

UNIQUE COVERAGE ISSUES IN FLOOD LOSSES

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I. INTRODUCTION

Floods are among the most frequent and costly natural disasters, according to the Federal Emergency Management Agency (FEMA) and the American Red Cross. Floods threaten property as well as lives, causing

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destruction, injury, and even death. In most cases, the damage caused by a flood forces people to abandon their homes temporarily or, in severe cases, permanently. Floods can occur in virtually any location and result from a variety of causes, including heavy rain, melting snow, rapidly rising bodies of water, hurricanes and other storms, clogged drainage systems, and the failure of levees and dams. Floods can have local effects, affecting small areas such as neighborhoods or communities, and can affect widespread areas such as coastal regions and river basins.

In late October 2012, Hurricane Sandy devastated the Atlantic coastline with flooding and other damage. The superstorm “left more than 50 people dead and more than 8 million without power, and it likely caused more than \$20 billion in damage.”¹ Even though Sandy was technically only a Category I hurricane, its destructive winds and flooding extended more than 450 miles from its center.² Other estimates put the number of deaths at 106³ and the total economic impact as high as \$50 billion.⁴ Specifically, it was estimated that Sandy “caused between \$30 billion and \$50 billion in economic losses, including property damage, lost business and extra living expenses” while insurance companies face losses ranging from \$10 billion to \$20 billion.⁵

In August and September of 2012, Hurricane Isaac damaged approximately 59,000 homes and killed eight people in Louisiana and Mississippi.⁶ One power company estimated that more than 470,000 homes and businesses lost power, including 156,000 in New Orleans alone.⁷ Governor Bobby Jindal stated that thousands of people were forced to stay in storm shelters across the state of Louisiana.⁸ In addition, the

1. Bryan Walsh, *Outsmarting the Surge*, TIME, Nov. 12, 2012, at 36.

2. *Id.* at 37. Hurricane Sandy also caused devastation in Haiti, causing at least fifty-four deaths, ruining crops, and leading to a new outbreak of cholera. Ishaan Tharoor et al., *World*, TIME, Nov. 12, 2012, at 19.

3. Alison Leigh Cowan et al., *Mapping Hurricane Sandy's Deadly Toll*, N.Y. TIMES, Nov. 17, 2012, http://www.nytimes.com/interactive/2012/11/17/nyregion/hurricane-sandy-map.html?buffer_share=d639f. The death toll was broken down as follows: New York City (43); New Jersey (37); Long Island (14); Northern New York suburbs (7); and Connecticut (5). *Id.*

4. Matthew Craft, *Hurricane Sandy's Economic Damage Could Reach \$50 Billion, Egecat Estimates*, HUFFINGTON POST (Nov. 1, 2012), http://www.huffingtonpost.com/2012/11/01/hurricane-sandy-economic-damage_n_2057850.html.

5. *Id.*

6. Alice Park, *Hidden Hazards*, TIME, Sept. 17, 2012, at 24 (eight deaths and initial estimate of 13,000 homes); *Hurricane Isaac Damaged 59,000 Homes in Louisiana, Officials Estimate*, TIMES-PICTAYUNE, Sept. 28, 2012, http://www.nola.com/hurricane/index.ssf/2012/09/hurricane_isaac_damaged_59000.html.

7. Rick Jervis, *Hurricane Isaac Pounds Louisiana, Water Pours over Levee*, USA TODAY, Aug. 29, 2012, <http://usatoday30.usatoday.com/weather/storms/story/2012-08-28/storm-isaac-hurricane/57360044/1>.

8. Campbell Robertson & Kim Severson, *Isaac Drenches Gulf Coast and High Water Cuts Off Many*, N.Y. TIMES, Aug. 29, 2012, <http://www.nytimes.com/2012/08/30/us/hurricane-isaac-makes-landfall.html?pagewanted=all>.

storm caused an estimated \$1.2 billion in insured losses alone as well as further damage that was not covered by some form of property insurance.⁹ In fact, Hurricane Isaac could top \$2 billion in total damages.¹⁰ State Farm Insurance alone received 16,780 claims related to Hurricane Isaac; around 12,000 of the claims were for property damage to a home or business.¹¹ According to the state insurance commissioner, approximately 31 percent of Louisiana residents have flood insurance.¹² Nearly 95,000 people have already sought individual aid from FEMA.¹³

In many cases, people who suffer devastating losses to their houses and personal possessions caused by floods have no insurance coverage for flood damage. Even though they may have general property insurance coverage, many property insurance policies, both personal and commercial lines, contain exclusions that preclude or limit coverage for flood-related losses.¹⁴ As a result, flood losses present special coverage issues for first-party property insurance claims, including (1) the definition of “flood” and “surface water” for purposes of the flood exclusion, (2) the anti-concurrent causation clause, (3) business income coverage during a flood, (4) civil authority coverage, and (5) coverage for dependent property or contingent business interruption. Although some of these special coverage issues have been the focus of commentary and scholarship,¹⁵ others have received relatively little attention.

