Global Journal of Politics and Law Research
Vol.7, No.3, pp.31-50, April 2019
Published by European Centre for Research Training and Development UK (www.eajournals.org)

A GENERAL OVERVIEW OF CAUSATION IN AMERICAN INSURANCE LAW

Michael Gavin Johnston*

**Doctoral candidate in Chinese Civil and Commercial Law, specializing in Maritime Law, under supervisor Dr. Hé Lìxīn (何丽新) at Xiamen University[1] School of Law.[2]*

ABSTRACT: *In insurance law, "doctrines of causation" refers to the legal principles that underscore how the cause of peril is determined. How does one analyze the logic of cause-and-effect under an insurance contract? When an "occurrence" of a peril befalls the insured, the insurer shall pay the indemnity, as agreed upon in the contract. However, how does one determine precisely the occurrence of a peril? For instance, if a home owner's insurance policy insures against the peril of fire, but excludes peril due to lightning strike; and then, a lightning strike causes a fire which subsequently burns down the house, then how does one determine the cause of loss? Does it constitute loss due to fire, or due to lightning? The answer to such a question concerns the doctrine of causation in insurance law. Within the context of American Insurance Law, two competing schools of thought exist, these are: the doctrine of Efficient Proximate Cause, and the doctrine of Concurrent Causation. This paper offers a general overview of this ongoing discussion in the world of American Insurance law regarding doctrines of causation. This paper finds that, overall, American insurance law presents a patchwork of differing jurisdictions, each with its own tradition. From a panoramic view, these traditions all fall into the Anglo-American legal experience, and have many innovations characteristic of this legal tradition; however, significant differences exist between the several states and the federal government. The issue of causation in insurance law in the US is not in any state of great urgency, yet causation in American insurance law remains an area of hot debate. The role of ACC clauses in US Insurance law in particular presents controversy.*

KEYWORDS: Efficient Proximate Cause (EPC), Concurrent Causation (CC), Partridge-Type Concurrent Causation (PTCC), American Insurance Law, Doctrine of Causation.

[1] 厦门大学(Xiamen University)：厦大总机(Tel)：+86-592-2180000; 地址：中国福建省厦门市思明区思明南路 422 号 邮政编码：361005 (No. 422, Siming South Road, Xiamen, Fujian, China. 361005). 闽 ICP 备 05005471 号 闽公网安备 35020302001480 号; https://en.xmu.edu.cn/

[2] 厦门大学法学院(Xiamen University School of Law) Address: 422 South Siming Road, Xiamen City, Fujian Province, China; Telephone: +86-592-2187417; Email: internationaloffice_law@xmu.edu.cn

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

INTRODUCTION

"Insurance" means equitable transfer of the risk of loss. Under an "insurance contract", a party known as an "insurer" agrees to "indemnify", or monetize, a potential loss, called a "peril"; the contracting party, called "the insured", pays a monetary exchange called a "premium" for this service. The insurance contract will typically define which peril or perils shall be insured against; and concomitantly which perils shall be excluded. When an "occurrence" of a peril befalls the insured, the insurer shall pay the indemnity, as agreed upon in the contract. However, how does one determine precisely the occurrence of a peril? For instance, if a home owner's insurance policy insures against the peril of fire, but excludes peril due to lightning strike; and then, a lightning strike causes a fire which subsequently burns down the house, then how does one determine the cause of loss? Does it constitute loss due to fire, or due to lightning? The answer to such a question concerns the doctrine of causation in insurance law. Within the context of American Insurance Law, two competing schools of thought exist, these are: the doctrine of Efficient Proximate Cause, and the doctrine of Concurrent Causation. Attendant to this discussion is the question of Anti-Causation Clauses (ACC), which are standard clauses of the insurer which specifically contract out of the implications of one or the other (or both) of the aforementioned causation doctrines. This paper offers a general overview of this ongoing discussion in the world of American Insurance law.

Causation in Insurance Law

In the law, "causation" speaks of the causal relationship between an action, or omission of an action, and its result (Smith & Simpson, 2006). Causation is a way of connecting a given behavior with a specific outcome. In American insurance law, doctrines for determining causal relationships between action and result are construed differently by different jurisdictions (Dale Joseph Gilsinger, 2008; Phillips & Coplen, 2007). In the USA, broadly speaking, these fall into two doctrines, namely: efficient proximate cause and concurrent causation (Phillips & Coplen, 2007). A third type of causation, Partridge-type Concurrent Causation (PTCC) represents a unique and specific type of situation, namely unrelated perils occurring simultaneously (Smith & Simpson, 2006).

Efficient Proximate Cause

One of the most prolific and popular doctrines used to determine causation in insurance disputes is efficient proximate cause (Smith & Simpson, 2006). The doctrine of efficient proximate cause can be best described with an example. Suppose X takes out a homeowner's insurance policy protecting his home from the peril of fire, but the policy excludes the peril of lightning. Later, the house of X is struck by lightning, and the lightning strike causes a fire which in turn burns the house down. Is this an example of loss due to fire or due to lightening; and does X recover for the loss under his current policy? If X lives in a jurisdiction that constructs insurance contracts following the doctrine of efficient proximate cause, then this is an example of lightning damage and X does not recover for the loss under the current policy. The efficient proximate cause doctrine

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

would argue that in a chain of events that cause loss, only the predominating operative factor that set events in motion is to be considered in determining the cause of loss, and therefore whether a given loss falls under coverage. In the example given above, the lightning is the operative factor, and the fire was but an instrument of the lightning.

