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Problems of Causation in Property Insurance Coverage

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Problems of Causation in Property Insurance Coverage

A difficult problem is presented in determining whether a property insurance policy covers a loss caused by interaction of insured and uninsured risks. Some courts have resolved the question by an application of a "proximate cause" test; others have applied a "contemplated damages" test. The author of this Note describes and analyzes these two approaches in three distinct casual relationships, and concludes that the "proximate cause" test is the more satisfactory since it provides a greater degree of predictability of policy coverage.

Three automobile owners, *A*, *B*, and *C*, have policies insuring against losses by fire but collision damage is excepted. *A*'s automobile is damaged when a fire breaks out in the car, panicking *A* and causing a collision. *B*'s automobile is damaged when a collision causes a fire; and *C*'s automobile is damaged when a collision and a fire occur simultaneously from independent causes. In determining whether *A*, *B*, and *C* recover their losses on their policies, a fundamental question arises as to what test should be used to determine the coverage of *any* property insurance policy.

Although courts have not been consistent in their treatment of these problems of policy coverage, generally two approaches have been taken to determine whether the insurance policies cover each of these losses. Some courts apply a proximate cause concept analogous to that applied in tort cases [1] and hold the insurer liable for all

1. The term "proximate cause" has been given a variety of meanings. See PROSSER, TORTS § 48 (2d ed. 1955). For purposes of the following discussion, the term is referred to in the "direct causation" sense, where responsibility is attached to an event if the loss followed reasonably therefrom, and if no self-sufficient and controlling force intervened. See, *e.g.*, Dixie Pine Prod. v. Maryland Cas. Co., 133 F.2d 583 (5th Cir. 1943), *cert. denied*, 319 U.S. 743 (1943). *Cf.* RESTATEMENT, TORTS § 435 (1934). In some jurisdictions, the loss must be foreseeable to be proximately caused by a given event. See, *e.g.*, Milwaukee & St. P. R.R. v. Kellogg, 94 U.S. 469 (1876); Shideler v. Halinger, 172 Kan. 718, 243 P.2d 211 (1952); Mauney v. Gulf Ref. Co., 193 Miss. 421, 9 So. 2d 780 (1942). Where the foreseeable loss rule is applied, there would probably be no difference between the tort proximate cause test and the contract rule of damages, for each requires the injury to be reasonably within the mind of the party to be held responsible before liability will attach.

In Camden Fire Ins. Ass'n v. Moore, 206 S.W.2d 104 (Tex. Civ. App. 1947), the court stated that the proximate cause concept as applied to insurance cases has a meaning substantially similar to that applied in negligence cases, except the element of foreseeability is lacking. This approach would be essentially the same as an application of the "direct causation" theory of proximate cause.

losses proximately caused by an insured event.[2] Other courts apply the technique used to measure damages in contract cases[3] and hold the insurer liable for losses reasonably within the contemplation of the parties at the time of policy execution.[4] Whether *A*, *B*, and *C* would recover in the three situations set out above may depend upon which of these two tests is applied. This Note will analyze the two tests to determine which is best suited to define property insurance[5] coverage in the three situations illustrated above: (1) where an insured event causes an excepted loss, (2) where an excepted event causes an insured loss, and (3) where an insured and an excepted event join to produce a loss which neither would have produced alone.

I. Insured Event Causing an Excepted Loss

The risk assumed by an insurer of property is almost always subject to two kinds of limiting provisions. One limits the coverage by excepting losses caused by particular events,[6] while the other limits the coverage of the consequences of the insured event.[7]

A. Proximate Cause Test

The leading case in which the proximate cause test was applied is *Lynn Gas & Elec. Co. v. Meriden Ins. Co.*[8] There a fire caused a short circuit in an electrical system which resulted in damage to the insured's machinery. When the insured sued for recovery on his fire insurance policy, the court compared the application of the proximate cause rule in insurance cases to its application in other actions and stated: "the question, What is a cause which creates liability? is to be determined in the same way in actions on policies of fire insur-

2. See, *e.g.*, Norwich Union Fire Ins. Soc'y v. Board of Comm'n, 141 F.2d 600 (5th Cir. 1944); Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N.E. 690 (1893); Friedman v. Insurance Co. of No. America, 4 Wis. 2d 641, 91 N.W.2d 328 (1958).

