non-auto coverage. However, based on that logic, when one turns to the automobile policy, there would be no coverage under that policy either, as that policy only covers automobile-related losses. This reductionist approach leaves the insured with a perverse result: no liability coverage when, in fact, the insured had two separate policies, both of which could have potentially been triggered.⁸² The conservative approach therefore leads to inefficient results. Efficiency gains made in consistency and complexity costs are lost in market spillovers, potential elimination of important victim compensation, and impossible loss distribution frameworks.

The dominant cause approach also creates problematic gaps in available insurance coverage. This result is particularly problematic in what Kenneth Abraham calls "mega-liability" disasters like 9/11⁸³ or with catastrophic, widespread loss cases caused by a complex causal factor, like an earthquake, volcano, flood, or hurricane.⁸⁴ If the dominant cause of the

82. See COLINVAUX, *supra* note 42, at 119 (warning of this very absurdity in result).

83. KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, 199 (2008) (discussing the wide-spread nature of "mega-liability" events such as 9/11, hurricanes, and other disasters).

84. See, e.g., Lavitt, *supra* note 32, at 207; Rob Risley, Comment, *Landslide Peril and Homeowners' Insurance in California*, 40 U.C.L.A. L. REV. 1145 (1992) (advocating a liberal approach to

loss is held to be an excluded cause within the widespread loss event itself, large groups of insureds would likely have no insurance coverage for the single biggest loss of their lives. This tips the balance against those who are in most desperate need of insurance coverage in favor of stable insurance markets. That may not be an efficient market response if the government is then left with providing some compensation to the destitute who now have nothing after a widespread loss disaster.

In loss distribution disputes, the insurer who specifically did not agree to underwrite additional concurrent risks can easily end up bearing the entire cost of the insured loss if the deemed dominant cause happens to be a covered cause. There is no proportional recovery under the dominant cause approach. The same logic operates to either grant the insured a windfall or a total loss in the event of a concurrently caused loss. The dominant cause approach therefore has a high potential to do violence to the very language of coverage grants and exclusions in insurance policies.

Finally, like the conservative approach, the dominant cause approach creates serious market gaps in coverage for which there is currently no product to fill. However, the dominant cause approach creates these gaps in a more unpredictable and often contradictory manner. There is no guarantee from case to case that a scenario with similar facts will end up with the same cause being deemed the dominant cause. The result depends on the storytelling of the causal scenario. It depends on how the lawyers plead the factual matrix making up the loss. It depends on a court's view of which cause is "responsible" and all the error bias that that inquiry entails.

To that end, choosing a dominant cause forces an insured into a coverage box—coverage questions are only answered with reference to a single cause in a concurrently caused loss. If an insured is in a loss distribution dispute, with multiple policies potentially covering the loss, choosing a dominant cause locks the insured into an inquiry centered around that one cause. Only those policies which cover the deemed dominant cause can be triggered. Those policies which exclude, or do not cover the loss, are outside the inquiry, even though the contractual language of the policy indicates that coverage is likely for a secondary concurrent but non-dominant cause.

The "Work Site Cleanup" example demonstrates this problem. If the dominant cause of the loss is deemed to be negligent automobile operation, the automobile liability policy covers the loss. This is problematic on its face because, while the auto policy insurer agreed to indemnify the insured for losses caused by automobile negligence, it specifically did not contract to cover for negligent work site cleanup. Second, the commercial liability

policy, which does cover negligent work site cleanup, has an exclusion for auto negligence. This insurance policy is immediately taken out of play. If there were an additional operative exclusion in the auto policy which might somehow deny coverage to the insured, the insured is left with nothing.

Alternatively, issues about available monetary limits of insurance might also cap recovery in an arbitrary fashion.⁸⁵ Imagine if the auto policy's limits were substantially less than those in the commercial liability policy. Even though both policies stipulated to cover some aspect of the ensuing loss, the insured is locked into the auto policy and its corresponding exclusions and limits. Potentially, the insured (and through the insured, the injured accident victims awaiting compensation) could end up with nothing or a substantially capped amount of recovery, even though the insured purchased two separate insurance policies designed to cover part of the concurrently caused loss. The all-or-nothing nature of the dominant cause approach creates such insurance gaps.

C. Pleading Problems

1. Why Pleading Problems Matter

One of the inefficiencies of the current approaches to concurrent causation across jurisdictions is the fact that insureds suing for coverage are unaware of how to most effectively plead their lawsuits. This results in “overpleading” in an attempt to catch one or more insurance policies which may be called upon to respond to the concurrently caused loss.⁸⁶ In addition, it may result in misdirected pleading. Insureds may be incentivized to characterize their losses in non-concurrent terms to avoid exclusionary language, depending upon the jurisdictional regime for deciding concurrent causation. Insurers may, by contrast, be incentivized to cast the factual scenario as one of concurrent causation in order to trigger the same exclusionary language. The result: an inefficient web of pleading behavior which increases complexity and administration costs to courts and litigants alike.

85. Ontario's no-fault automobile insurance scheme at the time of the accident did not provide coverage for pecuniary losses.

86. This phenomenon of “overpleading” by insurance lawyers, in order to tell a story with the intention to tag or avoid insurance coverage, has been thoughtfully documented by Tom Baker and Ellen S. Pryor. See Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395 (1994); Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721 (1997).

2. How Pleading Problems Play Out

It follows, then, that the most inconsistent approaches to concurrent causation also suffer the greatest from the inefficiencies of overpleading, because the incentives to overplead are that much greater. Litigants whose jurisdiction operates under a conservative or dominant cause approach are incentivized to overplead the involvement of causes in order to attract insurance coverage. Those two approaches operate on an all-or-nothing basis for granting insurance coverage, so the causal story told in the pleadings should strategically avoid instances of losses caused by concurrent excluded or non-covered causes. Otherwise, the insured's coverage argument is jeopardized. The dominant cause needs to be a covered cause. Under the conservative approach, no other competing excluded or non-covered concurrent causes can be present in order for coverage to attach.

The liberal approach does not incentivize overpleading in a concurrent causation scenario. Because all relevant causes in a causal chain are examined for coverage potential, and because an excluded cause in that chain does not oust coverage, the cost of inefficient overpleading is eliminated. Under the apportionment approach, there are no incentives to overplead in the absolute sense. The only incentives to overplead are in the descriptions of the relative causal roles of a covered as opposed to non-covered or excluded cause. Litigants may attempt to inflate the percentage loss contribution of a certain cause over another cause. Because this approach operates under proportional recovery and does not operate in an all-or-nothing fashion, it is actually more difficult to simply eliminate the causal role of a covered or non-excluded cause. Courts will expect the full panoply of causes to be part of the causal story.

D. Counsel Inefficiencies

1. Why Counsel Inefficiencies Matter

Because the result in concurrent causation cases is unpredictable in many jurisdictions, lawsuits may require multiple coverage counsel for various policies at risk of being triggered. This is especially likely in loss distribution disputes. If a loss resulting from concurrent causes may potentially invoke more than one insurance policy, each insurer will have its own lawyer to protect its interests. If there is the risk of one or more exclusions being triggered among the various policies in play, in liability insurance contexts there is an additional risk of the insured facing personal exposure to the cost of liability, as insurance protection may be denied to the insured. That insured may then be required to obtain separate counsel from the insurers to protect the insured's financial interests. This all re-

sults in an inefficient web of potentially duplicative lawyering that increases complexity and administrative costs.

2. How Counsel Inefficiencies Play Out

The prevalence of counsel inefficiencies tracks the incidence of overpleading, to some degree, as insureds attempt to tag as many potential sources of insurance as the fact situation will bear. Similarly, the more highly inconsistent an approach the more likely there will be a need for additional counsel in loss distribution disputes, as insurers and insureds cannot reliably predict which insurance policies may be triggered by which causes. The conservative and dominant cause approaches therefore likely create the greatest incentives for multiple coverage counsel who may not be integral to the resolution of the actual dispute. Instead, multiple unnecessary lawyers increase the possibilities for confusion, delay, and cost. In addition to the fact that these approaches display the greatest consistency costs and produce the greatest incentives to overplead, they also present the greatest risk for gaps of coverage for an insured.

For that reason, insureds will also necessarily have to consider retaining their own personal coverage counsel in liability insurance cases in addition to the counsel provided to them under the insurer's duty to defend. The insured's own personal assets may be exposed to potentially satisfy a judgment in a concurrent causation case if no insurance coverage is available under the insurance policies in play. The conservative and dominant cause approaches afford the greatest probability for personal exposure to liability. The conservative approach is the least likely approach to grant coverage. The dominant cause approach invokes an all-or-nothing result for insurance coverage, leaving some chance for the insured to be held personally liable for a tort.

The apportionment and the liberal approaches do not have the same counsel inefficiencies to the same degree because, if an insurance policy is potentially triggered to respond to a loss, it is clear that that particular insurance company will require counsel. That policy will be factually involved in the resolution of the dispute, and an unnecessary party need not be added merely because the insured wanted to hedge all possibilities.