The doctrine of efficient proximate cause can be summed up with the Latin phrase *causa proxima, non remota spectator*, meaning roughly "the immediate, not the remote, cause is considered" (Passa, 2003). This doctrine distinguishes between two types of cause, cause-in-fact and efficient proximate cause (Downs & Bolduan, 2015). "Cause-in-fact" refers to the immediate cause of loss, which in many cases may be more than one cause; whereas the "efficient proximate cause" refers to the operative or predominating peril which acts upon subsequent perils to produce loss. In the example above, the fire was the cause-in-fact; while the lightning was the efficient proximate cause. Efficient proximate cause looks at dependence of events both in operation and in origin. As quoted by Smith and Simpson (2006): "Events are dependent in origin if the initial event, the direct, efficient, dominant cause, acts upon existing forces and conditions to cause all subsequent events in the chain of causation. Events are dependent in operation insofar as they all must operate together to produce loss, without the intervention of any active, independent events. More formally, all events are jointly necessary and sufficient conditions of loss; none of the events alone are sufficient conditions to cause loss."

The Latin expression *sine qua non* (literally "but for") describes Smith and Simpson's logic. The point of failure closest to the occurrence which is sufficient to set the other causes in motion can be distinguished with the "but-for" test: "but for the lightning strike, the house would not have burned down". The fire did not occur "but for" the lightning, hence it is an instrument of the lightning rather than a hazard on its own. The loss is therefore a loss due to lightning, rather than the hazard of fire.

Concurrent Causation

The doctrine of concurrent causation is an alternative method for determining causation in US insurance law (Plitt, Maldondo, Rogers, & Plitt, 2015). It forms a minority school, being constructed in far fewer jurisdictions than efficient proximate cause (Phillips & Coplen, 2007; Plitt et al., 2015). Concurrent causation argues that in the event of loss from multiple contributing causes, any cause which can be determined as having contributed in a significant way to loss shall be determined to be the causative factor for the purposes of coverage and recovery. "In jurisdictions that follow a concurrent cause analysis, coverage is allowed whenever two or more causes contribute to a risk and at least one of them is covered under the policy" (Phillips & Coplen, 2007). Hence, an insurance contract that covers even one of the significant causes shall be liable for indemnity irrespective of whether the other contributing causes fall under coverage or are even excluded (Phillips & Coplen, 2007). Concurrent causation brings the concept of causation in insurance law closer to its counterpart in tort law (Smith & Simpson, 2006).

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

Hence, in the earlier example given above, if X takes out insurance on his home, covering the peril of fire but excluding the peril of lightning; and later a lightning strike occurs which causes fire that burns down the home of X; then under the doctrine of concurrent causation, X would recover for the loss. Under concurrent causation, both fire and lightning were significant in the occurrence of this loss, and as fire is covered under the policy, the loss is therefore covered. Concurrent causation would not attempt to determine which event preceded the other, as long as both or either were present, they constitute part of a single occurrence of loss.

Partridge-Type Concurrent Causation ("PTCC")

Partridge-type concurrent causation (PTCC) "only applies when concurrent negligent acts are independent and both acts are of sufficient dominance that each alone could cause bodily injury or property damage" (Smith & Simpson, 2006). PTCC is a variant of efficient proximate cause; two concurrent perils occur causing loss, however the lesser peril is occasional to the efficient proximate cause (Smith & Simpson, 2006).

For example, say X took out a fictional "diner's insurance" policy from insurer Y against the risk of being burned by scolding hot soup, but excluding the peril of an unsafe table. Later, X dines at restaurant Z, which negligently seats X at a table with a broken leg that could snap at any moment; and negligently serves X a scolding hot bowl of soup sufficient to cause injury. Either constitutes a peril, but X happens only to be insured against one of them. As the soup is being served to X, the table collapses and the scolding hot soup falls all over X and burns him. While sufficient to cause harm on its own, X fortunately avoids harm from the falling table. Nevertheless, X is severely burned by the soup. In trial, Y argues that the table was the efficient proximate cause of the loss, since its collapse caused the soup to spill. Hence, this was a loss due to the peril of unsafe table rather than of scolding hot soup. However, the judge rules otherwise, noting that the soup was a sufficient peril even without the table—had the table not collapsed, X would have begun eating the soup, so the soup still would have been sufficient to cause loss. The collapse of the table merely occasioned the peril of the soup. Hence, X recovers for the soup; though unharmed by the table, had there been any injury originating from the table alone, X would not have recovered for such loss. This example expresses the doctrine of PTCC.

PTCC is so named because this doctrine emerged from the interpretation of the case of *State Farm Mutual Automobile Insurance Co. v. Partridge 514 P.2d 123, 130 (Cal. 1973*) (Smith & Simpson, 2006). In this case, Wayne Partridge was covered by two separate insurance policies: an all-risk homeowner's insurance issued by State Farm Fire and Casualty Company, and car insurance issued by State Farm Mutual Automobile Insurance Company. While on a hunting trip, Partridge's firearm accidentally discharged while his vehicle was being negligently driven off-road in pursuit of game, thereby paralyzing another passenger. Prior to the trip, Partridge had also negligently modified his firearm to make it easier to fire. Partridge's auto insurance did not cover loss from negligently driving his vehicle off-road, and so would not cover Partridge's loss for his friend's

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

medical expenses. However, Partridge argued that his act of unsafely modifying his firearm constituted the peril of negligence under his homeowner's insurance, and it was an occurrence of this peril which had befallen; the negligent driving, while also constituting a covered peril under in its own right under his auto insurance, merely occasioned the peril of his modified firearm. The court ruled in partridge's favor.