3. See Kerr S.S. Co. v. Radio Corp. of America, 245 N.Y. 284, 157 N.E. 140, *cert. denied*, 275 U.S. 557 (1927); Hadley v. Baxendale, 9 Exch. 341 (1854). For a further discussion of the applicable contract law see Restatement, Contracts § 330 (1932); 5 Corbin, Contracts § 1007 (1951); 5 Williston, Contracts § 1344 (rev. ed. 1937).

4. See, *e.g.*, National Fire Ins. Co. v. Crutchfield, 160 Ky. 802, 170 S.W. 187 (1914); Bird v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86 (1918); Pennsylvania Fire Ins. Co. v. Sikes, 197 Okla. 137, 168 P.2d 1016 (1946).

5. Because the field of insurance includes so many different types of indemnification, the scope of this Note is necessarily limited to property insurance. However, it is probable that the analysis is applicable to other fields of insurance, such as liability and life insurance.

6. See note 33 *infra* and acompanying text.

7. For example, a fire insurance policy does not cover loss of profits due to destruction of the insured property unless specifically provided for. For a discussion of risk controls in insurance contracts, see Patterson, Essentials of Insurance Law §§ 57–59 (2d ed. 1957).

8. 158 Mass. 570, 33 N.E. 690 (1893).

ance as in other actions."[9] The court then applied the proximate cause test and allowed recovery.

The *Lynn* case did not involve a situation where an insured event caused an excepted loss. However, most courts apply the proximate cause test when an insured event causes an excepted loss and allow recovery on the ground that the predominant and efficient cause of the loss was insured against.[10] It would seem that to grant recovery for an excepted loss is contrary to the terms of the policy, but courts have used a variety of theories to reconcile recovery with the policy terms. A number of courts have dismissed the excepted loss as incidental.[11] For example, in *Pennsylvania Fire Ins. Co. v. Sikes*[12] a windstorm, an insured event, blew plaintiff's house into a flooded street causing flood damage, an excepted loss. The court allowed recovery for the full amount of the loss on the ground that the flood damage was only incidental to the total loss.

When the excepted loss contributes only slightly to the total loss, as in the *Sikes* case, it is proper for the courts to regard the excepted loss as incidental. But when the insured event itself inflicts no damage, and the only damage incurred is of the nature expressly excepted from the policy, the court is not justified in regarding the loss as incidental. To illustrate, in *Cole v. United States Fire Ins. Co.*[13] the plaintiff's policy insured against fire damage but excepted loss by explosion. The court granted recovery for explosion damage caused by an arsonist throwing a lighted match into a room he had earlier saturated with gasoline. The court characterized the loss by explosion as only incidental to the total loss. But clearly, since the explosion damage is the *only* damage, it cannot properly be dismissed as incidental; to so characterize it adds no support to the result.[14]

Another device used by courts to grant recovery for a loss ex-

9. *Id.* at 576, 33 N.E. at 692.

10. See, *e.g.*, Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70 (1880) (insured fire caused excepted explosion); Shirey v. Tri-State Ins. Co., 274 P.2d 386 (Okla. 1954) (insured windstorm caused excepted upset); Firemen's Ins. Co. v. Weatherman, 193 S.W.2d 247 (Tex. Civ. App. 1946) (insured windstorm caused excepted collision); Friedman v. Insurance Co. of No. America, 4 Wis. 2d 641, 91 N.W.2d 328 (1958) (insured windstorm caused excepted upset). *But see* Delametter v. Home Ins. Co., 233 Mo. App. 645, 126 S.W.2d 262 (1939) where the court held that an insured fire was not the proximate cause of the collision damage.

11. See, *e.g.*, Shirey v. Tri-State Ins. Co., 274 P.2d 386 (Okla. 1954); Marks v. Lumbermen's Ins. Co., 160 Pa. Super. 66, 49 A.2d 855 (1946). *Cf.* Anderson v. Connecticut Fire Ins. Co., 231 Minn. 469, 43 N.W.2d 807 (1950).

12. 197 Okla. 137, 168 P.2d 1016 (1946).

13. 265 Mich. 246, 251 N.W. 400 (1933).

14. The criticism of the *Cole* case is directed toward the reasons for the decision, not the result. Since it is well established that an explosion caused by a fire is within the terms of coverage of a fire policy, APPLEMAN, INSURANCE LAW AND PRACTICE § 3086 (1941); VANCE, INSURANCE § 153 (3d ed. 1951), the insured was probably paying premiums on the basis that explosion loss caused by fire was covered and recovery was warranted.