E. Anti-Concurrent Cause Clauses Unpredictably Enforced

A deceptively simple solution to concurrent causation may be to just contract out of concurrently caused losses entirely, using specifically worded exclusion clauses.⁸⁷ Courts, however, inconsistently enforce insur-

87. Michael E. Bragg notes that this is precisely what California insurers did after the 1983 earthquake. Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Prop-*

ers' contractual attempts to circumvent concurrently caused losses.⁸⁸ This adds to the unpredictability of the dispute, and, frankly, defeats the purpose of such language in the vast majority of cases.⁸⁹ A typical anti-concurrent cause exclusionary clause reads as follows: "We do not insure for losses caused directly or indirectly by any of the following, regardless of any other cause or event contributing concurrently or in any sequence to the loss" There are a variety of permutations of anti-concurrent cause language.⁹⁰

However, the effect of such exclusions in a concurrent causation situation is questionable. Some courts uphold the language as ousting coverage in a concurrently caused loss scenario. The language, in effect, converts the particular causal inquiry into the conservative approach to concurrent causation. These courts rely on a strict adherence of the contractual language plus freedom of contract principles as reasons for allowing insurers to circumvent the prevailing concurrent cause default rule in the jurisdiction's common law or statutory landscape.⁹¹

A surprising number of courts instead invalidate an anti-concurrent causation clause, deeming it a contractual attempt to dodge apparently immutable doctrinal rules for assessing concurrently caused insurance losses in that jurisdiction.⁹² If, for example, a jurisdiction has adopted a dominant cause approach to concurrent causation as a doctrinal default rule, courts are often hesitant to allow insurers to sidestep the rule to an insured's detriment. The pro-insured interpretive rules to be applied when construing insurance contracts in American and Canadian jurisdictions⁹³ bolster courts' conclusions to invalidate anti-concurrent causation clauses

erty Insurers, 20 FORUM 385, 389091 (1984). However, that state does not consistently uphold anti-concurrent cause clauses, as will be described later below.

88. See, e.g., COLINVAUX, *supra* note 42, at 116017 (noting that it is unclear what type of wording is required for an insurer to circumvent the prevailing legal rule for insurance causation).

89. See, e.g., Julie A. Passa, Case Comment, *Insurance Law—Property Insurance: Adopting the Efficient Proximate Cause Doctrine, but Saying No to Contracting Out of It*, 79 N.D. L. REV. 561, 572075 (2003) (explaining that California, North Dakota, and Washington preclude parties from contracting out of the efficient proximate cause doctrine).

90. Usually including "directly or indirectly" as well as "caused by," "contributed to," "aggravated by," or "resulting from."

91. See, e.g., Jussim v. Mass. Bay Ins. Co., 610 N.E.2d 954, 957-58 (Mass. 1993); Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272, 1277 (Utah 1993); Findlay v. United Pac. Ins. Co., 917 P.2d 116, 121-22 (Wash. 1996); State Farm Fire & Cas. Co. v. Paulson, 756 P.2d 764, 766-68 (Wyo. 1988).

92. See, e.g., Howell v. State Farm Fire & Cas. Co., 267 Cal. Rptr. 708, 711-12 (Cal. Ct. App. 1990); Safeco Ins. Co. of Am. v. Hirschmann, 773 P.2d 413 (Wash. 1989) (anti-concurrent cause clause did not oust coverage for concurrently caused loss caused partly by earth movement—case distinguished and limited in 1996 by *Findlay*, 917 P.2d 116 at 119-20); Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1 (W. Va. 1998). In Canada, Anthony J. Saunders notes that courts would likely read down any anti-concurrent cause clauses (like "directly or indirectly"). Saunders, *supra* note 62, at 162.

93. That is, the reasonable expectations doctrine, interpreting coverage clauses broadly and exclusions narrowly, and *contra proferentem*.

and to uphold the particular approach to concurrent causation as immutable by contract. There is something insidiously unfair about the anti-concurrent cause clauses in that an insured often cannot, *ex ante*, predict when the clause will convert a jurisdiction's concurrent causation legal rule into a conservative approach. The end result is unpredictability of enforcement of such clauses, even among the same courts in the same state.⁹⁴ That decreases the very efficiency the jurisdiction's concurrent causation default rule was likely designed to augment.

Gaps in coverage may be created by anti-concurrent cause clauses, particularly in loss distribution disputes involving competing, potentially overlapping insurance policies in a jurisdiction which adheres to the dominant cause approach to concurrent causation. Even though a dominant cause may be covered by a particular insurance policy, if a court gives effect to the anti-concurrent cause language in an insurance contract, the concurrent secondary, non-dominant cause will dictate that coverage is ousted. The insured will not be able to turn to the second competing insurance policy in a loss distribution dispute because the dominant cause has been set as triggering the first insurance policy. The benefits of overlapping coverage disappear, as described above.

This Article therefore treats anti-concurrent cause clauses in an ambivalent fashion and instead focuses on crafting legal rules which assist courts in determining whether or not such clauses are upheld at any point in time in any common law jurisdiction.

V. AN IMMUTABLE RULE FOR CONCURRENT CAUSATION IN INSURANCE

A. An Immutable Rule Incentivizes Policy Revisions

An immutable legal rule, or set of legal rules, is the optimal choice for revising the law with respect to concurrent causation in insurance.⁹⁵ Insurers can generally contract around default rules, as is evident in California's statutory attempt to make the liberal approach the default rule, unless the insurance contract says otherwise.⁹⁶ This statutory response incentivizes insurers in the state to include an anti-concurrent cause clause to contract around the statute in an attempt to oust coverage, defeating the very legislative spirit of invoking the pro-insured liberal approach as a default rule in the first place.

If some courts are treating concurrent causation common law doctrine as immutable, immune to contractual bargaining, then perhaps that signals

94. See, e.g., *Findlay*, 917 P.2d 116 at 119–20 (distinguishing *Hirschmann*, 773 P.2d 413).

95. Perhaps the most obvious vehicle for such an immutable rule is a statute dictating a state's approach to concurrent causation and that the approach applies regardless of contractual attempts to circumvent it.

96. See CAL. INS. CODE § 530 (West 2005).

a preference that there is at least some recognition of inequity at work with anti-concurrent cause clauses. As a result, these clauses are operationally unpredictable from jurisdiction to jurisdiction. At the same time, the long-term solution to concurrent causation ultimately rests with the contractual language in insurance policies. This may occur either as a rewording of a policy to bring it in line with a default or immutable legal rule, as a complete alteration of coverage and exclusionary rights with respect to concurrently caused losses, or perhaps even as an altogether novel insurance product. Similar to the effect of a legislated default rule, an immutable rule could have the effect of incentivizing a redrafting of the type of contractual language that results in the present inefficiencies with concurrent causation in insurance. As Daniel Schwarcz notes, insurance policy language is often not drafted efficiently because the current insurance market incentivizes insurers to keep the status quo.⁹⁷ A default rule merely prompts an insurer to draft contractual language in order to return to the status quo. An immutable rule, however, has the potential to prompt real innovation in insurance policy language, as will be described below, because insurers cannot simply draft out of the prevailing legal rule for concurrently caused losses.

Past academic attempts at categorical approaches to solving concurrent causation issues in insurance have not yet taken hold, except as *ex post* case descriptors, and have yet to be applied in practice in crafting an ideal solution to the voluminous insurance litigation about the topic. The reasons may be that the prior academic frameworks tried to do too much with too little. By categorizing broad series of discrete causal events and attempting to translate that into *ex ante* interpretive frameworks for coverage clauses or the events themselves, the frameworks instead cut too close to tort law's unsatisfying explanations of proximate cause, with all the unpredictability trappings of a fault-based analysis.

The proposals by Edwin Patterson,⁹⁸ William Brewer,⁹⁹ and Robert Jerry¹⁰⁰ prompt a return to a tort-like proximate cause analysis for insurance causation. Patterson's 1957 framework attempted to identify three types of causal events¹⁰¹ from which one could divine the legal effect of three different types of coverage clause¹⁰² and thus resolve concurrent cau-

97. Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1405–12 (2007) (describing reasons why insurance policies are inherently inefficient and why insurers maintain such inefficiencies). See also Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1990) (noting the challenges of filling gaps in contractual language); Boardman, *Insurance Understanding*, *supra* note 17 (noting that insurers draft language for courts, not for insurance customers).

98. PATTERSON, *supra* note 38.

99. Brewer, *supra* note 38.

100. JERRY & RICHMOND, *supra* note 1, at 574–80.

101. A “cause” sets an “event” in motion that causes a loss or “result.”

102. An “exception” clause deals with the cause of the insured event itself. Exception clauses

sation disputes.¹⁰³ Causes in chains of potentially insured events are labeled by Brewer according to their legal role.¹⁰⁴ Brewer's 1961 framework essentially advocates a dominant cause analysis after determining all potentially possible causes. The fact-finder must determine the most "responsible" cause. Robert H. Jerry proposes a dual-filtered approach, similar to Brewer's in structure.¹⁰⁵ Jerry's first proposed step is to assess all the possible causal factors that could have brought about the loss in question.¹⁰⁶ Subsequently, Jerry would have a court apply a tort-like remoteness filter to determine how far back in the causal chain of events one can rightly look in that given scenario.¹⁰⁷ Finally, one then applies whatever concurrent causation approach is in vogue in one's jurisdiction.¹⁰⁸ The advantage to Jerry's methodology is that it is jurisdictionally portable. The disadvantage, as Jerry appears to admit, is that remoteness of competing causes is often in the eye of the beholder as between insured and insurer.¹⁰⁹ Consistency of results is thus problematic from case to case.