Anti-Causation Clauses (ACC)

What is an ACC Clause?

Anti-Causation Clauses are clauses inserted into an insurance contract or policy that allow an insurer to contract out of the implications of causation in the event of loss (Dale Joseph Gilsinger, 2008; Passa, 2003). Causation is often seen by some as benefiting the insured rather than the insurer, and putting the insurer at a disadvantage (Dale Joseph Gilsinger, 2008). As such, there has always been a legacy of insurers trying to diminish the financial scope of monetary loss in insurance payments by trying to contract out of the legal doctrine of causation (Dale Joseph Gilsinger, 2008). The impact of such clauses on the material basis of a case can be difficult to adjudicate, seeming to extend coverage over such occurrences as are immediate.

Standard ACC Clauses

In those jurisdictions in the US that recognize ACC clauses, a standard language has evolved with regards to such clauses. Table 1 gives examples of the typical clauses inserted into insurance contracts to effect anti-concurrent causation, in both short- and long-forms.

Table 1: Standard ACC Clauses

Standard ACC Clauses:	
Short Form:	*"We do not cover loss to any property resulting directly or indirectly from any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."*
Long Form:	*"We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these."*

Adapted from Dale Joseph Gilsinger (2008)

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

Validity and Construction of ACC Clauses

ACC Clauses have generated much controversy in American insurance law. The right of an insurer to contract out of causation is not universally recognized throughout the USA. Table 2 below paraphrases the recognition of ACC by state-level jurisdictions in the USA.

Table 2: Validity of ACC Clauses at the State Level

Recognition of ACC as valid:	State:
Yes	AL, AK, AZ, CO, DC, GA, IN, LA, MA, MI, MO, NV, NJ, NY, OH, OK, TX, UT, WI, WY.
No	CA, ND, WA, WV.
As yet undefined in case law	AR, CT, DE, FL, HI, IL, IA, KS, KY, MD, ME, MN, MS, MT, NC, NE, NH, NM, OR, PA, RI, SC, SD, TN.

Adapted from Dale Joseph Gilsinger (2008)

The principle issue at point in the debate on the validity of ACC clauses is the freedom of contract versus the rights of the insured (Phillips & Coplen, 2007). Those who favor the recognition of ACC clauses cite the doctrine that contracting parties are free to determine the details of their compact, must ultimately be upheld in those contracts where they appear (Dale Joseph Gilsinger, 2008; Smith & Simpson, 2006). Those who argue against the concept note that insurance contracts are difficult to interpret without a causation doctrine; and further argue that ACC clauses unfairly favor insurers given that they reduce coverage that would otherwise have been extended under causation doctrines like efficient proximate cause and concurrent causation. This capon is further exacerbated by the fact that insurance contracts are contracts of adhesion, so freedom to identify and argue against ACC clauses by the insured is reduced; a catch-22 (Dale Joseph Gilsinger, 2008; Passa, 2003).

The construction of ACC clauses by the courts has been problematic. It would seem, that in the absence of a causation doctrine, the argument then becomes one of the insurer trying to demonstrate that an occurrence of an otherwise covered peril was not incidental to an excluded peril; and in the case of multiple, unrelated causes acting simultaneously that a covered peril of the only contributor to damage (Dale Joseph Gilsinger, 2008). Those jurisdictions that have found ACC clauses invalid have usually done so on the point that it is a canard to suppose that any given occurrence happens in isolation from other causes; the laws of physics and common sense dictate

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

that there is always a chain of causation, and ACC clauses create the insurmountable task of the insured trying to show that an occurrence occurred spontaneously "in a vacuum, as it were" (Dale Joseph Gilsinger, 2008; Passa, 2003).

Historical Development

Origins

In the context of the Anglo-American legal heritage, the practice of insurance can be traced back to as early as 1601 (Passa, 2003). Property insurance evolved out of early fire insurance contracts. Maritime insurance, in its immature form, probably migrated to the UK from the more developed maritime trading traditions of the ancient Mediterranean, such as Rhodes; but quickly developed its own unique character once it reached the UK. It was during the expansive age British maritime commercial and imperial dominance that modern insurance would achieve its present form; with the iconic Lloyds of London being a premier example. From here, modern insurance spread and diversified throughout the world, supplanting or combining with localized, indigenous forms of risk management elsewhere in the world. This included the American colonies that would come to form the US.

Beginnings of Proximate Cause

The Latin phrase *causa proxima, non remota spectator*, meaning roughly "the immediate, not the remote, cause is considered" (Passa, 2003) is generally considered the root of the Efficient Proximate cause doctrine. The meaning of this phrase entered hot debate in the House of Lords following the landmark case *Leyland Shipping Co. v. Norwich Union Fire Insurance Society [1918] A.C. 350 (H.L. 1918).* In this case, an insured attempt to recover insurance payments that were denied to him by the insurer. The original policy had covered "perils of the sea", which is to say general operations of sea voyage, but excluded "hostilities" and "warlike operations". During the voyage, the vessel was struck by a torpedo; however, the vessel was not sunk directly by the strike, instead, it began to take on water and eventually sink as a result.