9. Jeff Amy, *Insurers Processing Estimated \$1.2 Billion in Hurricane Isaac Claims*, INS. J., Sept. 3, 2012, <http://www.insurancejournal.com/news/national/2012/09/03/261539.htm>.

10. Manuel Bojorquez, *Hurricane Isaac Damage Could Top \$2 Billion*, CBS NEWS (Sept. 3, 2012), [http://www.cbsnews.com/8301-18563_162-57505291/hurricane-isaac-damage-could-top-\\$2-billion](http://www.cbsnews.com/8301-18563_162-57505291/hurricane-isaac-damage-could-top-$2-billion).

11. Sheila V. Kumar, *Hurricane Isaac Flood Insurance Claims Filed by Thousands in Wake of Storm*, HUFFINGTON POST (Sept. 5, 2012), http://www.huffingtonpost.com/2012/09/05/hurricane-isaac-flood-insurance_n_1857768.html.

12. *Id.*

13. *Id.*

14. In one example, an elderly Australian woman was assured by the City Council that her home could not be seriously affected by floods, and she therefore was not insured for flood damage when her home was seriously damaged. Aubrey Belford & Meraiah Foley, *Floods Peak, Leaving Ruin in Australian City*, N.Y. TIMES, Jan. 13, 2011, http://www.nytimes.com/2011/01/14/world/asia/14australia.html?_r=1&ref=asia.

15. See, e.g., Mark M. Bell, *A Concurrent Mess and a Call for Clarity in First-Party Property Insurance Coverage Analysis*, 18 CONN. INS. L.J. 73 (2012); Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957 (2010); William F. “Chip” Merlin Jr., *Corban v. USAA: A Case Providing Far Too Little Because It Was Rendered Far Too Late*, 79 MISS. L.J. SUPRA 129 (2010); Howard A. VanDine III & Erik T. Norton, *Anti-Concurrent Causation Clauses and Hurricane Relief: Was It Wind or Water?*, 19 S.C. LAW. 18 (Jan. 2008); Jacqueline Young, Note, *Efficient Proximate Cause: Is California Headed for a Katrina-Scale Disaster in the Same Leaky Boat?*, 62 HASTINGS L.J. 757 (2011).

II. AVAILABILITY OF INSURANCE FOR FLOOD LOSSES

A. Government Insurance Coverage

Most private insurance policies do not provide coverage for flood damage, as further discussed below in Part B. To fill the void left by private insurance companies, Congress created the National Flood Insurance Program (NFIP) pursuant to the National Flood Insurance Act of 1968.¹⁶ In creating the NFIP, which is codified at 42 U.S.C. §§ 4001–4128, Congress recognized that

many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions; but . . . a program of flood insurance with large-scale participation of the Federal Government and carried out to the maximum extent practicable by the private insurance industry is feasible and can be initiated.¹⁷

Therefore, Congress authorized creation of the NFIP to offer flood insurance “on a nationwide basis through the cooperative efforts of the Federal Government and the private insurance industry” that is “based on workable methods of pooling risks, minimizing costs, and distributing burdens equitably among those who will be protected by flood insurance and the general public.”¹⁸

The NFIP is administered by FEMA, which works with private insurance companies to offer flood insurance to property owners and renters.¹⁹ For property owners or renters to qualify for flood insurance through the NFIP, their communities must join the NFIP and agree to adopt and enforce ordinances that meet or exceed FEMA requirements to reduce the risk of flooding. If the community does not participate in the NFIP, residents can petition their local governments to request community participation.