The difficulty with all three frameworks is that it is often challenging, from the mere wording of a coverage clause, to *ex ante* determine the legal effect of the clause when presented with a potential causal scenario. This is most problematic under Patterson's framework in determining whether a clause limiting coverage is an exception or exclusion clause. Even *ex post*, after the loss has occurred and the court has rendered a decision, it is still sometimes debatable as to which clause has done what legal work.¹¹⁰ The difficulty with the three frameworks likely flows from the fact that their categorical approach to labeling the legal effect of coverage clauses stems from the labeling of the causal events themselves as from the standpoint of the cause first, as opposed to its role in the end result ultimate loss. This pushes one toward a tort-like proximate cause analysis of describing "causes," "events," and "results" all tied to the concept of causal responsibility as akin to tort-based relative remoteness.

define not what is excluded but instead what is just not covered by the insurance. An "exclusion" clause involves the event. Exclusion clauses negate coverage. And a "consequence" clause deals with the result that flows from the loss.

103. PATTISON, *supra* note 38, at 248–71.

104. Brewer, *supra* note 38, at 1144–45. An "actual cause" is the inciting event which links together events and results. A "substantial cause" is an actual cause that is deemed not too remote through a proximate cause sort of analysis. A "responsible cause" is a substantial cause to which the loss should rightly be attributed, identical to a proximate cause in tort law. For a critical description of Brewer's framework, see JERRY & RICHMOND, *supra* note 1, at 574.

105. JERRY & RICHMOND, *supra* note 1, at 574–80.

106. *Id.* at 575.

107. *Id.* Contrast this approach with Malcolm Clarke's proposal to restrict consideration to only those causes that are specifically mentioned in the insurance policy language. See CLARKE, *supra* note 36, at 184.

108. Either the dominant cause, liberal, or conservative approach. JERRY & RICHMOND, *supra* note 1, at 577–78.

109. See JERRY & RICHMOND, *supra* note 1, at 577.

110. For a critical approach to Patterson's framework, see *id.* at 571–74.

Instead of constructing labels for the constituent parts of any possible causation situation and then attempting to define its pattern and outcome, it may in fact be more assistive to reverse the analysis and discuss cause in relation to its sequence upon the loss. This makes more sense simply because the causal analysis in insurance law is the reverse of a causal analysis in tort law, as stated above. One does not ask whether a breach of the standard of care is a cause, as in tort. Instead, in insurance law, one starts with the loss and works backward to determine if a cause of the loss is a contractually covered cause. Predictably solving both coverage and loss distribution disputes about concurrent causation necessitates finding a recognizable pattern to the cases that actually has predictive value. Only then can a consistent immutable rule be constructed to provide predictable dispute resolution results.

B. Building the Solution: Temporal and Sufficiency Dimensions

No matter the approach presently utilized by courts and commentators alike, both groups tend to focus on one of two causal dimensions in determining results in a concurrently caused loss scenario: the temporal dimension and the sufficiency dimension of the relevant causes in play. One needs to be able to separate out the relevance of each dimension in order to then craft a suitable legal rule for that particular type of insured loss.

Concurrent causes can occur in sequence or simultaneously. Courts are often confused as to whether or not the timing of concurrent causes should drive the inquiry. The temporal relation of one concurrent cause to another can often relate to a sense of causal relativism, or remoteness, which is a concept particularly important to the dominant cause approach. The temporal dimension for a particular concurrent cause is, in fact, often the decoy that drives courts toward a proximate cause tort-like analysis. Instead, courts should take the information about the temporal dimension of a cause and use it to determine whether or not that particular cause was merely involved in the end result losses claimed by the insured.

Similarly, courts are rightly concerned about the relative causal sufficiency of each concurrent cause. Under the conservative approach, for example, courts are consistently occupied with the fairness of denying insurance coverage to an insured when a perceptibly necessary cause of loss combines with another far less perceptibly necessary cause. A solution for concurrent causation therefore needs to account for the causal relationships among the various factors in terms of sufficiency and temporal dimensions as defined in relation to the resulting end loss claimed under the insurance policy. This is important in order to provide a workable

baseline for conversations about whether or not certain causes trigger contractual insurance coverage.¹¹¹

1. The Temporal Dimension: Serial and Parallel Causes

The temporal dimension for each concurrent cause in a coverage or loss distribution dispute needs to be properly identified in order to determine the limits of the causal inquiry before one can begin to discuss sufficiency of a particular cause. It is here that many courts have, in the past, been confused and created unpredictable law because they treat the temporal dimension as a *substitute* for sufficiency. The temporal dimension instead is only used to place on a continuum of relevance the unique role a particular cause plays, or does not play, in a resulting loss. The key is to ensure that the temporal dimension is directly related to the end result loss claimed, as is described in more detail in the next Part below.

The dominant cause approach has been applied by some courts with the idea that “dominant” should be temporally and spatially reigned in as the cause nearest in time and distance.¹¹² The progeny of *Bird v. St. Paul Fire & Marine Ins. Co.*¹¹³ adopt this particular line of thinking.¹¹⁴ This type of inquiry hearkens to a “causation as chain of events” proximate cause inquiry in tort law. The inquiry is purely one of reductionist relative remoteness in time and space, centered around the end loss. By examining the chain of possible causes leading up to a loss, a court adopting this permutation of dominant cause should hold as “dominant” that cause which was nearest in time and distance to the loss. This approach to “do-

111. There have been other academic and judicial attempts to categorize causal patterns in insurance cases and build legal rules around such categorization. Unfortunately, these attempts have not resulted in any greater predictability in case outcomes. The reason largely stems from the fact that the categories are descriptive as to causal operation only, and not as to how that operation could relate to contractual coverage issues. For example, Malcolm Clarke notes a difference between causes which are consecutive and causes which are concurrent, highlighting the temporal dimension. Consecutive causes are not “true” concurrent causes but separated in time, really more akin to singular-cause cases, and should be treated as such. MALCOLM A. CLARKE ET AL., THE LAW OF INSURANCE CONTRACTS 796–99 (5th ed. 2006). Clarke also divides causes into two classes: interdependent and independent causes. *Id.* Interdependent causes are similar to parallel causes in that the causes must combine together to produce the loss. *Id.* Independent causes are similar to serial causes in that each cause, acting on its own, produces some type of loss. *Id.* Here, Clarke is describing the sufficiency dimension. Richard A. Fierce also notes distinctions between “dependent” and “independent” causes in *Insurance Law—Concurrent Causation: Examination of Alternative Approaches*, 10 S. ILL. U. L.J. 527, 533–35 (1985). Anthony Saunders uses the terms “serial” and “concurrent” to describe the temporal dimension in insurance causation as a differentiating factor among concurrently caused losses. See Saunders, *supra* note 62, at 145.

112. See, e.g., STEMPLE, *supra* note 1, § 7.02, at 7–10 to 7–13 (explaining that the cause nearest to the loss, as opposed to dominance, can sometimes drive the inquiry).

113. *Bird v. St. Paul Fire & Marine Ins. Co.*, 120 N.E. 86, 87–88 (N.Y. 1918). See also Swisher, *The Legacy of Bird v. St. Paul Fire*, *supra* note 31, at 386

114. See, e.g., Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1007 (2d Cir. 1974); Howell v. State Farm Fire & Cas. Co., 218 Cal. App. 3d 1446, 1456 (Cal. Ct. App. 1990).

minance" creates its own problems because the cause closest in time and space may actually be relatively inconsequential in bringing about the entire loss. Instead, time as a causal limiter needs to be understood in its contractual context with the insurance policy.

The temporal dimension can be split into two possible categories: serial and parallel causes. A loss caused by serial causes is a loss resulting from two or more causes occurring in a sequence, over a discrete period of time. This type of loss event comprises causes acting one after the other, in serial fashion. For example, in the "Weathered House" scenario, the wind, rain, and hail may have each battered the house at different times in the course of producing the end result property damage. In the "Work Site Cleanup" example, the negligent work site cleanup necessarily had to occur before the negligent driving, in order to produce the end result loss.

A loss resulting from parallel causes, however, is indivisible along a temporal continuum. This is a loss caused by two or more causes occurring simultaneously, together. The causes are not separable by instances of time. For example, in a house fire claim, fire and smoke damage often occur simultaneously to harm the insured property. In the liability insurance context, losses caused by parallel concurrent causes also occur. A daycare worker insured by a commercial liability insurance policy may be negligently supervising children under her care while also simultaneously negligently operating an automobile. If the child is injured, the end result loss may be caused by two parallel concurrent causes. Categorizing concurrent causes first by their temporal dimensions in relation to the end result damage claimed under the policy is the first step toward determining what causes need to be examined in a concurrently caused loss scenario.

2. Using the Temporal Dimension to Set Boundaries for the Analysis: Involvement and Necessity

In order to effectively assess which approach to concurrent causation best suits a certain loss, one must first determine which causes are relevant to the coverage inquiry. Past attempts at using a tort-like remoteness analysis have, to date, been unhelpful because they inevitably move to equity-based fault concerns as a substitute for the inquiry. As mentioned above, some courts also get misguided by using the temporal relation between causes and the loss as a determinant of causal "fault." As will be shown, tying the temporal dimension of a certain cause to its relation *only* to the end result loss claimed acts as a limiter on causal involvement, thus suitably narrowing the inquiry to only relevant causes. This Part explains how this operates.