The insurer tried to withhold indemnity, arguing that the ultimate cause of loss had been "warlike operations", which were excluded under the policy. The insured, however, argued that the operative cause of loss had been the taking on of water. "Perils of the Sea" is usually interpreted to include the entry of seawater onto a vessel. Lord Shaw noted that while the taking on of water had indeed been the cause-in-fact, it was not the "cause in efficiency". The operative cause that had sunk the vessel was the torpedo strike, which acted subsequent upon the taking on of water. In determining the cause of loss, Lord Shaw made reference to the ancient test of *sine qua non*, Latin for "but for", as in "but for the torpedo strike, the ship would not have sunk." The reasoning here is that in any case of loss, there will always be several factors that contribute to several different forms of damage; but the causative factor that is to blame is the original point of failure. In interpreting the indemnification of risk in an insurance policy, the perils outlined in the policy

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

are to refer to the predominating or original cause, the "efficient proximate cause". Hence, the insured lost the suit.

Efficient Proximate Cause in the USA

One of the earliest cases to touch upon efficient proximate cause in the USA was the federal case *Insurance Co. v. Tweed 74 U.S. (7 Wall.) 44 (1868)*. In this case, the Alabama Warehouse took out insurance coverage for bales of cotton, but this coverage excluded loss from fire, including fire from explosion. An explosion did occur in another warehouse in the same lot; and the fiery debris from a third warehouse adjacent to the Alabama which had subsequently caught on fire, in turn, ignited the Alabama. Later, in determining coverage, the appeals court ruled that the efficient proximate cause had indeed been fire due to explosion, and so refused payment (Passa, 2003).

In the case of *Insurance Co. v. Boon 95 U.S. 117 (1877)* a storehouse in Glasgow, Missouri took out an insurance policy against fire, but excluded damage due to wartime combat. In 1864, during a battle in the American Civil War, a fire was started in a remote part of the city as a result of combat; which subsequently spread throughout the whole town and engulfed the storehouse. The court determined that, despite the remote location of the fire at the start, combat had been the efficient proximate cause of the loss. In its judgment, the court occasioned to further refine the meaning of the expression *causa proxima, non remota spectator*. The court decided "The question is not what cause was nearest in time or place to the catastrophe…[t]he proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes… it is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster" (as quoted by Passa (2003)).

In the case of *Bird v. St. Paul Fire & Marine Insurance Co. 120 N.E. 86, 86 (N.Y. 1918)*, the iconic Justice Cardozo explained: "Even for the jurist, the same cause is alternately proximate and remote as the parties choose to view it. A policy provides that the insurer shall not be liable for damage caused by the explosion of a boiler. The explosion causes a fire. If it…were not for the exception in the policy, the fire would be the proximate cause of the loss and the explosion the remote one. By force of the contract, the explosion becomes proximate. A collision occurs at sea, and fire supervenes. The fire may be the proximate cause and the collision the remote one for the purpose of an action on the policy. The collision remains proximate for the purpose of suit against the colliding vessel. There is nothing absolute in the legal estimate of causation. Proximity and remoteness are relative and changing concepts". This case did establish that a cause that is too remote will not be material to the case (Smith & Simpson, 2006).

In *Lanasa Fruit Steamship & Importing Co. v. Universal Insurance Co. 302 U.S. 556 (1938)*, a ship transporting bananas took out insurance for its cargo; coverage including "perils of the sea", but excluding "inherent vice" (Passa, 2003). The ship was later stranded due to delay, and the cargo rotted. The court determined that a ship being stranded constituted a peril of the sea, and

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

was the efficient proximate cause of loss. This was despite the fact that the ship's being stranded occurred last in the sequence of events leading up to the cause-in-fact of the fruit's rotting. In handing down this judgment, the court therefore determined that the efficient proximate cause needn't be the first in the chain of events, merely the predominate factor (Passa, 2003).

In State-level Jurisdictions

States have had a long history of adjudicating the doctrine of Efficient Proximate Cause, paralleling the federal experience (Passa, 2003). Most states follow the Efficient Proximate Cause doctrine, whereas four states follow the alternative doctrine of concurrent causation. These four states are Florida, Kentucky, Texas, and Wisconsin (Phillips & Coplen, 2007).

One celebrated case that trail blazed causation in insurance law at the state level was *Sabella v. Wisler (1963) 59 Cal. 2d,* in which the California Supreme Court laid out its test for causation, establishing efficient proximate cause as the doctrine for the state, following the court's interpretation of sections 530 and 532 of the California Insurance Code (Phillips & Coplen, 2007). Many of these decisions would be revisited again in the landmark court case *Garvey v. State Farm Fire & Casualty Co. (Cal. 1989),* which established that negligence can be a cause under efficient proximate cause, and that the efficient proximate cause of a peril was not necessarily first in time, but predominate in cause, and which acts subsequent upon later causes without interference from another outside cause (Phillips & Coplen, 2007; Plitt et al., 2015). Garvey would go on to be cited by a wide variety of other jurisdictions in the US, and forms on key case in constructing efficient proximate cause in the US. A more complete listing of the causation doctrines of the several US states can be found on Table 3.