The insured could also argue that when the insurer excepted explosion damage

cepted from policy coverage is to hold that the parties intended any loss to be covered if proximately caused by an insured event.[15] Unlike the contemplated damages test of contract law,[16] the court does not inquire into what the parties actually intended, but only raises an irrebuttable presumption that they intended the proximate cause test to be applied. Courts using this approach are merely creating a presumption in order to fill in the unexpressed terms of policy coverage. This presumption would be valid only if the insured could show that an ordinary property owner expects that an insurance policy will cover all losses when proximately caused by an insured event. On the other hand, if the insurer could show that premiums were not calculated on the assumption that a proximate cause test would be applied to determine policy coverage,[17] or that a reasonable and valid business purpose existed for excluding the loss, the court would be less justified in presuming that the parties intended the proximate cause test to be applied.

A third means of reconciling recovery with the policy terms is for the court to say that the policy coverage is ambiguous when an insured event causes an excepted loss, and to construe the ambiguity most strongly against the insurer.[18] For example, the New York Standard Fire Policy provides: "this Company shall not be liable for loss occurring . . . as a result of explosion or riot, unless fire

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from the policy, it intended to exclude coverage of the more common types of explosion such as boiler and other unintentional losses; it did not intend to exclude an unusual loss such as that caused by the intentional act of an arsonist.

15. *E.g.*, Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N.E. 690 (1893); Ortiz-Leon v. Porto Rican & Am. Ins. Co., 37 P.R.R. 303 (1927); American Indem. Co. v. Haley, 25 S.W.2d 911 (Tex. Civ. App. 1930).

16. See note 22 *infra* and accompanying text for a discussion of the contemplated damages test.

17. There is some evidence that the proximate cause test *is* the test used by insurance companies to establish premiums. See Kochendorfer, *Collision Damage Under the Automobile Comprehensive Clause*, 1951 INS. L.J. 171, 178 where the author, a defense attorney for an insurance company, states:

> To bring collision damage within the coverage of the comprehensive clause of the automobile insurance policy, it is necessary that such damage be proximately caused by a hazard against which the automobile is insured under such comprehensive clause. . . . the hazards insured against are not necessarily limited to those specifically mentioned in the comprehensive clause.

Although the state has power to fix premiums charged by the insurer, German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914), most statutes provide only that the insurance commissioner has the power to set aside the rates if it is determined, by hearing, that they are excessive, inadequate, or unfairly discriminatory. *E.g.*, MINN. STAT. §§ 70.62–.64 (fire), 70.37–.39 (casualty) (1957).

18. See, *e.g.*, Norwich Union Fire Ins. Soc'y v. Board of Comm'rs, 141 F.2d 600 (5th Cir. 1944); Edgerton & Sons, Inc. v. Minneapolis Fire & Marine Ins. Co., 142 Conn. 669, 116 A.2d 514 (1955); Boecker v. Aetna Cas. & Sur. Co., 281 S.W.2d 561 (Mo. Ct. App. 1955); Pred v. Employers' Indem. Corp., 112 Neb. 161, 198 N.W. 864 (1924).

This general rule arises from the presumption that the insurer draws the contract in his own favor. Miller v. Mutual Life Ins. Co., 206 Minn. 221, 289 N.W. 399 (1939).

ensue, and in that event for loss by fire only."[19] Without question, the policy is completely ambiguous as to whether a loss is covered when a fire causes an explosion. Where such ambiguities are present, the court may apply the familiar rule of construction that ambiguities in the policy are to be construed most strongly in favor of the insured. Even though recovery would seem to be automatic when this rule of construction is applied, this result is not unreasonable because the insurer could have dispelled the ambiguity by clarifying the policy terms as to whether these peripheral losses are covered.

It is evident that an application of the proximate cause test would almost always result in recovery for the insured. The only defense available to the insurer is to show that there is no proximate relationship between the insured event and the excepted loss. The utility of this defense is questionable because rarely would there not be a proximate relationship, and because of the seeming propensity of jurors to find for the insured.[20]

Since an application of the proximate cause test seems to be tantamount to recovery for the insured, the real question is whether the result is sound. In some instances, the insurer may show that the premiums of plaintiff's risk group were calculated on the basis that only risks common to all were covered and that a loss was excepted from policy coverage because not all members of plaintiff's risk group were subjected to the risk of this loss. The insurer could then prove that to allow recovery for such a loss would lead to increased insurance premiums for the entire risk group, with the result that some property owners would be paying for risks which do not confront them. For example, assume that *A*'s building is heated by a system involving a boiler while *B*'s building is not. Even though the risk of loss by explosion is greater for *A* than for *B* because of the presence of the boiler, *A* and *B* could both be included in the same risk group for fire insurance because loss by explosion is excepted. But if the proximate cause test is applied and *A* is allowed to recover for explosion damage because it is proximately caused by fire, an insured event, the cost of insurance would probably be increased for *A* and *B*'s entire risk group. Thus *B* will pay for protection against risk of loss by explosion even though such a risk does not exist for him.