Because the causal inquiry in insurance law is different than in tort law, there appears to be two appropriate baseline qualities in setting boundaries for the causal inquiry in insurance law. Recall that causation in in-

surance uses a causal inquiry only to determine if a resulting loss triggers indemnity coverage. The first baseline quality in sorting out relevant causes in the causal inquiry has to do with the role a potential cause plays in the events leading to the loss. The second necessarily builds on the first and has to do with the role a potential cause plays in the cause of the end result actual damage for which insurance indemnity is claimed. This layered approach works because the causation question in insurance must eventually be answered backward to tort. One starts with the damage—the end result—and works backward to determine the responsible cause which may trigger insurance coverage.

Ironically, a recent tort causal innovation by Jane Stapleton actually proves to be a suitable vehicle to explain the necessary difference in setting boundaries for the causal inquiry in insurance versus tort.¹¹⁵ Stapleton argues that proximate cause analysis in tort, and all its doctrinal and philosophical baggage, should be jettisoned for a much more fluid test: causal “involvement.”¹¹⁶ Stapleton argues that, in tort, the causal inquiry should focus on the involvement of a certain cause in a tort loss and its sufficiency in bringing about the harm.¹¹⁷ By treating causation as “involvement,” Stapleton’s approach promotes the merging of normative and non-normative information in a tort loss. All too often, in asking “what caused the accident?” in tort, the question becomes normatively charged and is divorced from the actual happening of events because of the compensatory and deterrence aspects of the tort system as a system. In other words, the tort concepts of fault and blame force the causal inquiry to a certain conclusion in the fault or blame context. The cause with the most moral blame is often difficult to ignore.

Using the concept of causal “involvement” in insurance causation analysis, however, can actually achieve a separation effect from the normative traps of tort causation so prevalent in both courts’ use of the dominant cause approach and when courts use the temporal dimension alone as a driver for causal relevance. Involvement makes the determination of causal necessity in an insurance context a much easier question. Instead of asking “did this particular cause produce an insured loss?” one should ask “how was this particular cause involved in bringing about an insured loss?” Insurance law cares about the “how” from a contractual perspective, not the “why” from a fault-based tort perspective.

For example, in the “Weathered House” example, asking “did rain produce an insured loss?” is not a helpful inquiry. It did. Rain damaged some of the property to some degree, say twenty percent. Asking “was rain the last cause in time to produce some loss?” is also not a helpful

115. See Stapleton, *supra* note 5.

116. *Id.* at 436.

117. *Id.*

question. Using the temporal dimension of rain alone to limit the causal inquiry limits the analysis to a cause that played only twenty percent of a role in the total loss. The discomfort with determining entire coverage and exclusionary questions on either type of inquiry is obvious—one does not get a helpful answer that satisfies whether or not indemnity *should* be provided by the insurance policy. Asking instead, “was rain involved in bringing about an insured loss and if so, how?” provides a much more context-rich response. The rain only damaged the internal contents to the home, valued at twenty percent of the entire loss. But it was a necessary element in producing “some” part of the entire end loss. Determining involvement is only half of the equation in setting boundaries for the insurance causal inquiry. One needs to know what to do with the information gleaned from causal involvement.

The answer is simple: tie involvement directly to the end result insured losses at issue through a determination of simple causal necessity of results—either the results of the external force in property insurance or the results of behavior in liability insurance. This will act as a limiter on the causal inquiry generated by asking about involvement. Limiting involvement in an insurance causation context to only those causes resulting in end result losses does not misleadingly focus the inquiry on causal eventualities that have nothing to do with the loss. Recall that the causation analysis in insurance is almost the reverse as that of tort. The question is, as Banks McDowell calls it, a “damages” question.¹¹⁸ One looks at the end result damage at issue with the insurance claim and works backward to how that particular resulting damage got there. It also, by nature, incorporates similar temporal dimension concerns which drove some courts to apply a “first in time” approach to causation, yet actually avoids nonsensical or overly rigid application of such an approach.

In the “Weathered House” example, assume the entire house is destroyed by a combination of rain, wind, and hail, acting in combination. Rain is a potential cause of damage. It was “involved” in bringing about the end result loss because rain fell on some property inside the home after the roof was ripped off by high winds. The rain therefore damaged the property to some degree as a serial cause. It is involved in the loss and is therefore a relevant cause because, without the rain, the damage may likely have been less. The analysis does not account for the fact that it was raining at some time before, during, or after the loss. It only concentrates on the episode of rain that caused the damage to the house. That is the point of temporal concern. Assume damage of that property attributable to rain is about twenty percent of the total loss claimed. Therefore, rain is a concurrent cause that needs to be explored with regard to its status as a

118. McDowell, *supra* note 12, at 577.

covered or excluded cause in an insurance policy. The result of the cause is some increased loss to the insured.

Contrast this result with a different twist on the same scenario. Assume that the “Weathered House” was damaged by a combination of rain, wind, and hail. Shortly after—or during—that damage, a hurricane-strength storm surge destroyed the property entirely, reducing it to rubble. The result would have been the same from the storm surge regardless of the previous damage caused by the wind, rain, and hail. The loss claimed by the insured is the same loss: the house is destroyed. But, by asking how rain is involved in the loss, the answer is different. Rain is a discrete, serial cause. Rain caused twenty percent of the intermediate damage. But intermediate damage is not the subject of inquiry. Without the rain, the damage still would have occurred. The end result loss about which the insured claims was caused entirely by storm surge (which is, incidentally, the last event in time to touch the house). The rain was not a necessary cause for the end result loss to occur and should not be part of the concurrent cause inquiry. This approach avoids the mystifying causal chains of events from a standard, unprincipled dominant cause analysis relying on foreseeability or inevitability or something else. It forces one to look at the end result damage in question, then determine involvement of a particular cause at issue based on its role only in the end result damage. If that cause is not tied directly to the end result damage, it should not be considered as a concurrent cause in the analysis. It also avoids problems in overly focusing on a cause’s particular temporal dimension. A cause can be a serial or parallel cause but, if the cause is not involved in the end result damage, it should not be considered a relevant cause for coverage assessments.

The approach works in a broader fashion to define the scope of examination for appropriate causes of losses in liability insurance contexts. There is also one additional matter to stress for liability insurance applications: it is the *result* of the behavior with respect to the end result loss that should be the focus of the causal inquiry, not the mere behavior itself. The inquiry about causal involvement catches more potential causal behavior at issue because the very subject of liability insurance is the causal interplay of various behaviors and actions. Liability insurance coverage is worded very broadly to encompass this comprehensive type of coverage.

To use the “Work Site Cleanup” scenario as an example, the end result loss is liability for the injury and deaths of the children on the school bus. One needs to ask how the negligent work site cleanup as a potential cause was involved in the end result damage. Negligent work site cleanup set the stage for the heavy sign base plate to rocket through the bus window. It was a necessary cause, even though it happened before the negligent automobile operation. There was temporal separation between the

initial activity of improperly setting the sign base down and the negligent driving.¹¹⁹ The only temporal moment the analysis should acknowledge, then, is when the *result* of the behavior is *activated* to cause the loss. Without the negligent work site cleanup behavior's result being activated, there would be no end result damage. The negligent behavior's result is not just a causal eventuality but a causal necessity for the end result damage. It is a reciprocal, serial cause, as will be described below in the Sub-part about causal sufficiency. The vehicle would have passed harmlessly by the school bus without this additional causal event. The result of the cause is therefore both involved and necessary for the end result damage to have occurred. It is a concurrent cause that should therefore be in play in any insurance coverage analysis. For both property and liability insurance, in order to limit the scope of inquiry about the various potential causes at play in a loss, one should ask how a particular cause was necessarily involved in the end result loss. If that cause is operating in a liability insurance context, the focus of the inquiry is on the result of the behavior in question, not merely the behavior itself.

3. Defining Necessity with the Sufficiency Dimension: Discrete and Reciprocal Causes

To recap, the choice of an efficient legal rule for concurrent causation requires that a fact-finder first determine the type of causal context involved in the loss. In order to focus a court's causal inquiry on the correct attributes of each concurrent cause in the analysis, a court needs to first define the temporal dimension of the various causes at issue. Causes can be either serial or parallel. That information forces a court to steer clear of an inefficient or illogical over-emphasis on the timing of various causes. Next, using that information, a court determines which causes are at play by asking whether the serial (or parallel) causes are necessarily involved in the end result loss claimed by the insured. For losses potentially covered by liability insurance, it is the result of the behavior that is the focus of inquiry, not the behavior itself.

The final step toward choosing an efficient legal rule for concurrent causation is to assess the causal sufficiency of the various competing necessary concurrent causes in a given factual matrix as each cause relates to the end result damage. This final step actually acts as a vital limiter on the temporal dimension and causal necessity. It avoids inept use of remoteness principles from tort law.