Birth of Concurrent Causation

The concurrent causation doctrine was first established at the state-level in the landmark court case *Wallach v. Rosenberg (Fla. App. 1988)* (Plitt et al., 2015). Since its establishment in this case, other states have adopted this doctrine in similar cases, including Kentucky in *State Farm Fire & Casualty Insurance Co. v. Aulick, 781 S.W.2d 531 (Ky. Ct. App. 1989),* Texas in *Warrilow v. Norrell,791 S.W.2d 515 (Tex.App. 1989),* and Wisconsin in *American Motorists Insurance Co. v. R&S Meats, Inc., 526 N.W.2d 791 (1994) (Phillips & Coplen, 2007*). A more complete listing of the causation doctrines of the several US states can be found on Table 3.

Predominant Causation Doctrines by US State

The US is a federal system, in which power is shared between the federal government and the several states. As such, each state has the power to decide for its self which doctrine to utilize in determining causation. The overwhelming majority of States utilize the doctrine of Efficient Proximate Clause, where as a minority of states follow the Doctrine of Concurrent Causation. Attendant to the question as to which doctrine is constructed by a state is whether said state recognizes the right of an insurer to contract out of causation doctrines by inserting ACC clauses

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

into insurance contracts. A number of states have yet to affect a descript doctrine concerning insurance causation, whether through legislation or a determining court case. This information is paraphrased on the table below.

Table 3: Causation Doctrines by US State

State	Casual Doctrine	Key Cases	ACC
Alabama (AL)	CC	*State Farm Fire & Casualty Co. v. Slade, 747 So. 2d 293 (Ala. 1999); Western Assurance Co. v. Hann, 201 Ala. 376, 78 So. 232 (1917)*	Yes
Alaska (AK)	CC	*State Farm Fire & Casualty Co. v. Bongen, 925 P.2d 1042 (Alaska 1996)*	Yes
Arizona (AZ)	EPC	*Millar v. State Farm Fire & Casualty Co., 804 P.2d 822 (Ariz. 1990); Koory v. Western Casualty & Surety Co., 737 P.2d 388 (Ariz. 1987)*	Yes
Arkansas (AR)	EPC	*New Hampshire Insurance Co. v. Frisby, 522 S.W.2d 418 (Ark. 1975)*	Unknown
California (CA)	EPC	*(codified CAL. INS. CODE §§ 530, 532); Garvey v. State Farm Fire & Casualty Co., 48 Cal. 3d 395, 770 P.2d 704 (Cal. 1989)*	No
Colorado (CO)	EPC	*Kane v. Royal Insurance Co. of America, 768 P.2d 678 (Colo. 1989); Western Insurance Co. of Pittsburgh, Pa. v. Skass, 171 P. 358 (Colo. 1918)*	Yes

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

Connecticut (CT)	EPC	*Sansone v. Nationwide Mutual Fire Insurance Co., 770 A.2d 500 (Conn. Super. Ct. 1999); Frontis v. Milwaukee Insurance Co., 242 A.2d 749 (Conn. 1968)*	—
Delaware (DE)	Unknown	*No Cases*	—
Florida (FL)	CC	*Wallach v. Rosenberg, 527 So. 2d 1386 (Fla. App. 1988)*	—
Georgia (GA)	EPC	*Western Pacific Mutual Insurance Co. v. Davies, 601 S.E.2d 363 (Ga. Ct. App. 2004)*	Yes
Hawaii (HI)	EPC	*Kee Kan v. Alliance Assurance Co. of London, 16 Haw. 674 (Haw. Terr. 1905); Hawaii Land Co. v. Lion Fire Insurance Co., 13 Haw. 164 (Haw. Terr. 1900)*	—
Idaho (ID)	Unknown	*None*	Yes
Illinois (IL)	EPC	*Mammina v. Homeland Insurance Co., 9 N.E.3d 437 (Ill. App. Ct. 1937)*	—
Indiana (IN)	EPC	*Ramirez v. American Family Mutual Insurance Co., 652 N.E.2d 511 (Ind. Ct. App. 1995)*	Yes
Iowa (IA)	EPC	*Qualls v. Farm Bureau Mutual Insurance Co., 184 N.W.2d 710 (Iowa 1971); Jordan v. Iowa Mutual Tornado Insurance Co. of Des Moines, 130 N.W. 177 (Iowa 1911)*	—
Kansas (KS)	EPC	*Maryland Casualty Co. v. Cherryville Gas, Light & Power Co., 162 P. 313 (Kan. 1917); Hartford Fire Insurance Co. of Hartford, Conn., 67 P. 440 (1902)*	—

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

Kentucky (KY)	CC	*State Farm Fire & Casualty Insurance Co. v. Aulick, 781 S.W.2d 531 (Ky. Ct. App. 1989)*	—
Louisianna (LA)	EPC	*Richie v. State Farm Fire & Casualty Co., 356 So. 2d 101 (La. Ct. App. 1978); Roach-Strayhan-Holland Post No. 20, American Legion Club v. Continental Insurance Co. of N.Y., 112 So. 2d 680 (La. 1959); Prytania Park Hotel v. General Star Indemnity Co., 896 F. Supp. 618 (E.D. La. 1995)*	Yes
Maine (ME)	Unknown	*None*	Unknown
Maryland (MD)	EPC	*Hartford Steam Boiler Inspection & Insurance Co. v. Henry Sonneborn & Co., 54 A. 610 (Md. App. 1903); Transatlantic Fire Insurance Co. of Hamburg, Germany v. Dorsey, 56 Md. 70 (1881)*	—
Massachusetts (MA)	EPC	*Jussim v. Massachusettes Bay Insurance Co., 597 N.E.2d 954 (Mass. 1993); Alton v. Manufacturers & Merchants Mutual Insurance Co., 624 N.E.2d 545 (Mass. 1993); Preferred Mutual Insurance Co. v. Meggison, 53 F. Supp. 2d 139, 142 (D. Mass. 1999)*	Yes
Michigan (MI)	EPC	*Hayley v. Allstate Insurance Co., 686 N.W.2d 273 (Mich. Ct. App. 2004)*	Yes