Proof that some insured property owners would be paying for protection against a loss which does not exist for them indicates a rational connection between the premium paid and the excepted loss. Where such a relationship exists, there is a genuine business

19. N.Y. INS. LAW § 168(6).

20. See PATTERSON, ESSENTIALS OF INSURANCE LAW 7, 229 (2d ed. 1957) where the author comments on the generosity of juries, and states that erroneous court decisions are one of the insurer's four major risks of loss.

purpose in excepting the loss and courts should be less inclined to grant recovery than if a valid business purpose did not exist.

B. The Contemplated Damages Test

Courts applying the contract theory of damages usually deny recovery when an insured event causes an excepted loss on the ground that the terms of the policy and extrinsic evidence show clearly that the parties did not intend the policy to cover this loss.[21] The leading case for application of the contemplated damages test is *Bird v. St. Paul Fire & Marine Ins. Co.*[22] There the plaintiff's boat was damaged by the concussion of an explosion caused by a fire on a distant shore. In plaintiff's suit on his fire policy, the court denied recovery and held that the fire was so distant from the insured's property that the parties could not have contemplated such a loss to be covered. Chief Judge Cardozo stated: "Our guide is the reasonable expectation and purpose of an ordinary businessman when making an ordinary business contract."[23] The rationale for applying the contract rule of damages is also suggested in the *Bird* opinion: "There are times when the law permits us to go far back in tracing events to causes. The inquiry for us is how far the parties to his contract intended us to go. The causes within their contemplation are the only causes that concern us."[24]

When a court applies the contemplated damages test, two fundamental considerations come into conflict. On the one hand, it is common knowledge that a typical insured does not read his insurance policy[25] and therefore it is not necessarily true that, by an exception clause, both parties intended a given loss to be excepted from policy coverage. On the other hand, practical business considerations require that the insured be bound by the terms of the policy, regard-

21. Westchester Fire Ins. Co. v. Bell, 151 Ga. 191, 106 S.E. 186 (1921); Hustace v. Phenix Ins. Co., 175 N.Y. 292, 67 N.E. 592 (1903); Shahin v. Niagara Fire Ins. Co., 265 App. Div. 397, 39 N.Y.S.2d 887 (1943); Service Trucking Co. v. American Cas. Co., 160 Pa. Super. 331, 51 A.2d 397 (1947). *Contra*, Cook v. Continental Ins. Co., 220 Ala. 162, 124 So. 239 (1928).

22. 224 N.Y. 47, 120 N.E. 86 (1918).

For applications of Chief Judge Cardozo's test in subsequent insurance cases, see, *e.g.*, Mork v. Eureka-Security Fire & Marine Ins. Co., 230 Minn. 382, 42 N.W.2d 33 (1950); Harris v. Allstate Ins. Co., 309 N.Y. 72, 127 N.E.2d 816 (1955); Colley v. Pearl Assur. Co., 184 Tenn. 11, 195 S.W.2d 15 (1946).

23. Bird. v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47, 49, 120 N.E. 86, 87 (1918).

24. *Ibid.*

25. In Keogh v. Sharon Township Mut. Fire Ins. Co., 195 Minn. 575, 578, 263 N.W. 601, 602 (1935), the court stated: "Policies of fire insurance are rarely examined by the insured. The same degree of vigilance and critical examination would not be expected or demanded as in the case of some other instruments."

The New York courts have taken judicial notice of the fact that insured property owners rarely read their insurance contracts. Magnolia-Broadway Corp. v. Fire Ass'n, 137 N.Y.S.2d 918 (1955). See VANCE, INSURANCE § 44 (3d ed. 1951).

less of the lack of an actual intent on the part of the insured.[26] If not, the insurer would have no effective means of controlling the risk it assumes.