For example, the dominant cause approach is an attempt to set boundaries as to what causes one should include or ignore in a concurrent cau-

119. This is why the "first in time" dominant cause approach produces erroneous results for this type of accident.

sation analysis. This approach breeds inconsistency because of the interpretation of what is “dominant.” The dominance analysis, to some courts, is akin to a weighted proximate cause analysis in tort law. The greater a role a particular cause plays in bringing about the loss, the greater dominance it is accorded. One then looks at the most “responsible” or “faulty” cause in an attempt to weed out other, less consequential causes. Indeed, Robert Jerry’s proximate cause style remoteness filter and William Brewer’s causal categories rely on traditional proximate cause analysis from tort.¹²⁰

Many of the active causes of losses in property insurance, for example, do not even have fault as an element causing the loss. The weather, earthquakes, floods, and the like are not usually, or cannot be, caused by fault. They are factual occurrences in nature the exposure to which causes some damage. Asking how much more “blameworthy” wind was than water in a hurricane loss is not only a conceptually jarring question but an inefficient one as well. How is a court to assess the relative consequential weight of one cause over another in all cases? Dominance as “most responsible” cause thus often does not help determine boundaries of what causes should be considered in a concurrent causation analysis. But, “blameworthy” is often another way of saying “sufficiency.” It is different, however, from causal necessity. The sufficiency dimension of the causes is therefore an important consideration.

The sufficiency dimension of causes can either be thought of as discrete or reciprocal. A loss caused by discrete concurrent causes exhibits independent, individually sufficient causes.¹²¹ Each cause, acting on its own, will cause some portion of the loss, but not the total cumulative loss. Discrete causes most often occur in a first party property loss context. In the “Weathered House” example, wind, rain, and hail each have the capability of causing discrete damage if operating alone. The end result insured loss claimed, however, is a combination of these causes. Losses caused by discrete causes are also usually the subject of coverage disputes, not necessarily loss distribution disputes. Discrete causes present an analytic problem because it becomes tempting to try to divide the causes based on some sort of notion of causal responsibility. Covering or excluding the entire end result loss somehow seems unfair to the insurer or insured, be-

120. See JERRY & RICHMOND, *supra* note 1, at 574–80; Brewer, *supra* note 36, at 1142–45.

121. Examples include a wide variety of cases, the most notorious of which are the property insurance cases in the wake of natural disasters such as earthquakes, hurricanes, and floods. See, e.g., Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346 (5th Cir. 2007) (flood water from Hurricane Katrina); Shelter Mut. Ins. Co. v. Maples, 309 F.3d 1068 (8th Cir. 2002) (flood in home followed by mold); Julian v. Hartford Underwriters Ins. Co., 110 P.3d 903 (Cal. 2005) (rain-induced landslide); Graham v. Pub. Emps. Mut. Ins. Co., 656 P.2d 1077 (Wash. 1983) (mudslide from Mt. St. Helens volcano eruption).

cause the causes are separated in effect from each other, though cumulative in end result.

By contrast, concurrently caused losses resulting from reciprocal causes exhibit interdependent, individually insufficient causes.¹²² Without both causes acting together, at the same time, the loss could not have occurred. The loss can only occur if the causes operate in reciprocal fashion. Reciprocal causation most often occurs in a third party liability insurance context, or tort insurance.

The *Derkson* “Work Site Cleanup” is a classic example of a concurrently caused loss resulting from reciprocal causes. It is impossible to articulate which cause results from a given reciprocal concurrent cause without reference to both causes operating in reciprocal fashion. There is no one “cause.” Both become necessary and sufficient factors for the accident to have even taken place. In the “Work Site Cleanup” scenario, without the negligent work site cleanup, there would be no loss, as there would be no improperly placed sign-base to rocket through the bus window. The negligent driving alone would have caused no loss. By the same token, there would be no loss if there were only the negligent work site cleanup without the negligent vehicle operation. The sign base needed to be in motion to propel it through the air, which required vehicle operation.

In cases where losses result from reciprocal causes, there often exists a certain paralysis about determining coverage issues. This is created by insurance law’s all-or-nothing exercise of often having to choose between a covered and excluded cause, when both were necessary to produce the loss. This is a different consideration than the sequential analysis required when scrutinizing losses resulting from discrete causes. The efficient solution to concurrent causation therefore requires recognition of two different types of causal sufficiency: discrete or reciprocal causes.

The following chart summarizes the types of concurrent causes that could be at work in a given fact scenario. The identification of the relevant causes then drives the choice of legal rule which is detailed in the final Part.

TABLE 1

122. Examples of parallel cases abound. See, e.g., *Cawthon v. State Farm Fire & Cas. Co.*, 965 F. Supp. 1262 (W.D. Mo. 1997) (involving a coverage contest between a homeowners liability policy and an automobile liability policy where negligent tree removal in the insured’s backyard with a truck caused the death of a bystander, and the coverage dispute centered around which of two competing causes caused the loss: negligence in planning to remove the tree or negligence in operating the truck); *Travelers Ins. Co. v. Aetna Life & Cas. Co.*, 571 N.E.2d 1383 (Mass. 1991) (involving a contest between automobile liability coverage and commercial general liability coverage where adult day care center client in a wheelchair fell down porch steps while being transported to the center by van); *Gulf Ins. Co. v. Noble Broad.*, 936 S.W.2d 810 (Mo. 1997) (involving a commercial general liability policy and automobile liability policy potentially implicated by concurrent causes where negligent crowd control during a parade combined with negligent automobile operation to produce injury).

	Serial	Parallel
Discrete	<ul style="list-style-type: none"> • sequential • result divisible 	<ul style="list-style-type: none"> • simultaneous • result divisible
Reciprocal	<ul style="list-style-type: none"> • sequential • result indivisible 	<ul style="list-style-type: none"> • simultaneous • result indivisible

VI. THE EFFICIENT SOLUTION TO CONCURRENT CAUSATION

The efficient solution to concurrent causation among common law jurisdictions is to develop immutable legal rules that account for the temporal and sufficiency dimensions of the various concurrent causes involved in a loss. This focuses a court on the relevant aspects of each cause as it pertains to a coverage analysis that is based on contractual principles, as opposed to tort principles.

Recall that the apportionment and liberal approaches presented the fewest difficulties with respect to inconsistency costs, gaps in coverage, overpleading, duplicative coverage counsel, and anti-concurrent causation clauses. Though not perfect, the efficacy of these approaches can be greatly improved if a court follows the prior categorization of causal involvement and determines the temporal and sufficiency dimensions of the causes at play in a given loss scenario. Whether a cause is parallel or serial in its temporal dimension does not actually necessitate a separate legal rule per se. Instead, the temporal dimension assists with drawing the boundaries of what causes to consider and what to ignore. The sufficiency dimension, however, does alter the choice of efficient legal rule.

For losses resulting from serial and parallel discrete causes, the most efficient approach is the apportionment approach, particularly for those disputes about loss distribution. For losses resulting from serial and parallel reciprocal causes, fact finders should use the liberal approach to concurrent causation for both coverage and loss distribution cases. Interestingly, as further proof that this model is the sensible outcome, using separate immutable rules tooled to take advantage of the differences between discrete and reciprocal causes largely tracks treating first party property insurance as different from third party liability insurance, a concept repeatedly echoed by courts¹²³ and scholars.¹²⁴

123. See, e.g., *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 705 (Cal. 1989).

A. Apportionment for Losses Resulting from Serial and Parallel Discrete Causes

Apportionment is the most effective approach in concurrent-causation cases where the loss is resulting from either serial or parallel discrete causes. This approach produces the most cost-efficient and, indeed, fair answer among the four possible approaches. Courts assessing losses resulting from serial and parallel discrete concurrent causes should apportion percentage contributions to each discrete cause in the causal chain in relation to the end result damage ensuing divisibly from that particular cause. This process makes apportionment akin to a contributory negligence analysis in tort law. Because the losses are discretely divisible as to the end result damage, the cost to separate the causes and apportion the loss is low to zero. The causes are notionally divisible already, ready to be apportioned. This is why it makes little sense to adopt a more costly and unpredictable approach to concurrent causation in these cases. This is also why a court needs to first identify the temporal dimension for each cause, so as not to get caught up with the roles of insufficient, unnecessary causes that have nothing to do with the end result loss.

Cases resulting from discrete concurrent causes are most often first party property insurance cases, though there can be instances of discrete causes in liability insurance when multiple separate behavioral inputs all harm a person or property. Causes have acted concurrently in a divisible nature to produce an end loss. Property insurance policies allow for more surgically tailored coverage and exclusion clauses.¹²⁵ The insurer has greater linguistic control over the underwritten risk, as opposed to liability insurance where the insurer's exposure is as wide as tort law.

By assigning a percentage contribution for each discrete cause in the causal chain, parties would invest some information, complexity, and administrative costs on the front end. But that investment is far less costly in the short run than the cost to the overall insurance market in the scenarios using the all-or-nothing dominant cause and conservative approaches. In those instances, the exclusionary language of the insurance policies is often frustrated. The insured often loses coverage which she paid for and expected in just such a loss, and for which the insurer pockets a premium

124. See, e.g., McDowell, *supra* note 12, at 591–92. British courts have not yet addressed the distinction between property and liability insurance in causation analyses. See Lowry & Rawlings, *Proximate Causation*, *supra* note 18, at 319.

125. See, e.g., LOWRY & RAWLINGS, INSURANCE LAW, *supra* note 18, at 233–34 (advocating different treatment of concurrent causation in property insurance than liability insurance, because property insurance coverage is defined in terms of causation, where the policy requires the loss to have been caused by a specific peril); McDowell, *supra* note 12, at 592 (explaining that first party property insurance causation analysis is more closely tied to strict contractual analysis than tort analysis).

and underwrites a portion of the very loss that occurred. Furthermore, gaps in coverage are eliminated, particularly for “all risks” property coverage. This is especially important in catastrophic loss events, which typically have multiple causes acting together in one conceptual event, like a hurricane, tornado, or earthquake.