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

Minnesota (MN)	CC	*Henning Nelson Cost Co. v. Fireman's Fund American Life Insurance Co., 383 N.W.2d 645 (Minn. 1986); Waseca Mutual Insurance Co. v. Noska, 331 N.W.2d 917 (Minn. 1983)*	—
Mississippi (MS)	EPC	*Rhoden v. State Farm Fire & Casualty Co., 32 F. Supp. 2d 907 (S.D. Miss. 1998)*	Unknown
Missouri (MO)	EPC	*Toumayan v. State Farm General Insurance Co., 970 S.W.2d 822 (Mo. Ct. App. 1998); Beauty Supplies, Inc. v. Hanover Insurance Co., 526 S.W.2d 75 (Mo. Ct. App. 1975)*	Yes
Montana (MT)	EPC	*Park Saddle Horse Co. v. Royal Indemnity Co., 261 P. 880 (Mont. 1927)*	—
Nebraska (NE)	EPC	*Curtis O. Griess & Sons, Inc. v. Farm Bureau Insurance Co. of Nebraska, 528 N.W.2d 329 (Neb. 1995); Brown v. Farmers Mutual Insurance Co. of Nebraska, 468 N.W.2d 105 (Neb. 1991)*	—
Nevada (NV)	Unknown	*Schroeder v. State Farm Fire & Casualty Co., 770 F. Supp. 558, 561 (D. Nev. 1991)*	Yes
New Hampshire (NH)	EPC	*Weeks v. Co-operative Insurance Companies, 817 A.2d 292 (N.H. 2003)*	—

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

New Jersey (NJ)	EPC	*Simmonetti v. Selective Insurance Co., 859 A.2d 694 (N.J. Super. 2004); Franklin Packaging Co. v. California Union Insurance Co., 408 A.2d 448 (N.J. Super. 1979); Assurance Co. of America, Inc. v. Jay-Mar Inc., 38 F. Supp. 2d 349 (D.N.J. 1999)*	Yes
New Mexico (NM)	Unknown	*None*	Unknown
New York (NY)	Unknown	*Bebber v. CNA Insurance Companies, 729 N.Y.S.2d 844 (N.Y. Sup. Ct. 2001); Kosich v. Metropolitan Property & Casualty Insurance Co., 214 A.D.2d 992 (N.Y. 1995); Kula v. State Farm Fire & Casualty Co., 212 A.D.2d 16 (N.Y. 1995)*	Yes
North Carolina (NC)	CC	*Erie Insurance Exchange v. Bledsoe, 540 S.E.2d 57 (N.C. Ct. App. 2000); Avis v. Hartford Fire Insurance Co., 195 S.E.2d 545 (N.C. 1973)*	—
North Dakota (ND)	EPC	*State Fire & Tornado Fund of the North Dakota Insurance Dep't v. North Dakota State University, 694 N.W.2d 225 (2005); Western National Mutual Insurance Co. v. University of North Dakota, 643 N.W.2d 4 (N.D. 2003)*	No

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

Ohio (OH)	EPC	*Front Row Theatre, Inc. v. American Manufacturer's Insurance Companies, 18 F.3d 1343 (6th Cir. 1994); Boughan v. Nationwide Property & Casualty Co., 2005 WL 126781 (Ohio Ct. App. 2005) (not published)*	Yes
Oklahoma (OK)	EPC	*TNT Speed & Sport Center, Inc. v. American States Insurance Co., 114 F.3d 731, 733 (W.D. Okla. 2003); Shirey v. Tri-State Insurance Co., 274 P.2d 386 (Okla. 1954)*	Yes
Oregon (OR)	EPC	*Naumes, Inc. v. Landmark Insurance Co., 849 P.2d 554 (Or. Ct. App. 1993); Gowans v. Northwestern Pacific Indemnity Co., 260 Or. 618 (1971); Point Triumph Condominium Ass'n v. American Guaranty Liability Insurance Co., 2000 WL 34474454 (D. Or. 2000)*	Unknown
Pennsylvania (PA)	CC	*Spece v. Erie Insurance Group, 850 A.2d 679 (Pa. Super. Ct. 2004)*	—
Rhode Island (RI)	EPC	*Jerry's Supermarkets, Inc. v. Rumford Property & Liability Insurance Co., 586 A.2d 539 (R.I. 1991)*	—
South Carolina (SC)	EPC	*King v. North River Insurance Co., 297 S.E.2d 637 (S.C. 1982)*	—
South Dakota (SD)	EPC	*Lummel v. National Fire Insurance Co. of Hartford, 210 N.W. 739 (S.D. 1926)*	—