One means of reconciling these two conflicting considerations is to look to whether the insurer can justify excluding the loss from coverage. If the insurer can produce no evidence supporting a valid business purpose in excluding the loss from coverage, the court could properly assume that the insurer included the exception clause only for purposes of avoiding liability to the unwary policyholder. But if the insurer demonstrates a valid business purpose in excluding the loss, such as the availability of other insurance to cover the loss, or that premiums were calculated and risk groups established on the assumption that the loss was not covered, the court should be more disposed to uphold the insurer's risk controls.[27]

II. Excepted Event Causing an Insured Loss

A property insurance policy frequently provides protection against a general type of loss but excepts coverage for such a loss when it is caused by a specific event.[28] When a causal relationship exists between the excepted event and the insured loss,[29] the policy

26. See VANCE, *op. cit. supra* note 25, at 259, where the author states:
> a large and increasing number of courts apply to insurance contracts the strict rule that he who puts his bargain in writing will not, in the absence of fraud or mistake, be allowed to deny his knowledge of the terms of the writing or question the binding force of any provisions thereof, whether in fact known or unknown.

27. The Supreme Court of Washington has adopted what appears to be a third test to determine policy coverage by stating:
> In tort cases, the rules of proximate cause are applied for the single purpose of fixing culpability, with which insurance cases are not concerned. . . . Insurance cases are not concerned with why the injury occurred or the question of culpability, but only with the nature of the injury and how it happened.

Bruener v. Twin City Fire Ins. Co., 37 Wash. 2d 181, 183, 222 P.2d 833, 835 (1950). If the court intends to disregard the cause of the loss, this approach would work an injustice on the insurer since the risk assumed is usually expressed in terms of insured and excepted causes.

In Truck Ins. Exch. v. Rohde, 49 Wash. 2d 465, 303 P.2d 659 (1956) an automobile driver had a liability policy covering up to $20,000 for each injury and up to $50,000 for each accident. The question of whether the insurer was liable for $50,000 for one accident, or $150,000 for three accidents arose when the insured struck three motorcycles riding tandem. The court held that the insurer was liable for only one accident and not three, because the insured's single act of negligence was the proximate cause of all the damage. Although this case is distinguishable from *Bruener* as one involving third-party liability, it may be an indication that the Washington court has not completely abandoned the proximate cause test as a means of determining policy coverage.

28. See note 33 *infra* and accompanying text.

29. The term "insured loss" refers only to the general type of insurance held by the policyholder when used in the context of an excepted event causing an insured loss. Because the policy terms explicitly except it from coverage, it is not a loss which the policyholder is protected against and to the extent that the term suggests recovery, it is a misnomer.

does not cover the loss. For example, in *American Mfg. Corp. v. National Union Fire Ins. Co.*[30] the plaintiff was covered by a policy insuring against damage caused by a sprinkler system but loss caused by windstorm was excepted. The insured's property was damaged when a windstorm blew off a section of roof causing a leak in the sprinkler system. The court denied recovery[31] on the ground that the "exception" clause excluded damage from sprinkler system leakage when caused by a windstorm.[32]

In determining whether an insured loss caused by an excepted event is covered, an application of the contemplated damages test would be inappropriate when it requires an examination of extrinsic evidence; the policy clearly states that the insurer does not assume the risk of the loss. For example, the Minnesota Standard Fire Insurance Policy provides:

> This company shall not be liable for loss by fire or other perils insured against in this policy *caused*, directly or indirectly by: (a) enemy attack . . . (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority. . . .[33]

Since the policy terms are clear and unambiguous as to whether a loss is covered when caused by an excepted event, the court could only find it to be the intention of the parties that the policy does not cover the loss, and it would be improper for the court to look to extrinsic evidence to determine the parties' intentions.[34]

Although the terms of the policy are explicit, courts have demon-

30. 203 La. 507, 14 So. 2d 430 (1942).

31. In denying recovery, the court overruled Hardin Bag & Burlap Co. v. Fidelity & Guar. Fire Corp., 1 So. 2d 830 (La. 1941), *rev'd*, 203 La. 778, 14 So. 2d 634 (1943). In the latter case, the court held that the exception clause did not qualify the original coverage of the policy, and referred only to hazards unrelated to the insured event.

32. In Washington, where the court has rejected the proximate cause rule and adopted a test allowing recovery if the loss itself is insured, Bruener v. Twin City Fire Insur. Co., 37 Wash. 2d 181, 222 P.2d 833 (1950), recovery may be allowed because the loss itself was insured against. See note 27 *supra*; 64 HARV. L. REV. 859 (1951).