Although participation in the NFIP generally is discretionary, it is mandatory under certain circumstances. The National Flood Insurance Act was amended by the Flood Disaster Protection Act of 1973 and the National Flood Insurance Act of 1994 to require flood insurance for loans secured by improved real estate within high-risk flood areas. As a result, homes and businesses with mortgages from federally regulated or insured lenders in high-risk flood areas are required by federal law to have flood insurance through the NFIP.²⁰ In addition, a lender may require flood insurance even if it is not required under federal law.

16. See 42 U.S.C. §§ 4001–4128 (2006).

17. *Id.* § 4001(b).

18. *Id.* § 4001(d).

19. *Id.* § 4012(a).

20. *Id.* § 4012a.

Homeowners, renters, and business owners may purchase NFIP coverage through property and casualty insurance agents. NFIP coverage can provide residential coverage of up to \$250,000 for buildings and up to \$100,000 in coverage for personal property and commercial coverage of up to \$500,000 for buildings and up to \$500,000 for contents.²¹ However, flood insurance coverage is limited for basements, regardless of zone or date of construction. Flood insurance also is limited for building areas below the lowest elevated floor, such as crawlspaces and other enclosed areas, depending on the building's flood zone and date of construction.

Rates for flood insurance through the NFIP are regulated and do not differ from company to company or agent to agent.²² The rates depend on many factors, which include the date and type of construction of the property to be insured, along with the area's level of risk. The level of risk for an area is determined by FEMA, which identifies flood zones based on the land area's risk of flooding: low, moderate, or high risk. FEMA prepares Flood Insurance Rate Maps (FIRM), which generally outline a community's base flood elevations, flood zones, and floodplain boundaries. In May 2012, Congress passed the National Flood Insurance Program Extension Act, which authorized a new effort to bring the flood maps up to date by directing FEMA to use "the best available science regarding future changes in sea levels, precipitation, and intensity of hurricanes," i.e., the projected impacts of climate change.²³

Land areas that are at high risk for floods are called Special Flood Hazard Areas (SFHA). High-risk areas have at least a one percent annual chance of flooding, which equates to a twenty-six percent chance of flooding over the life of a thirty-year mortgage. All homeowners in these areas with mortgages from federally regulated or insured lenders are required to purchase flood insurance. SFHAs are shown on flood maps as zones labeled with the letter A or V.

Land areas that have a low to moderate risk for floods are called Non-Special Flood Hazard Areas (NSFHA). In moderate-to-low-risk areas, the risk of being flooded is reduced but not completely removed. These areas are outside the one percent annual flood-risk floodplain areas, so flood insurance is not required, although it is recommended for all property

21. *Id.* § 4013(b).

22. *Id.* §§ 4014, 4015.

23. H.R. 5740 was signed into law as the National Flood Insurance Program Extension Act, Public Law No. 112-123, 126 Stat. 852 (2012). The Act also reauthorized the NFIP for five years, phased out subsidies on properties with repetitive losses, allowed FEMA to purchase reinsurance, capped annual premium increases at 20 percent (instead of the previous 10 percent), allowed coverage for multifamily properties, and included minimum deductibles.

owners and renters. NSFHAs are shown on flood maps as zones labeled with the letter B, C, or X (or a shaded X).²⁴

Finally, it is important to note that the NFIP policies, while covering damage to property, do not provide coverage for business income, civil authority, or dependent property.

B. *Private Insurance Coverages*

Property insurance policies generally fall into two categories: “all risk” policies and “named peril” policies.²⁵ An all risk policy provides coverage for all direct losses caused by any fortuitous events not specifically excluded under the policy; in contrast, a named peril policy covers only those losses caused by events specifically listed in the policy’s coverage.²⁶ Neither all risk policies nor named peril policies typically provide any coverage for losses caused by flood. Named peril policies generally do not list flood among the covered perils, and all risk policies usually contain an exclusion for losses caused by water, including floods and surface water.

1. Water Exclusions

Although the language of the water damage exclusion may differ depending on the specific policy provision, one of the common water damage exclusions contained in the standard homeowners policy provides, in pertinent part:

SECTION I—EXCLUSIONS

- A. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

* * *

3. Water Damage

Water Damage means:

- a. Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

24. Further information regarding the NFIP and administration of the NFIP can be found at <http://www.floodsmart.gov/floodsmart/> and also can be found through FEMA at <http://www.fema.gov/about/programs/nfip/index.shtm>.

25. See *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33 (2d Cir. 2006); *TAG 380, LLC v. ComMet 380, Inc.*, 890 N.E.2d 195 (N.Y. 2008).