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

Tennessee (TN)	EPC	*Hall & Hawkins v. National Fire Insurance Co., 92 S.W. 402 (Tenn. 1906)*	—
Texas (TX)	CC	*Warrilow v. Norrell, 791 S.W.2d 515 (Tex. App. 1989); Travelers Indemnity Co. v. McKillip, 469 S.W.2d 160 (Tex. 1971)*	Yes
Utah (UT)	EPC	*Alf v. State Farm Fire & Casualty Co., 850 P.2d 1272 (Utah 1993)*	Yes
Vermont (VT)	Unknown	*None*	Unknown
Virginia (VA)	Unknown	*None*	Unknown
Washington (WA)	EPC	*Wright v. Safeco Insurance Co. of America, 109 P.3d 1 (Wash. Ct. App. 2004); Safeco Insurance Co. v. Hirschmann, 773 P.2d 413 (Wash. 1989)*	Yes
Washington, DC (DC)	EPC	*Cameron v. USAA Property & Casualty Insurance Co., 733 A.2d 965 (D.C. 1999); Quadrangle Development Corp. v. Hartford Insurance Co., 645 A.2d 1074 (D.C. 1994); Unklesbee v. Homestead Fire Insurance Co. of Baltimore, 41 A.2d 168 (D.C. App. 1945)*	No
West Virginia (WV)	EPC	*West Virginia Fire & Casualty Co. v. Mathews, 543 S.E.2d 664 (W. Va. 2001); Murray v. State Farm Fire & Casualty Co., 509 S.E.2d 1 (W. Va. 1998)*	No

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

Wisconsin (WI)	CC	*American Motorists Insurance Co. v. R&S Meats, Inc., 526 N.W.2d 791 (1994); Lawyer v. Boling, 238 N.W.2d 514 (Wis. 1976)*	Yes
Wyoming (WY)	EPC	*State Farm Fire & Casualty Co. v. Paulson, 756 P.2d 764 (Wyo. 1988); Miles v. Continental Casualty Co., 386 P.2d 720 (Wyo. 1963)*	

Table adapted from Phillips and Coplen (2007), with some data updated from (Dale Joseph Gilsinger (2008)).

Jurisdictions in the US overwhelmingly follow the doctrine of Efficient Proximate Cause. Many jurisdictions also recognize ACC clauses as valid, though the number of states that do so is smaller than the number of states that follow the doctrine of Efficient Proximate Cause. Only four states—Florida, Kentucky, Texas, and Wisconsin—follow the doctrine of Concurrent Causation.

DISCUSSION

The debate in the literature on how best to construct causation in insurance hinges on two main issues: 1.) how to define "causation" in such a way as to which is realistic, and avoids pharisaical results, and 2.) how best to construe causation in such a way as to balance the interests between the insurer and the insured in an equitable and economic manner. 3.) how to draw the line between proximity and remoteness—that is, how to logically and fairly identify the point in the chain of causation without extending the "butterfly effect" indefinitely to some whimsically remote point, or conversely, to draw the line too close so as to ignore real causes simply because they are separated by one too many arbitrarily defined degrees; and 4.) how to incorporate and discern causation in convoluted situations involving a nexus of several interrelated causes.

"Causality" does not possess a uniform definition in physics, philosophy or law; or even between different branches of law, such as between tort law and insurance law. "Causation" as the concept is understood in law, is handed down to us from days past when modern physical thinking about the universe was not the same as it is today. Despite much development and reform, it retains a highly parochial, rigid, linear and normative character; very much a distinct legacy of the philosopher or lawyer thinking of "cause A" leading to "result B" in the vacuum of a hypothetical situation in their mind, or of an idealized court case, and then trying to extend such thinking to other scenarios (Smith & Simpson, 2006). This is why insurance contracts are written with presumed perils like "earth movement" and "perils of the sea", which don't correspond to discreet physical phenomena or causes, but to hubristic and circumstantial notions that bespeak a limited human bias about how things work. This reflexivity has real consequences upon how people end

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

up living their lives under an insurance contract and can have whimsical results. The anecdote recounted by Phillips and Coplen (2007), in which a contractor's clearly faulty work, built to defend against mudslide, was denied coverage since its structure was destroyed due to mudslide, illustrates the sometimes Pecksniffian results of insurance doctrines on causation.

Further, how does one draw the line between proximity and remoteness—that is, how does one logically and fairly identify the point of failure in the chain of causation without extending the "butterfly effect" indefinitely to some whimsically remote point, while not also creating a rigid rule that marks a predefined cut-off point so close as to ignore real causes simply because they are separated by one too many arbitrarily defined degrees? Smith and Simpson (2006), noted that the "'but for' proximate cause test in tort law does not translate well to insurance coverage issues because an insured can always trace a necessary causal antecedent of a peril back to the beginning of time and may also trace a causal consequence of a peril indefinitely into the future…[f]or this reason, the bare tort concept of causation in fact fails…". Efficient proximate cause assumes a sort of "blocky" universe in which descript "perils" neatly fit neatly together, much like puzzle pieces, in a linear chain of events, like falling dominoes (Phillips & Coplen, 2007). In *Bird v. St. Paul Fire & Marine Insurance Co. 120 N.E. 86, 86 (N.Y. 1918)*, Justice Cardozo noted "Even for the jurist, the same cause is alternately proximate and remote as the parties choose to view it" (as quoted by (Smith & Simpson, 2006)).