33. MINN. STAT. § 65.011(2) (1957).

The New York Standard Fire Policy provides:

> This Company shall not be liable for loss by fire or other perils insured against in this policy, *caused*, directly or indirectly, by insurrection, invasion, bombardment, rebellion, revolution, or military or usurped power; nor by order of any civil authority. . . .

N.Y. INS. LAW § 168(6). (Emphasis added.) See PATTERSON, CASES ON INSURANCE 390–91 (3d ed. 1955).

34. In Port Washington Nat'l Bank & Trust Co. v. Hartford Fire Ins. Co., 253 App. Div. 760, 300 N.Y. Supp. 874 (1937), the insured's building was accidently destroyed by fire when federal agents demolished a distillery contained in the building. The fire policy excepted "loss or damage caused directly or indirectly . . . by order of any civil authority." A New York court, in a jurisdiction which usually applied Chief Judge Cardozo's contemplated damages test as set out in the *Bird* case, denied recovery on the ground that the fire was proximately caused by an excepted event.

strated a reluctance to deny recovery even though a causal relationship appeared to exist. A variety of devices have been used to arrive at a result which would permit recovery. One device is to find an efficient and intervening cause breaking the chain of causation between the excepted event and the insured loss. For example, in *Maxwell v. Springfield Fire & Marine Ins. Co.*[35] the plaintiff was insured against sprinkler system damage but loss caused by windstorm was excepted. Insured's goods were damaged when a windstorm tore a hole in the roof of his building and caused the sprinkler system to leak. The court granted recovery on the ground that the wind was an indirect and remote cause of the loss because the hazard of the sprinkler system intervened.

It would appear that the sprinkler system damage caused by the windstorm was precisely the type of damage which the insurer intended to exclude from policy coverage.[36] Of course, where there is what can be fairly termed an intervening cause, the court is justified in granting recovery.[37] But under the court's analysis in the *Maxwell* case every insured hazard could be construed as an intervening force breaking the chain of causation, and the insurer's risk controls would be subverted.

Another device used to permit recovery is to treat the excepted event and the insured loss as two independent risks and to disregard the causal connection between them. This approach is suggested by *Hanover Fire Ins. Co. v. Newman's Inc.*[38] There, the policy insured against sprinkler damage but "excepted, among other things, loss or damage caused directly or indirectly by . . . cyclone."[39] A cyclone caused the sprinkler system to go off, but the court granted recovery on the ground that the policy did not exclude damage from the sprinkler system when caused by extraneous forces. The court's rationale seemed to be that because the excepted event and the insured loss were independent risks, the causal relationship between the two

35. 73 Ind. App. 251, 125 N.E. 645 (1920).

36. The policy language provided in part:

> This company shall not be liable (1) for loss by fire, however caused; (2) nor for loss resulting from the leakage of water, if such leakage is caused directly or indirectly by fire; (3) nor for loss due to stoppage or interruption of any work or plant, unless liability for such loss is specifically assumed herein; (4) nor for loss *caused* by lightning (whether fire ensued or not), cyclone, tornado, windstorm, earthquake, explosion, or blasting. . . .

Id. at 254, 125 N.E. at 646. (Emphasis added.)

37. For example, in Maryland Cas. Co. v. Razook, 24 F.2d 160 (5th Cir. 1928) the policy covered loss from rain damage but excepted loss caused directly or indirectly by windstorm. When the insured sued for damage from rain driven through windows broken by a windstorm, the court granted recovery on the ground that the rain was an intervening force between the breaking of the windows by the wind and the ultimate damage from rain. The court's result is sound, for there was no compelling causal relationship between the force of the wind and the rain damage.

38. 108 F.2d 561 (5th Cir. 1939).

39. *Id.* at 562.

was immaterial. Under the policy language the court was unjustified in granting recovery because the only reasonable interpretation of the policy was that it excepted from coverage all damage *caused* by a windstorm.[40] Here again the court disregarded the explicit terms of the policy by granting recovery.

When the insurer excepts losses of the general type insured against when caused by a specific event, the court should only look to whether a causal relationship exists between the cause of the loss and the loss itself. If such a causal relationship does exists, the court should deny recovery even though the insured believed he was protected unless some equitable grounds exist for reformation of the policy.[41] The common belief of the property owner as to the protection he receives under the insurance policy should be irrelevant when the policy terms are so explicit.