26. See *Parks*, 472 F.3d 33; *Janart 55 W. 8th L.L.C. v. Greenwich Ins. Co.*, 614 F. Supp. 2d 473 (S.D.N.Y. 2009); *Royale Green Condo. Ass’n v. Aspen Specialty Ins. Co.*, 2009 WL 799429, at *7–8 (S.D. Fla. Mar. 24, 2009); *Poulton v. State Farm Fire & Cas. Cos.*, 675 N.W.2d 665 (Neb. 2004).

- b. Water or water-borne material which backs up through sewers or drains or which overflows or is discharged from a sump, sump pump or related equipment; or
- c. Water or water-borne material below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.²⁷

Similar to the language found in homeowners policies, the standard commercial property policy and the standard business owners policy each contains a water exclusion that provides, in pertinent part:

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

* * *

g. Water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
- (2) Mudslide or mudflow;
- (3) Water that backs up or overflows from a sewer, drain, or sump; or
- (4) Water under the ground surface pressing on, or flowing or seeping through:

27. 1 MILLER'S STANDARD INSURANCE POLICIES ANNOTATED (West) § I.3, at 212 (ISO Form HO00031000) (5th ed. 2007). Similarly, the language contained in the water exclusion endorsement that replaces the water damage exclusion in the standard homeowners policy provides:

SECTION I—EXCLUSIONS

A.3 Water Damage is replaced by the following:

3. Water

This means:

- a. Flood, surface water, waves, including tidal wave and tsunami, tides, tidal water, overflow of any body of water, or spray from any of these, whether or not driven by wind, including storm surge;
- b. Water which:
 - (1) Backs up through sewers or drains; or
 - (2) Overflows or is otherwise discharged from a sump, sump pump or related equipment;
- c. Water below the surface of the ground, including water which exerts pressure on, or seeps, leaks or flows through a building, sidewalk, driveway, foundation, swimming pool or other structure; or
- d. Waterborne material carried or otherwise moved by any of the water referred to in **A.3.a** through **A.3.c** of this exclusion.

Id. § I.3 A.3.3, at 215 (ISO Form HO00030511) (6th ed. 2012) [hereinafter MILLER'S STANDARD].

- (a) Foundations, walls, floors or paved surfaces;
- (b) Basements, whether paved or not; or
- (c) Doors, windows, or other openings.²⁸

2. Coverage Options

Although most property insurance policies procured through the private market provide no coverage for losses caused by flood, there are several exceptions. First, a property owner may be able to pay an additional premium for a flood coverage endorsement that adds “flood” to the policy’s “Covered Causes of Loss.”²⁹ Property policies containing a flood coverage endorsement usually contain a separate coverage limit and deductible for flood losses. A standard flood coverage endorsement provides, in pertinent part:

FLOOD COVERAGE ENDORSEMENT

* * *

C. Additional Covered Cause of Loss

The following is added to the Covered Causes of Loss:

Flood, meaning a general and a temporary condition of partial or complete inundation of normally dry land areas due to:

1. The overflow of inland or tidal waters;
2. The unusual or rapid accumulation or runoff of surface waters from any source; or

28. *Id.* § B.1.g, at 470.4 (ISO Forms CP10200402 and CP10301000); *Id.* § 1B.1.g, at 503.6 (ISO Form BP00030106). The water exclusion in a commercial property or business owners policy may be superseded by a water exclusion endorsement, which typically reads as follows:

A. The exclusion in Paragraph B. replaces the Water Exclusion in this Coverage Part or Policy.

B. Water

1. Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, whether or not driven by wind (including storm surge);
2. Mudslide or mudflow;
3. Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;
4. Water under the ground surface pressing on, or flowing or seeping through:
 - a. Foundations, walls, floors or paved surfaces;
 - b. Basements, whether paved or not; or
 - c. Doors, windows, or other openings; or
5. Waterborne material carried or otherwise moved by any of the water referred to in Paragraph 1., 3. or 4., or material carried or otherwise moved by mudslide or mudflow.

Id. § 28, at 483.9 (ISO Form CP10320808); *id.* § 4A, at 506.8 (ISO Form BP01590808).

29. In flood coverage disputes, insurers are often quick to point out that additional coverage was available for an additional premium. If the insured did not purchase the additional coverage, he must not be covered for flood, and allowing the insured to receive coverage for which he never paid would essentially make the flood coverage endorsement nugatory.