Concurrent causation was meant to be a fix to this type of epistemology (Plitt et al., 2015). Phillips and Coplen (2007), as well as Fu (傅廷中 & 陆玉, 2016a), pointed out that concurrent causation is similar to the "but for" theory as used in tort law, while efficient proximate cause is analogous to the proximate or legal causation analysis in tort law. Phillips (2007) gives the example of two negligent campers each leaving their fire unattended at different camp sites in the woods, and each causing a forest fire that eventually engulfs the whole forest; both contributed to the loss, yet either would have been sufficient alone to cause loss, so both are equally liable. This resolves much that is wrong with efficient proximate cause, but introduces new problems (Phillips & Coplen, 2007; Plitt et al., 2015). Concurrent causation looks at loss as a sort of "dog pile" of contributing factors, any significant enough to be noteworthy to the jurist having an equal contribution in efficiency, if not in fact. This is a problem, both because it can, in some instances, create disproportional results, in which contributing perils that affect the whole in unequal ways are still held equally liable; and also because it presents a greatly increased economic burden to the insurer, who will find it more difficult to withhold payment (Passa, 2003; Plitt et al., 2015; Smith & Simpson, 2006; 傅廷中 & 陆玉, 2016b). It was the increased burden placed on insurers by concurrent causation that led to an increase in the prevalence of ACC clauses.

ACC clauses add another layer of complexity to insurance law. Efficient proximate cause and concurrent causation are sometimes said to slant insurance too far in favor of the insured, whereas ACC clauses now reverse that trend and slant it even further in the opposite direction (Dale Joseph

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

Gilsinger, 2008; Passa, 2003). The option to "contract out of" an established legal doctrine or process on how to interpret the very meaning of a contract in the first place, presents issues. Firstly, when ACC clauses are used to contract out of efficient proximate cause or concurrent causation, no alternative system is given to determine casual relationships (Dale Joseph Gilsinger, 2008; Passa, 2003). Then how does one distinguish between cause-in-fact and cause in efficiency? Given bodies remain at rest until acted upon by an outside force, there is no such thing as a "pure" immediate cause. As such, every occurrence represents a link in a chain. Secondly, a disingenuous insurer could use an ACC clause to contract out of causation that is inevitable, or highly probable, such as "falling rocks, except as caused by avalanche" or "mudslide, except as caused by rain" (Passa, 2003).

Chinese impressions of US insurance law change rapidly as China's economy continues to change. Zhou (周学峰, 2011) believed that efficient proximate cause would be beneficial for China, and argued for its adoption. Zhou believed that China's then insurance law, the "Insurance Law of 2010", and supplementary interpretations by the SPC, were vague, and laconic on the point of causation. This economic shift has value for insurers, since they now reduce their risks; however, it retracts coverage from the insured. Later writers on Chinese insurance law, especially after the adoption of the 2015 Insurance Law Amendment, did not write as highly of efficient proximate cause, however (傅廷中 & 陆玉, 2016a, 2016b; 郑海新, 2016; 韩林 & 牛晓光, 2016). The economic impact of efficient proximate cause, with or without ACC, was generally seen to be too favorable wealthy insurers, and to the insured. Concurrent causation construes more coverage to the insured, and gives a flexible doctrine for interpreting causality, but was still seen as too vague. Overall, Chinese literature discussing US insurance paradigms were positive when contrasting the US to China's still as-yet developing system; but ultimately favored European models.

CONCLUSION

Overall, American insurance law presents a patchwork of differing jurisdictions, each with its own tradition. From a panoramic view, these traditions all fall into the Anglo-American legal experience, and have many innovations characteristic of this legal tradition; however, significant differences exist between the several states and the federal government. The issue of causation in insurance law in the US is not in any state of great urgency, yet causation in American insurance law remains an area of hot debate. The role of ACC clauses in US Insurance law in particular presents controversy.

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

References

Dale Joseph Gilsinger, J. D. (2008). Validity, Construction, and Application of Anticoncurrent Causation (ACC) Clauses in Insurance Policies.

Downs, A. B., & Bolduan, L. M. (2015). Efficient proximate cause instruction. *Law and Practice of Insurance Coverage Litigation, 52*(64), 1.

Passa, J. A. (2003). Insurance Law - Property Insurance, Adopting the Efficient Proximate Cause Doctrine, but saying no to contracting out of it. *North Dakota Law Review, 79*(561), 561-588.

Phillips, M. C., & Coplen, L. L. (2007). Concurrent Causation versus Efficient Proximate Cause in First-Party Property Insurance Coverage analysis. *American Bar Association, 32*.

Plitt, S., Maldondo, D., Rogers, J. D., & Plitt, J. R. (2015). Efficient proximate cause versus concurrent cause. *Couch on Insurance, 7*(101:55).

Smith, R. L., & Simpson, F. A. (2006). Causation in Insurance Law. *South Texas Law Review, 48*, 305-421.

傅廷中, & 陆玉. (2016a). 保险法中的近因原则与民法中因果联系原则关系之辩. *中國社会科学院研宻生院学报, 1*(211), 90-94.

傅廷中, & 陆玉. (2016b). *保险法近因原则相关问题研究*. 大连海事大学, 清华大学.

周学峰. (2011). 论保险法上的因果关系 ——从近因规则到新兴规则. *法商研究, 1*(141).

郑海新. (2016). 海上保险近因原则分析——对比《英国海上保险法》与《挪威海上保险计划》. *法制博览, 3*, 269.

韩林, & 牛晓光. (2016). 事故寄与度——减少理赔纠纷的重要原则. *China Insurance, 3*.

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)