III. Concurrent Causes

A. Proximate Cause Test

Another perplexing problem in determining policy coverage arises when two causes, one insured and one uninsured or specifically excepted,[42] join to produce a loss which neither would have produced alone.[43] Most courts apply the proximate cause test and allow the jury to determine which force was the predominant and efficient cause of the loss.[44] For example, in *Anderson v. Connecticut Fire Ins. Co.*[45] the insured building collapsed from the combined forces of wind and an accumulation of snow on the roof. Plaintiff recovered

40. If the insurer did not intend to exclude sprinkler system damage caused by windstorm, it must have intended to exclude direct windstorm damage without the intervening agency of the sprinkler system. But the latter interpretation is ludicrous because it is so obvious that an insurance policy protecting against damage caused by a sprinkler system would not cover windstorm damage that it would be unnecessary to even mention such an exclusion.

41. See, *e.g.*, Mosiman v. Rapacz, 250 Minn. 464, 84 N.W.2d 898 (1957).

42. Since a specifically excepted cause of loss is as much at the risk of the insured as is an uninsured cause of loss, there should be no distinction between an insured cause joining with an uninsured cause and an insured cause joining with a specifically excepted cause.

43. The natural incidents of a force already in motion are not regarded as concurrent with the moving force. Richards, Insurance § 448 (4th ed. 1932). If the damages are severable, the loss is attributed to each and recovery is allowed only for the insured loss. Howard Fire Ins. Co. v. Norwich & N.Y. Transp. Co., 90 U.S. (12 Wall.) 194 (1870).

44. See, *e.g.*, Niagara Fire Ins. Co. v. Muhle, 208 F.2d 191 (8th Cir. 1953); Princess Garment Co. v. Fireman's Fund Ins. Co., 115 F.2d 380 (6th Cir. 1940); Phenix Ins. Co. v. Charleston Bridge Co., 65 Fed. 628 (4th Cir. 1895); Clouse v. St. Paul Fire & Marine Ins. Co., 152 Neb. 230, 40 N.W.2d 820 (1950); Wood v. Michigan Millers Mut. Fire Ins. Co., 245 N.C. 383, 96 S.E.2d 28 (1957); Finney v. Sandy & Beaver Valley Farmers Mut. Ins. Co., 105 Ohio App. 441, 152 N.E.2d 689 (1957).

45. 231 Minn. 469, 43 N.W.2d 807 (1950).

on a windstorm policy which excepted damage caused by snow; the appellate court, in affirming stated:

> it was for the jury to determine whether a windstorm was the efficient and proximate cause of the damage to the building within the coverage of the policy, or whether a blizzard or snowstorm was the efficient and proximate cause thereof within the meaning of the exclusionary clause.[46]

In a case such as this, where the damages caused by each force are inseparable, the burden of the total loss falls on the party who assumed the risk of the cause of the loss which the jury finds to be proximate.[47]

When a loss has been occasioned by concurrent causes, it is anomalous to apply the proximate cause test and permit the jury to determine that one was the predominant and efficient cause of the loss. Clearly, the loss would not have occurred but for the combination of two independent forces, the *uniting* of which is the real precipitating cause of the loss.[48] Since the risk of loss caused by one force is borne by the insurer and the risk of loss of the other force is borne by the insured, to grant or deny recovery for the total loss assumes that one party intended to bear *both* risks. Even though the damages are inseparable, it would be fairer to simply divide the loss evenly than to require one party to bear the total burden. This principle has often been applied to joint tortfeasors[49] and to contribution among two or more insurers who have each insured the damaged property under separate policies.[50]

B. Contemplated Damages Test

A few courts have applied the contemplated damages test to concurrent cause cases and have inquired into what the parties must have reasonably intended at the time of policy execution.[51] In *Hartford Fire Ins. Co. v. Nelson*[52] plaintiff sued on a policy insuring against windstorm damage but excepting damage from hail. The

46. *Id.* at 476–77, 43 N.W.2d at 813.

47. *Id.* at 475–76, 43 N.W.2d at 812.

48. For example, if a property owner had protection against rain damage, but damages caused by windstorm was excepted, and the wind drove the rain through an open, vertical window, the damage would be a result of the uniting of the two forces. Oviously, no damage would have occurred from the action of one force alone.

49. PROSSER, TORTS § 46, at 248 (2d ed. 1955).

50. VANCE, INSURANCE § 14 (3d ed. 1951).

The New York Standard Fire Policy states:

> This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

N.Y. INS. LAW § 168. In policies containing this pro rata insurance clause, the insurer's liability for contribution is limited to the proportion of its policy to the total insurance on the property.

