

**IMPLICATIONS OF ANTI-CONCURRENT CAUSATION CLAUSES
IN GULF COAST HURRICANE CLAIMS**

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In the aftermath of recent Gulf Coast hurricanes Katrina, Rita and Ike, large numbers of property owners who did not maintain flood coverage under the National Flood Insurance Program turned to their homeowners or commercial property insurance policies for relief. While such policies generally insure against damage caused by wind or hail, including damage from rain entering through breaches in a dwelling caused by wind or hail, most also contain a water damage exclusion eliminating coverage for damage caused directly or indirectly by “flood, surface water, waves, tidal water, overflow of a body or spray from any of these, whether or not driven by wind.” Typically, water damage exclusions are accompanied now by an anti-concurrent causation clause (“ACC clause”) stating: “[The insurer] will not pay for loss or damage caused directly or indirectly by [sources identified in the water damage exclusion]. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.” The ACC clause eliminates application of the efficient proximate cause rule, whereby coverage depended on the relative contribution of the covered and the excluded perils.¹ Accordingly, in the context of hurricane damage, the ACC clause operates to deny coverage for damage caused concurrently by wind (a covered peril) and flooding (a non-covered peril), regardless of which was the proximate or predominant cause of the loss.

Not surprisingly, courts in the affected Gulf Coast areas of Texas, Louisiana, and Mississippi have spent the last several years dissecting the impact and enforceability of these specific policy provisions. Ultimately, the Fifth Circuit has described these provisions as “unambiguous,”² and has consistently held that an ACC clause precludes coverage for flood-

related damage regardless of whether an insured proves that a covered peril initially or subsequently contributed to cause the damage.

Beginning with *Leonard v. Nationwide Mutual Insurance Co.*,³ a claim involving water damage caused, in part, by the storm surge from Hurricane Katrina, the Fifth Circuit held that the ACC clause “unambiguously excludes coverage for water damage ‘even if another peril’—e.g., wind—‘contributed concurrently or in any sequence to cause the loss.’”⁴ The Court added:

The plain language of the policy leaves the district court no interpretive leeway to conclude that recovery can be obtained for wind damage that “occurred concurrently or in sequence with the excluded water damage.”⁵

Moreover, in reversing the district court, the Fifth Circuit identified three discrete damage categories: “(1) damage caused exclusively by wind; (2) damage caused exclusively by water; and (3) damage caused by wind ‘concurrently or in any sequence’ with water.”⁶ The court held that “if wind and water synergistically caused the *same* damage, such damage is excluded.”⁷ “The only species of damage covered under the policy is damage caused *exclusively* by wind.”⁸ “If, for example, a policyholder’s roof is blown off in a storm, and rain enters through the opening, the damage is covered. Only if storm-surge flooding—an excluded peril—then inundates the *same* area that the rain damaged is the ensuing loss excluded because the loss was caused concurrently or in a sequence by the action of a covered and an excluded peril.”⁹ Subsequently, in *Tuepker v. State Farm Fire & Casualty Co.*,¹⁰ another Hurricane Katrina claim arising in Mississippi, the Fifth Circuit upheld its ruling in *Leonard*.¹¹

Likewise, in May 2008, the Fifth Circuit again reinforced its position on the enforceability of flood and ACC clauses/exclusions in a Hurricane Katrina case arising in Louisiana, *Bilbe v. Belsom*.¹² In *Bilbe*, the appellate court affirmed the district court’s rejection of the insured’s allegation “that the Water Damage Exclusion does not apply because it was the storm surge, not a flood, that had caused the damage.”¹³ In this regard, the Fifth Circuit noted,

“[w]e have repeatedly held that the term “flood” includes storm surges.”¹⁴ In addition, the Fifth Circuit again rejected the insured’s argument that the ACC clause should not apply because a covered peril was the proximate or producing cause of damages:

In Bilbe’s memorandum in opposition to summary judgment, she mentions that wind damage occurred before the storm surge arrived. This perhaps is a vague allusion to proximate cause The contract states that the Water Damage Exclusion applies regardless of “whether other causes acted concurrently *or in any sequence with the excluded event to produce the loss*.”¹⁵

The emphasis that the *Bilbe* court placed on the words “*in any sequence with the excluded event to produce the loss*” in the above quote highlights the fact that the Court applied the ACC clause to exclude all damage caused by the synergistic effect of wind and flood, even if the flood occurs after the wind damages the property.¹⁶

Most recently, on April 2, 2009, the Fifth Circuit issued its opinion in *Arctic Slope Regional Corp. v. Affiliated FM Insurance. Co.*, in which it confronted the application of an ACC clause with respect to damage caused in-part by the Hurricane Rita storm surge in Louisiana.¹⁷ In *Arctic Slope*, the insured argued first that storm surge damage was expressly covered by the wind/hail provision of the relevant policy, and alternatively that the ACC provision of the policy was ambiguous and must be construed in its favor.¹⁸ The Fifth Circuit rejected both arguments and again upheld the application of the ACC clause.