There is also an elimination of the possibility of multiple policies being triggered in loss distribution disputes. Insurance brokers will not be called upon to indemnify insureds, thereby avoiding that market inefficiency. Therefore, no insured or third party loses the opportunity of at least some compensation, and no insurer is guaranteed a chance to escape scot-free even though coverage is clearly provided. This produces the most fair and predictable result. Each party gets what each party agreed to, as best as the proportional inquiry can achieve. An ideal proportional assessment of concurrent causation is really then based on the proportion of the risk underwritten by the insurer.

The apportionment question should continue the analytic trend and focus on the end result dollar value of the damage caused by each of the concurrent causes.¹²⁶ This avoids complicating analogies to tort law’s comparative negligence concepts, which are designed to operate on fault-based principles. Keeping the inquiry to damage costs only on a per-cause basis forces courts and litigants away from the temptation to assess apportionment based on some causal “responsibility” other than indemnity alone. That keeps the case grounded in insurance law contract principles and away from the muddying effect of importing tort principles.

Litigation costs will likely be significantly reduced in the long run. The incentive to overplead will be reduced in a coverage case, as there will no longer be a concern that characterization of one specific concurrent cause as *the* covered concurrent cause will solely dictate coverage. There may be some incentive to plead so as to attempt to tag more insurance policies in a loss distribution case in the hopes of increasing the available aggregate proportional recovery among various policies. There may also be a corresponding need for additional coverage counsel in loss distribution disputes, though this would likely not increase in incidence than what exists already under, say, a dominant cause approach. The removal of the complete avoidance of coverage as incentive for litigation behavior may alter the dynamic enough to promote settlement of these cases.

There is, however, little incentive for an insurer to take a chance in court at escaping indemnifying the insured altogether under a proportional recovery scheme for concurrent causation. If the insurer covered one of the concurrent causes, the insurer will be paying something. Perhaps then

126. See, e.g., Fierce, *supra* note 49, at 533 (suggesting that causation analysis should examine the sufficiency of damage as determinative, in addition to causal interaction).

counsel can more easily agree on the proportion, rather than have the dispute be about coverage or no coverage at all. The incentive to litigate is reduced because each party will know *ex ante* that the policy must pay something. The question then just becomes “how much.” That is likely an easier question to settle upon than an all-or-nothing coverage question. It is certainly a cheaper question to answer on a systemic basis than the tortured dominant cause litigation that proliferates. An immutable apportionment rule for cases involving losses caused by serial and parallel discrete causes therefore promotes the greatest efficiency in information, complexity, administrative, and consistency costs. The court system’s initial systemic investment in determining proportional percentages on a case-by-case basis will likely soon be made up in the precedential value of various fact patterns in cases that can assist litigants in charting their insurance litigation, not unlike what occurred when jurisdictions moved to comparative fault regimes in tort.

Choosing apportionment as the immutable legal rule for losses caused by discrete causes is not just a mere application of a more complicated, finely tuned dominant cause approach. Apportionment addresses the dominant cause approach’s greatest inefficiency: the inefficiency of the all-or-nothing approach to insurance coverage. Proportional recovery requires that a court apportion all relevant causes, not just one cause. This results in a fuller and fairer inquiry into the cause of the loss as it relates to insurance coverage. Moving away from dominance to a more equitable apportionment approach results in greater predictability in the absolute sense.

While this approach certainly benefits individual insureds in a lawsuit, it is also helpful to insurers who are repeat players in the litigation system and who may often have large inventories of similar cases to process.¹²⁷ The apportionment approach is a better approach for aggregate cases because of the predictable precedential value and built-in incentives to settle that the dominant cause approach just does not have. In fact, the dominant cause approach fosters litigation through its all-or-nothing operation. An argument can also be made that it is informationally cheaper to center a dispute around the various causal factors being placed on a relative continuum rather than whether the cause is a factor at all. Simply put, the apportionment approach provides opportunity for compromise. Any insurer dealing with a large inventory of cases after, say, a mass disaster, can surely appreciate the negotiating leverage provided by being able to negotiate causal roles separately. There is simply a greater panoply of factors through which litigants can flesh out the precise causal role of the dispute.

127. See, e.g., ABRAHAM, *supra* note 83, at 225 (insurers are repeat players in the litigation system who “employ a bureaucracy that promotes routinized settlement” practices).

B. A Liberal Approach for Losses Resulting from Serial and Parallel Reciprocal Causes

The liberal approach to concurrent causation is the most effective legal rule for solving cases where the losses are resulting from reciprocal causes. This approach avoids the inefficient and unpredictable all-or-nothing methodology of both the conservative and dominant cause approaches. Reciprocally-caused losses most often appear in cases involving third-party liability insurance, although they can also appear in property insurance scenarios with similar effects. Causes act concurrently in concert to produce the loss. The loss would not have resulted without both causes acting together. Liability insurance offers remarkably wide indemnity coverage, as wide as tort law.¹²⁸ Exclusions are difficult to draft because it is challenging to predict the myriad permutations of negligence that may come together to produce a loss.¹²⁹

The liberal approach is a simple, predictable legal rule that saves information, administrative, and consistency costs unlike any of the other approaches. It has the greatest savings in complexity costs among the other approaches for reciprocal causation cases. Michael Trebilcock notes that third party liability insurance questions are consistently more expensive questions to answer than first party property insurance questions.¹³⁰ By removing the assessment of responsibility for multiple causes, the liberal approach allows insureds and insurers to plan their insurance affairs. Both know there will be coverage for a concurrently caused loss caused by reciprocal causes.

It is inefficient to use an apportionment approach in reciprocal causation cases because apportionment is nearly always impossible or completely unpredictable and inefficient to discover, as noted in the previous Sub-part. The liberal approach avoids the inefficiency of a dominant cause analysis. There is no unpredictability and no temptation to mix tort responsibility with a dominant cause's responsibility for the loss. Those problematic leanings toward tort concepts of causation are completely avoided by this legal rule. This sidesteps all the litigation costs of dominant cause cases.

128. Banks McDowell notes that the liability insurer largely cannot control its indemnity responsibility within the insurance contract itself, other than by limiting the dollar value of the indemnity. *See* McDowell, *supra* note 12, at 591. *See also* Lowry & Rawlings, *supra* note 18, at 318–19 (asserting liability insurers offer wider indemnity than property insurers, so parallel causation losses should be covered as long as one cause is covered).

129. *See, e.g.*, LOWRY & RAWLINGS, INSURANCE LAW, *supra* note 18, at 233–34 (advocating a different treatment for concurrent causation in property insurance than liability insurance in which the causes are split equally).

130. Trebilcock, *supra* note 7, at 253.

Like the apportionment rule above for losses caused by discrete causes, the liberal approach for losses caused by reciprocal causes also reduces or destroys the incentive to litigate about concurrent causation. Insurers and insureds will know that a loss caused by reciprocal causes will be covered. Unlike the apportionment rule, the question does not even then get to “how much?” It is a much simpler analysis: there is indemnity from the policy. There is nothing stopping an insurer in a loss distribution dispute from seeking contribution from the additional insurers on a ratable basis, but such is done only after the coverage question is efficiently answered in the affirmative.

An immutable liberal rule creates no dangerous gaps in coverage. There is no forced and artificial determination of a single dominant cause to an accident, the answer to which then controls available coverage. This is an extremely important feature because liability insurance is a direct source of compensation for injured third parties. If an insured is denied insurance coverage under the conservative or dominant cause approach, that loss is usually borne not by the insured, but by the injured third party victim seeking to recover in tort from the insured. The strong policy reasons for compensation for the injured—which, incidentally, lead nearly all jurisdictions to adopt some form of state-run mandatory automobile insurance—point to the adoption of a liberal rule of concurrent causation for reciprocal causation in order to maintain the efficacy of the insurance system as being a rough-and-ready compensation system for the injured. It also completely avoids the problem of insurance brokers becoming implicated in insurance gap cases.

Overpleading will likely cease in loss distribution cases in which various policies overlap and cancel each other out with coverage and exclusion clauses. There will no longer be an incentive to tag more than one policy, except for cases where insurance coverage limits are at issue. This will also reduce the necessity for multiple coverage counsel if only the policy truly at risk of being called upon to pay is involved in the dispute.