51. See *e.g.*, Palatine Ins. Co. v. Petrovich, 235 S.W. 929 (Tex. Civ. App. 1917).

52. 64 Kan. 115, 67 Pac. 440 (1902).

court denied recovery when wind-driven hail damaged the insured's building. The court reasoned that since hail insurance was available at a higher premium, the insurer did not intend to assume the greater risk of hail damage at this lower premium rate. The existence of other insurance may be strong evidence of what the *insurer* intended the policy to cover. However, unless it can be shown that the *insured* also knew or should have known[53] of other available insurance, this factor would not be competent evidence of what *both* parties intended. The burden of showing that the insured had knowledge of the availability of other insurance should rest on the insurer.

Even if the insurer demonstrates that the insured knew or should have known of the availability of other insurance, this fact alone should not be conclusive of the parties' intent. It does not necessarily follow that because the insured knew of the availability of other insurance, he also knew that his policy excepted events for which coverage was available under other types of insurance and that he intended a loss occasioned by concurrent causes to be either totally included or totally excluded from policy coverage.

Another factor which the courts use to determine the intention of the parties is the physical setting of the insured property. For example, in *National Fire Ins. Co. v. Crutchfield*[54] the insured property, situated in a traditional flood area, was destroyed by a combination of high wind and flood water. The court denied recovery on the ground that the policy excepted flood damage, and said it was immaterial which force was the proximate cause of the loss because from the physical setting of the property, it was clear that the parties intended to exclude recovery when damage was even indirectly caused by flood. But where the physical setting of the property is not unique and gives *no* indication of what the parties intended, the probative value of looking to the physical setting is lost. Since the location of most insured property would probably not indicate what the parties intended as to particular losses, the utility of looking to the physical setting is limited.

In general, an application of the contemplated damages test would seem inappropriate in concurrent cause cases. In most situations the parties probably had no actual intent as to who would bear the loss; therefore it would be improper to require one party to bear the total loss. Dividing the loss between the insured and the insurer would be more equitable when the intent of the parties is so speculative.[55]

53. Knowledge of the availability of other insurance could be assumed when the common understanding of insurance purchasers is that a different and independent risk is involved and would naturally be covered by other insurance.

54. 160 Ky. 802, 170 S.W. 187 (1914).

55. See notes 49 & 50 *supra* and accompanying text.

IV. Conclusion

Neither the proximate cause test nor the contemplated damages test is sufficient to accurately determine policy coverage. The proximate cause test is subject to the criticism that it permits recovery which may extend beyond the terms of the policy. An application of the contemplated damages test to determine the parties' intent when the parties' actual intent is not manifested may be so conjectural as to be virtually useless.

Often the courts do not base their decisions upon a logical application of these tests, but rather appear to use them to justify a result based on other reasons. Inconsistent approaches to the question of policy coverage have magnified the uncertainty in this area, and an elementary step for the court is to at least be consistent in applying a particular test. A test is needed which can be applied to a given fact situation so that the results can be more accurately predicted. Ideally, the parties' intent should be clearly spelled out in the terms of the policy. But, of course, the parties could not possibly consider *all* contingencies, and there would always be areas not specifically covered by the policy.

Perhaps the proximate cause test is the more appropriate test to apply where an excepted event causes an insured loss, or where an insured event causes an excepted loss. Even though the court's result may appear to be contrary to the terms of the policy, if the court commits itself in advance to such a test, it will be the common understanding of the insurance purchaser that the policy will either exclude or include these peripheral losses; premiums can then be calculated accordingly. If the premiums are so calculated, the parties' intent will coincide with the court's result. More predictability is achieved because any layman can reasonably determine whether a "proximate" relationship exists between a given event and a loss. Certainly, the results are more predictable under the proximate cause test than under the contemplated damages test where the court is free to make any arbitrary determination as to what the parties reasonably intended.

There are several advantages to selecting a test which gives some predictability of result. The cost of insurance will be reduced because the number of cases requiring litigation by the insurer will be diminished; the insured will not litigate a case in which it appears that he will not recover, nor will the insurer defend a case where it appears that the insured will recover. Claims will be paid more promptly with less costly and time-consuming litigation for the insured. The chances that the insured or the insurer will get a windfall will be reduced if the courts are consistent in applying the proximate cause test because the parties can more accurately establish the premiums in accordance with the risks involved.