3. Mudslides or mudflows which are caused by flooding as defined in C.2 above. For the purpose of this Covered Cause of Loss, a mudslide or mudflow involves a river of Liquid and flowing mud on the surface of normally dry land areas as when earth is carried by a current of water and deposited along the path of the current.

All flooding in a continuous or protracted event will constitute a single flood.

D. Exclusions, Limitations and Related Provisions

* * *

2. To the extent that a part of the Water Exclusion might conflict with coverage provided under this endorsement, that part of the Water Exclusion does not apply.³⁰

A flood coverage endorsement also generally provides coverage for the removal of debris caused by or resulting from flood, except for deposits of mud or earth.

As an extension to the above flood coverage endorsement, some property policies contain limited exceptions to the policy's water exclusion that reinstate coverage in limited circumstances. The water exclusions in a standard commercial property or business owners policy each contains an exception that provides in pertinent part: "But if water, as described above in **g.(1)** through **g.(4)** above, results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage."³¹

Some property policies contain a water backup endorsement that reinstates coverage under the policy for water that backs up from a sewer or drain.³² The water backup endorsement in the standard homeowners policy provides as follows:

Back-up of sewers or drains. We cover direct physical loss caused by water:

- a. which backs up through sewers or drains; or
- b. which enters into and overflows from within a sump pump, sump pump well or other type of system designed to remove subsurface water which is drained from the foundation area.

30. MILLER'S STANDARD, *supra* note 27, § D2, at 471.7 (ISO Form CP10651000).

31. *Id.* § B.1.g.5, at 470.4 (ISO Forms CP10200402 and CP10301000); *id.* § B.1.g.5, at 503.6 (ISO Form BP00030106). Similarly, the water exclusion endorsements in a commercial property or business owners policy contain an exception that typically reads as follows: "But if any of the above, in Paragraphs 1. through 5., results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage." *Id.* § 28, at 483.9 (ISO Form CP10320808); *id.* § 4A, at 506.8 (ISO Form BP01590808).

32. "An exception to an exclusion cannot create coverage where none exists." *Hartford Cas. Ins. Co. v. Evansville Vanderburgh Pub. Library*, 860 N.E. 2d 636, 646 (Ind. Ct. App. 2007) (citation and quotations omitted); *see also* *Wright v. Safeco Ins. Co. of Am.*, 109 P.3d 1, 7 (Wash. Ct. App. 2004). Rather, an exception to an exclusion operates to restore coverage only if the damage ensues from a covered cause of loss. *See Weeks v. Coop. Ins. Cos.*, 817 A.2d 292, 296 (N.H. 2003).

This coverage does not apply if the loss is caused by your negligence.³³

Finally, it may be possible to purchase an excess flood insurance policy from a private carrier that provides additional funds above the uniform NFIP flood policy limits.

III. COVERAGE ISSUES

To determine whether and to what extent a property insurance policy provides coverage for flood losses, it is necessary to look to the terms of the policy. Terms in an insurance policy are given their ordinary and common meaning, unless otherwise defined in the contract.³⁴ However, many policies do not contain a definition for essential terms such as “flood” or “surface water.”³⁵ Courts often rely upon dictionary definitions to find the common meaning of words that are not specifically defined in the insurance policy.³⁶

A. Definition of “Flood” and Case Law Distinctions

The term “flood” has been repeatedly characterized in both lay and legal dictionaries as an overflowing or inundation of water over usually dry land.³⁷ “Flood” is similarly defined under federal law. For example, the National Flood Insurance Act defines the word as follows:

33. MILLER'S STANDARD, *supra* note 27, § 33, at 244.4 (Form HOMIS). Likewise, the water backup endorsement in the standard commercial property policy provides: “We will pay for loss or damage to covered property caused by water that backs up from a sewer or drain. However, this Additional Coverage does not provide coverage for loss or damage due to water emanating from a sump pump well or similar device designed to prevent overflow, seepage or leakage of subsurface water.” *Id.* § 44, at 493.4 (Form CPMIS).

34. See *Bituminous Cas. Corp. v. Advanced Adhesive Tech.*, 73 F.3d 335 (11th Cir. 1996); *Nautilus Ins. Co. v. Vuk Builders, Inc.*, 406 F. Supp. 2d 899 (N.D. Ill. 2005); *Ticor Title Ins. Co. v. FFCIA/IIP 1988 Prop. Co.*, 898 F. Supp. 633 (N.D. Ind. 1995).