In rejecting the insured’s first argument, the Court held that although the policy’s definition for wind and hail provided coverage for “[d]irect and/or indirect action of wind and/or hail.... including but not limited to, loss or damage caused when water, in any state...is carried, blown, driven, or otherwise transported by wind onto or into said location,” the storm surge was nevertheless unambiguously excluded under the flood exclusion. Accordingly, the Fifth Circuit determined that the policy’s broad definition of the “wind/hail” peril was irrelevant since the surge was clearly excluded elsewhere in the policy.¹⁹ The Court explained:

Arctic Slope maintains that Omega's damage falls squarely within the plain language of the wind/hail provision because the storm surge consisted of water driven by wind onto or into Omega's property...The district court rejected Arctic Slope's proffered interpretation of the wind/hail provision as unreasonable in light of the entire policy. We need not opine on that conclusion, however, because even if a hurricane storm surge falls within the definitions of both an excluded peril (flood at Omega's site) and a covered peril (wind/hail), the policy is not ambiguous. The policy explicitly states that it covers all risks of direct physical loss or damage "except as excluded under this policy." Section A, Perils Insured. There is no ambiguity when the policy is read as a whole. The exclusion of storm surge as a flood event cannot be reversed by its possible inclusion as a wind/hail event.²⁰

The Court also rejected Arctic Slope's contention that the ACC provision was ambiguous, finding that the "ACC clause is unequivocal and unyielding. It excludes insurance against loss or damage caused by or resulting from any of the listed causes, including flood...."²¹

As demonstrated by these decisions, Fifth Circuit courts continue to enforce ACC clauses, thereby generally confining coverage for Gulf Coast hurricane claims to incidents of high winds unaccompanied by storm surge or other excluded water damage.²² Although the Fifth Circuit has left open the possibility that an insured might avoid the effects of an ACC clause where there are distinct and separable elements of damage to property caused on one hand by a covered peril and on the other hand by an excluded peril, such a scenario obviously presents significant evidentiary hurdles.²³ Claims for loss under both "open peril" and "named peril" policies ultimately place the burden on the insured to prove segregation of covered claims from non-covered claims when the defendant insurer meets its burden of proof regarding a defense of exclusion.²⁴

¹ *Arctic Slope Regional Corp. v. Affiliated FM Ins. Co.*, 2009 U.S. App. Lexis 6900, *2 (5th Cir., 2009).

² *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 214 (5th Cir. 2007) (applying Louisiana law) (footnote omitted). The Louisiana Supreme Court later agreed, citing in part *Katrina Canal*, 495 F.3d at 214.

³ 499 F.3d 419 (5th Cir. 2007) (applying Mississippi law).

⁴ *Leonard*, 495 F.3d at 430-435. The Court also noted that "a majority of states enforce ACC exclusion clauses...only Washington and West Virginia do not allow abrogation of the default rule via an ACC clause...California and North Dakota require efficient proximate causation by statute." With respect to California's application of the efficient proximate causation doctrine, however, note that, on April 2, 2009, the Ninth Circuit

issued an opinion, *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 2009 WL 861475 (9th Cir. 2009), remanding a case to the trial court for determination of whether California's efficient proximate cause doctrine demands coverage for excluded water damage notwithstanding the presence of an ACC clause in the contract.

⁵ *Leonard*, 495 F.3d at 426 (quoting the district court's opinion, 438 F.Supp.2d at 693).

⁶ *Leonard*, 495 F.3d at 426.

⁷ *Leonard*, 495 F.3d at 426.

⁸ *Leonard*, 495 F.3d at 426.

⁹ *Leonard*, 495 F.3d at 431.

¹⁰ 507 F.3d 346 (5th Cir. 2007) (applying Mississippi law).