An immutable liberal rule for reciprocal concurrent causation cases produces the most fair result for both the insured and insurer. The insured’s expectation of coverage is acknowledged by the fact that the insurer has to pay for a covered cause. The insurer underwrote part of a risk and so therefore must indemnify. There is some indirect recouping of the loss to insurers and the corresponding violence done to exclusionary language in instances where insurers are called upon to indemnify when a covered cause combines with an excluded cause. This is recouped in system-wide dispute resolution savings. Insurers at least know where they stand under a liberal rule. In a contest among concurrent causes, the insured wins. The certainty in that, while prompting greater incidences of payouts by insurers, results in an overall cost savings for the insurers who are repeat players in the insurance system. Actuarial evidence of concur-

rently caused losses under an immutable liberal rule can actually help insurers better predict and underwrite such risks, and then charge corresponding premiums. Better yet, perhaps rather than attempting to contract out of concurrent causation,¹³¹ an insurer could invent a concurrent causation endorsement and charge an additional premium based on the reasonable increase in possibility that such indemnity provisions would be triggered.¹³²

The following chart summarizes how the sufficiency dimension, not the temporal dimension, drives the choice for effective immutable legal rule for two different concurrent causation factual matrices:

TABLE 2

	Serial	Parallel
Discrete	<ul style="list-style-type: none"> • sequential • result divisible • <i>apportionment</i> 	<ul style="list-style-type: none"> • simultaneous • result divisible • <i>apportionment</i>
Reciprocal	<ul style="list-style-type: none"> • sequential • result indivisible • <i>liberal rule</i> 	<ul style="list-style-type: none"> • simultaneous • result indivisible • <i>liberal rule</i>

C. Systemic Efficiencies

On a systemic level, adopting these two immutable rules achieves more than just moving money previously spent on insurer litigation to money spent on insurer payouts to insureds. The move to dual immutable rules increases the ability of insurers to reliably predict loss payouts and set premium rates accordingly, based on better experience rating for two

131. The real risk is that a court may not hold the clause enforceable. *See supra* Part III.

132. Banks McDowell suggests that insurers sell combination liability policies, such as a homeowners-automobile insurance policy, to avoid loss distribution disputes among competing insurers. *See* McDowell, *supra* note 12, at 589–90. While admittedly some insurers offer discounts for purchasing both policies with the same company, McDowell’s suggestion would go a long way to avoiding loss distribution disputes among liability insurers in the event two potentially overlapping policies are not underwritten by the same insurer. This often occurs when the negligence of multiple, separately insured parties combines to produce a concurrently caused loss. McDowell’s thinking underlines the incentives for market creativity in insurance that a properly crafted, predictable immutable rule could bring about. Indeed, Kenneth Abraham has warned against the fragmenting of modern insurance coverage as creating potential insurance gaps and less than optimal insurance. *See* Abraham, *supra* note 79, at 105–07.

crucial events: the loss-causing factual matrices which demand payout, and the possibility of litigation about a concurrently caused loss. The move also drastically reduces spillover effects into other insurance markets, particularly for reciprocal causation cases involving tort.

Adopting the two immutable rules increases an insurer's ability to rate payout experiences for the loss-causing factual matrices that comprise concurrent causation losses. Relatively quickly, insurers should be able to accurately develop actuarial information about just how often insurers are required to make payouts for concurrently caused reciprocal losses. In fact, at present, insurers should have enough predictive information in hand about how often they *would* be required to pay if a jurisdiction moved from, say, a dominant cause approach to an immutable liberal approach for reciprocal causation losses. The incidence of payouts and denials on all reciprocal concurrently caused losses would, under a liberal approach to concurrent causation, switch to payouts only.

At first blush, how can that be a savings when the rate of payout probably increases? The answer lies in the loss distribution mechanism inherent in insurance itself: the power of more certain aggregate loss information. Once insurers have a greater certainty of experience for payouts, even if the payouts are aggregately higher, an insurer can then reliably increase premiums to what a more certain market would bear. More desirably, as will be mentioned below, insurers should instead find the savings elsewhere through a new regime for discretely caused losses, through avoidance of insurance market spillovers, and by enjoying drastically decreased litigation expenses. In short, the immutable rule for reciprocal causation takes some of the uncertainty out of what is often a fortuitous question. The fortuity that is left is rightly only in the event causing the loss, not the fortuity of having to indemnify the insured. That latter type of fortuity has often become the cause of much inefficiency that was never meant to be.

For discretely caused losses, insurers will benefit from the move from an all-or-nothing payout regime to one of proportional payouts directly related to the risk underwritten in the first place. That, in itself, is a tremendous savings and aids in an actuarially predictable premium-payout ratio. In fact, it is such an aggregate improvement from the unpredictable dominant cause approach that savings garnered with discretely caused losses could be used to initially fund whatever perceived short-term losses insurers initially face in the move to a liberal approach to reciprocal causation. For discretely caused losses under an apportionment regime, insurers only have to pay for the losses rationally linked to premiums charged for expected enumerated experiences. Over time, insurers will be better able to predict the percentage payouts resulting from serially caused losses in various scenarios. Premiums can be set to properly reflect the risk underwritten. The inefficiencies of an all-or-nothing regime are completely avoided.

The cost savings inherent in the rigor of the front-end analysis cannot be overemphasized. Parties can focus scarce litigation resources on only those concurrent causes that rightly should be relevant to the coverage determination question. This can now be accomplished by using the temporal dimension of the concurrent cause to determine causal involvement as a necessary cause related to the end result loss. Parties and courts will no longer be distracted by irrelevant temporal or necessity considerations in determining what causes are important enough to merit attention.

An example is helpful to demonstrate the suitability of the analysis for a very typical causation problem involving the elimination of confusing precursor “causes” in a chain of events leading up to a loss. Determining the point of temporal concern is important in the analysis because it can weed out misleading causal factors. For example, assume a fire insurance policy covered losses to property caused by fire but is silent as to coverage about losses caused by theft.¹³³ The insured’s house catches fire and is severely damaged. While the house is charred and vacant a day after the flames subsume, a thief steals some valuable contents. Is the loss “caused by fire,” and thus a covered loss? It is tempting to argue that the contents would not have been stolen but for the fire (or, to put it another way, that the fire *caused* the ultimate theft). By following the proposed causal analysis noted above, one is lead to the conclusion that “fire” and “theft” are not really concurrent causes at all. The only reason one might even consider them concurrent is to attempt to force theft coverage from the fire policy.

First, one must define the temporal dimension of the causes. The causes are serial causes. The fire came first, the theft second. Next, one must discern causal involvement by working backward from the end result loss. Is fire, the covered cause, necessarily involved in the end result loss? The end result loss here, the end result dollar value of the damage, is the stolen contents. The theft occurred after the fire. Was fire involved in bringing about the end result loss, and if so, how? No flames touched the contents. The claim is not for burned contents, but stolen contents. The fire was not a necessary condition of the end result dollar value of the loss, even though one could argue that fire created conditions which set the stage for the loss to occur. Merely being *a* condition is not enough; the fire must be necessarily involved in the end result dollar value of the loss claimed under the policy. The cause that was necessary to make the end result loss—the lost contents—was the theft. The fire—the covered cause—was over by that point. In fact, the fire and theft were not properly concurrent causes at all. But, as theft is not a covered cause, no coverage attaches, and the analysis stops.

133. With thanks to Wei Zheng for this example.

However, even if the analysis continues on a hypothetical basis, the correct result is still achieved. The final step in the analysis is the assessment of the sufficiency dimension. Here, one assesses the causal sufficiency of the causes in play. The causes here cannot be discrete causes, because fire itself caused no proportion of the end resulting damage. It played no role in the end result loss other than being a precursor event. The entire end result dollar value damage was from the theft. And the causes cannot be reciprocal causes, because, although the fire and theft may be interdependent, they are not individually insufficient causes. The causes did not occur simultaneously, where only their combination would bring about the end result loss. Theft alone, as a cause in this fact scenario, is sufficient to cause the entire loss. The fire was not required in addition to theft to bring about the end result loss. So the causes are not truly concurrent at all. No coverage results. The fire was no more than a sequential happening that occurred before the theft. To think otherwise is to undertake a remoteness analysis that moves away from “cause” as a contractual trigger to “cause” as part of a torts story, which has no place in insurance law.

The result of this analysis—that the fire is not a concurrent cause along with theft—makes commercial sense. No reasonable insurer or insured would expect that a fire-only policy, which covers loss “caused by fire,” would indemnify for theft. While it may be true that the theft would not have occurred without the initial fire taking place, the underlying purpose of the fire insurance coverage is preserved. The analysis avoids an unhelpful remoteness inquiry into space and time and produces a predictable result. It also avoids doing violence to the contractual language when a concurrent causation argument is used as an offensive tactic to force coverage by tracing contractually irrelevant chains of events.

Moving to the twin immutable rules also allows insurers to predict the frequency of litigation about concurrently caused losses. Litigation about parallel causation cases should be largely eliminated. The insurer pays in a concurrently caused loss. The litigation costs spent in disputing coverage and loss distribution can instead be spent on payouts which are certain. Insurers are incentivized to settle because liability to indemnify is no longer questionable merely because the loss is concurrently caused. Insurers are free to use the savings from eliminated litigation to fund the payout increases. Alternatively, insurers can raise premiums based on rational payout incidence or, instead, take the corresponding savings in discrete causation causes to fund whatever initial cost is required for liability insurance cases. Once liability insurance payout patterns become discernible, insurers should be able to actuarially predict reciprocal causation payout incidences and have competitive premiums based on actual experience ratings under the new regime.

Litigation about discrete causation cases will be limited to only a debate about the percentage contribution of a certain insured loss. With the litigation subject moving away from all-or-nothing coverage to instead only the proportion of coverage attributable to the insurer, insureds and insurers face greater incentives to settle. While there is certainly a lot of room to dispute within that range of possible proportions, most cases should quickly arrive at some relative scope about which a sensible settlement discussion is the more rational alternative to unpredictable and costly litigation. If, for example, rain damages a home in a hurricane, the dollar figure of the damage attributable to that rain alone is likely quantifiable into some reasonable range, even if expert assistance is required to set the reasonable ranges. The dispute, then, will be about the bounds of that range and not about whether or not the loss is covered at all. This is a much less resource-intensive litigation fight to have, if litigation ensues at all.