¹¹ The Fifth Circuit again reiterated its holding from *Leonard* and *Tuepker* in *Broussard v. State Farm Fire and Cas. Co.*, 523 F.3d 618, 624 n.1 (5th Cir. 2008). The Court noted, however, that the claims in *Broussard* "[a]re different from the claims in *Tuepker*" because "the *Tuepker* plaintiffs challenged the enforceability of the ACC clause and the applicability of the water damage exclusion to a hurricane-created storm surge" whereas "the main thrust of the *Broussards'* claim is that their home was destroyed by tornadic winds prior to the arrival of the storm surge.

¹² 530 F.3d 314 (5th Cir. 2008) (applying Louisiana law).

¹³ *Bilbe*, 530 F.3d at 315.

¹⁴ *Bilbe*, 530 F.3d at 315 (citing *Tuepker*, 507 F.3d at 352-53); *See also Cameron Parish School Board v. RSUI Indem. Co.*, No. 06-1970, 2008 U. S. Dist. Lexis 64902 (W.D. La. Aug. 25, 2008).

¹⁵ *Bilbe*, 530 F.3d at 317 n.3 (alterations in original, except underlining added). In so holding, the court mentioned the three discrete categories of damage detailed in *Leonard*. *See supra* note 22 and accompanying text.

¹⁶ In March 2009, the Fifth Circuit reiterated its *Bilbe* opinion in another Hurricane Katrina claim out of Louisiana, *Kodrin v. State Farm Fire & Casualty Co.*, 2009 U. S. App. Lexis 4811 (5th Cir. 2009) (applying Louisiana law). As with *Broussard*, however, *Kodrin* did not focus on the issue of concurrent causation or the application of an ACC clause because the *Kodrins* claimed that wind alone destroyed their house whereas State Farm claimed that flood alone destroyed the house. Thus, the jury in *Bilbe* was given the option of choosing wind or flood, but not a combination of both. The court explained, "following *Bilbe*, the *Kodrins* could recover under their homeowner's policy only if the jury should find that wind alone, and not flooding at all, caused their loss. Conversely, if the jury should find that flooding destroyed the home, the policy's exclusionary clause would bar recovery." *Kodrin*, 2009 U. S. App. Lexis 4811 at *3.

¹⁷ *Arctic Slope Regional Corp. v. Affiliated FM Ins. Co.*, 2009 U.S. App. Lexis 6900 (5th Cir. 2009) (applying Louisiana law).

¹⁸ *Arctic Slope*, 2009 U.S. App. Lexis 6900 at *2.

¹⁹ *Arctic Slope*, 2009 U. S. App. Lexis 6900 at *2 (noting that the district court rejected Arctic Slope's contention that the surge could be interpreted as a covered peril under the wind/hail provision).

²⁰ *Arctic Slope*, 2009 U. S. App. Lexis 6900 at *2.

²¹ *Arctic Slope*, 2009 U. S. App. Lexis at *2.

²² Although *Leonard*, *Tuepker*, *Bilbe*, and *Arctic Slope* were decided under Louisiana and Mississippi law, Texas courts have reached the same conclusions. *See Claunch v. Travelers Lloyds Ins. Co.*, No. 4:07-CV-548-A, 2008 U. S. Dist. Lexis 1979, *4 n.4 (N.D. Tex. 2008); *Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, No. CIV.A.3:99CV1623D, 2002 U. S. Dist. Lexis 3594, *4-*5 (N.D. Tex. Mar. 5, 2002); *Valley Forge Ins. Co. v. Hicks, Thomas & Lilienstern, L.L.P.*, 174 S.W.3d 254, 257, 259 (Tex. App.—Houston [1st Dist.] 2004, no pet.); and *Wong v. Monticello Ins. Co.*, No. 04-02-00142-CV, 2003 WL 1522938, *1 (Tex. App.—San Antonio Mar. 26, 2003, pet. denied) (not designated for publication).

²³ In footnote 15 to *Kodrin*, *supra*, the Fifth Circuit commented, "It is important to distinguish between this dispute over which force totally destroyed a home and cases in which the parties disagree as to the causes of various damaged elements of a home. Distinct elements of damage would have to be considered separately. Flood-damaged carpets, for example, would not bar recovery for a wind-damaged roof." *See also Dickinson v. Nationwide Mut. Fire Ins. Co.*, 2008 U. S. Dist. Lexis 34354, *3 (S.D.Miss. 2008) (explaining "[t]he ACC provision does not purport to apply to losses caused separately by two forces (wind and water) acting sequentially but separately").

²⁴ *Copelin v. State Farm Ins.*, U. S. Dist. Lexis 10800, at *6 (E.D.La. 2009).