Finally, an insurance world that adopts the two immutable rules for discrete and reciprocal causation is one that allocates losses according to the parties who undertook the risks insured. Inefficient spillover effects into other insurance markets are drastically reduced. The potential effect of gaps in coverage on insurance brokers' liability insurance have already been discussed. But there is real potential in reciprocal causation cases to have spillovers into other insurance markets as well, if anything other than a liberal rule for concurrent causation is adopted.

Recall that liability insurance is the rough-and-ready backbone of the compensatory aspect of the tort system. If a third party accident victim is injured in a jurisdiction that has an insurance loss distribution system with an unpredictable legal rule for concurrent causation, like the all-or-nothing dominant cause approach, the injured third party accident victim may often be denied compensation because the underlying tortfeasor is denied liability insurance coverage in a concurrent causation scenario. If, in this unpredictable system, losses are not borne by the parties who charge a premium to underwrite a certain risk, then those parties profit while the resultant loss—the compensation sought by the accident victim—must be redressed elsewhere in the system.

That "elsewhere" is often either to other insurance sources, such as the injured victim's first party insurance benefits, like long term disability insurance or first party health insurance, or instead to societal benefits, such as social security or the public welfare social safety net. In short, the one who agreed to bear the loss (the insurer) is now not predictably bearing the loss under similar repeat circumstances because of the fortuity of a concurrent uninsured event being deemed the "dominant cause."

A liberal approach to concurrent causation for reciprocal causes at least ensures that the insurer who took the premium for some of the loss bears the burden of indemnity. The spillover is avoided. Insurers can then

rely on the certainty of the system to set rates that the market can bear. Insureds can then also rely on insurance coverage when those insureds are called upon to pay for losses stemming from their tortious liability. There will be no insurance gaps. And accident victims, who are not parties to these insurance contracts at all, can rely on a predictable source of compensation and not be unpredictably forced on occasion to seek first party benefits or state welfare.

D. A Note on Exclusions from Coverage

Thus far, this Article has focused the inquiry on determining whether or not concurrent causes attract available insurance coverage largely with respect to coverage clauses in insurance policies. Yet insurance policies also exclude specific causes from coverage for a variety of reasons. Exclusions could appear in a policy because of market segmentation, moral hazard, or adverse selection concerns on the part of the insurer. One might expect that the reason for an exclusion clause appearing in the policy might affect whether or not that exclusion takes precedence over coverage in a concurrently caused loss in order to oust coverage. Quite simply, it should not.¹³⁴ The proposed immutable rules effectively avoid any problems with competing coverage and exclusion clauses in a concurrently caused loss scenario.

The reason is this: the analysis for coverage also needs to match the analysis for interpreting the exclusion clause. Moving to an extra-contractual consideration of the purpose of the exclusion in the policy is irrelevant and perhaps misleading when confronted with a concurrently caused loss. It is certainly backward to what is considered when interpreting a coverage clause. Such a move would likely prompt a relative weighting of exclusions to coverage that is ill fitted particularly in those jurisdictions which interpret coverage clauses broadly and exclusion clauses narrowly. The analysis for concurrent causation purposes should not inquire into the purpose of the exclusion any more than it inquires into why the coverage clause exists.

The apportionment approach for discrete causes proceeds regardless of the exclusion or coverage clauses present in the policy. If one concurrent discrete cause is necessarily involved in the end result loss and is excluded from coverage, the proportion of that discrete cause is deducted from the loss, as coverage is denied that particular cause. The approach accounts

134. Note that the causation coverage and exclusion questions are separate from contractual interpretation questions. The causation analysis proceeds after the meaning of the relevant clauses are settled. At the policy interpretation stage, to determine what a particular exclusion means, the purpose of the exclusion in the policy may be a relevant consideration. Once that meaning of the exclusion is settled and a court or party moves to consider whether or not such an exclusion is triggered, then the purpose behind the exclusion should be deemed irrelevant.

for the exclusion, without regard as to what underlying purpose the exclusion might serve in the overall policy.

Exclusions under the liberal approach for reciprocal causes, however, become tied to whether or not there is coverage for an involved and necessary reciprocal cause. The standard method for determining insurance coverage availability for a given loss is to first interpret the coverage clause to understand whether coverage is initially provided for the particular loss caused by a certain event. If coverage is provided, the next step is to interpret any valid exclusion clauses and evaluate the efficacy of the exclusion in negating the coverage granted under the first step. If a reciprocally caused loss results from a covered and an excluded cause, the loss is still covered using a liberal rule for concurrent causation. This makes sense not only because an insured's expectation of insurance coverage is upheld. It additionally avoids problematic gaps in insurance coverage that exclusions create in concurrent causation situations.

There is an argument that the liberal approach does violence to an exclusion clause. In a reciprocally caused loss, however, where a covered cause combines with an excluded cause, the ties go to the insured. To do otherwise is to adopt the inefficient conservative approach to concurrent causation. Because more often than not reciprocally caused losses involve liability insurance, the varying arrays of behavior that could combine to produce reciprocal concurrently caused losses might actually trigger exclusions far too regularly, thereby frustrating available coverage.

An example is helpful here to illustrate. Take the "Work Site Clean-up" reciprocal causation fact scenario. The causes of the loss are negligent driving of the truck and negligent work site cleanup. The coverage clause of the policy covers for the negligent cleanup. The driver who was swerving wildly is subsequently criminally charged with dangerous operation of a motor vehicle. Assume the homeowners liability insurance policy has an additional typical exclusion for losses "caused by an intentional or criminal act" on the part of the insured. This exclusion is designed to combat the moral hazard of insureds acting intentionally or criminally and thereby unreasonably increasing the risk of a loss. The "criminal act"—the negligent automobile operation—is an excluded cause. Of course, it is also excluded by the market segmentation clause which excludes losses "caused by use or operation of an automobile."

Regardless of the policy purpose of either exclusion, a liberal approach would grant coverage because the covered reciprocal cause—negligent cleanup—has necessarily combined with the excluded reciprocal cause—negligent and now criminal automobile operation—to produce the resulting end loss. The only reason why payout would be avoided would be under a conservative or dominant cause approach, because then the covered cause would combine with the excluded cause to produce the end result loss. In those cases, however, the insurer would have taken a pre-

mium for a risk underwritten that did, in fact, materialize entirely because of the reciprocal nature of the concurrent causes. Both causes were necessary for the loss to occur. The injured parties in the fact pattern would be left with no source of compensation if coverage was excluded. The liberal approach for reciprocal losses therefore avoids gaps in coverage. The type of exclusion is immaterial to the operation of this particular legal rule, as the end result effect is the same.

VII. CONCLUSION

Concurrent causation disputes are expensive, unpredictable, and incredibly inefficient to resolve. They are also becoming increasingly prevalent as insureds grasp for coverage in the wake of large-scale disasters and rising costs of accidents. Creative lawyers attempt to seek indemnity for their clients by implicating various policies. And dangerous gaps in insurance coverage expose not only an insured's assets but remove a source of compensation for injured third party victims.

By creating a more structured inquiry into the temporal and sufficiency dimensions of the concurrent causes necessarily involved in the end result loss, the causal analysis stays true to its contractual roots and avoids unnecessary and inefficient detours into tort law. The analysis also sensibly leads to the adoption of two separate immutable rules for two different kinds of concurrent causation scenarios through which courts and parties in common law jurisdictions can solve many of the inefficiencies that currently plague these types of cases. For those cases where the potentially insured loss results from discrete concurrent causes (most often property insurance disputes), applying an apportionment rule to solve the concurrent causation dispute leads to greater cost savings for insureds, insurers, and the justice system. Proportional responsibility for the loss is aggregated on a per-cause basis. This stops the inefficient all-or-nothing approach to coverage and assists with loss sharing in loss distribution disputes.

For those insurance disputes where the potentially insured loss results from reciprocal concurrent causes (most often liability insurance disputes), applying a liberal rule is the most efficient response. If a loss is caused by a covered cause, the loss is covered, even though an excluded or non-covered cause may have combined together to produce the loss. This approach is straightforward to apply. Whatever increase in liability for insurers is created in its application is more than made up in the increased predictability savings on a system-wide level. This approach also preserves the unique compensation aspect of liability insurance that is so important to injured third parties. It also creates market opportunities for

insurers to produce an insurance product that actually insures for concurrently caused losses.¹³⁵

Both immutable rules provide serious disincentives to litigation, which is a significant cost savings. They are simple to apply in coverage and loss distribution disputes. Finally, insurers and insureds can reasonably predict the coverage outcomes of a dispute. Adopting these two immutable rules in common law jurisdictions for that single reason is, in itself, a worthy cause.

135. Of course, there are large systemic incentives for insurers to persist with current insurance policy language and products, even if it is inefficient in the short run to do so. Insurers at least have the bank of court precedents to assist in predicting how policy provisions will be interpreted. See Abraham, *supra* note 17, at 555–56; Schwarcz, *supra* note 97 (discussing how the insurance market incentivizes insurers to avoid re-drafting insurance policies and instead maintain even ambiguous insurance policy language); Boardman, *Insuring Understanding*, *supra* note 17 (benefits to insurer in using “abstruse language” outweigh benefits of redrafting insurance policies in plain language).