35. Of course, some policies do define the term “flood.” For example, a primary policy defined flood as “all physical loss or damage caused by or resulting from flood waters, rising waters, waves, tide or tidal water, surface waters, or the rising, overflowing, or breaking of boundaries of lakes, reservoirs, rivers, streams or other bodies of water, whether driven by wind or not, including spray and sewer back-up resulting from any of the foregoing, all regardless of any other cause or event contributing concurrently or in any other sequence of loss.” *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 563 F.3d 777, 781 (9th Cir. 2008). Another all risk commercial policy defined “flood” as “waves, tide or tidal water, inundation, rainfall and/or resultant runoff, and the rising (including overflowing or breakage of boundaries) of lakes, ponds, reservoirs, rivers, harbors, streams, or similar bodies of water whether wind-driven or not.” *SEACOR Holdings, Inc. v. Commonwealth Ins. Co.*, 635 F.3d 675, 679 (5th Cir. 2011).

36. See *Alea London Ltd. v. Lee*, 649 S.E.2d 542 (Ga. Ct. App. 2007); *Bd. of Educ. of the Liverpool Cent. Sch. Dist. v. Utica Mut. Ins. Co.*, 836 N.Y.S.2d 491 (N.Y. Sup. Ct. 2007); *Zarder v. Humana Ins. Co.*, 765 N.W.2d 839 (Wis. Ct. App. 2009).

37. See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 674 (4th ed. 2000) (“[a]n overflowing of water onto land that is normally dry”); BLACK'S LAW DICTIONARY 640 (6th ed. 1990) (“[a]n inundation of water over land not usually covered by it”);

-
-
- (a) As used in this chapter—
- (1) the term “flood” shall have such meaning as may be prescribed in regulations of the Administrator, and may include inundation from rising waters or from the overflow of streams, rivers, or other bodies of water, or from tidal surges, abnormally high tidal water, tidal waves, tsunamis, hurricanes, or other severe storms or deluge[.]

* * *

- (b) The term “flood” shall also include inundation from mudslides which are proximately caused by accumulations of water on or under the ground. . . .
- (c) The term “flood” shall also include the collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels. . . .³⁸

Likewise, FEMA has defined “flood” as

- (a) A general and temporary condition of partial or complete inundation of normally dry land areas from:
 - (1) The overflow of inland or tidal waters.
 - (2) The unusual and rapid accumulation or runoff of surface waters from any source.
 - (3) Mudslides (i.e., mudflows) which are proximately caused by flooding as defined in paragraph (a)(2) of this definition and are akin to a river of liquid and flowing mud on the surfaces of normally dry land areas, as when earth is carried by a current of water and deposited along the path of the current.
- (b) The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in paragraph (a)(1) of this definition.³⁹

Courts have generally concluded that the plain and ordinary meaning of the term “flood” means the overflow of a body of water onto an area that is normally dry. For example, in *Vanderbrook v. Unitrin Preferred Insurance Co. (In re Katrina Canal Breaches Litigation)*,⁴⁰ the Fifth Circuit considered the definitions contained in various dictionaries and legal treatises, as well as decisions from Louisiana courts and others, before reach-

MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 480 (11th ed. 2003) (“a rising and overflowing of a body of water especially onto normally dry land”).

38. 42 U.S.C. § 4121(a)(1), (b)–(c) (2006).

39. 44 C.F.R. § 59.1.

40. 495 F.3d 191 (5th Cir. 2007).

ing a conclusion on the “generally prevailing meaning” of the term “flood.” The court held:

In light of these definitions, we conclude that the flood exclusions are unambiguous in the context of this case and that what occurred here fits squarely within the generally prevailing meaning of the term “flood.” When a body of water overflows its normal boundaries and inundates an area of land that is normally dry, the event is a flood.⁴¹

However, there are several decisions in which courts have held that the plain and ordinary meaning of “flood” includes more than the overflow of a body of water. In *Walker v. McKinnis*,⁴² the court examined a policy exclusion that defined “water damage” as “flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by the wind.” After considering dictionary definitions for the term “flood,” the court found that rain water that drained off the roof onto the ground and then into a basement window well was a “flood” within the meaning of the insurance policy’s flood exclusion.⁴³ The court explained:

The fact that the policy included both “flood” and “an overflow of a body of water” as meanings for “water damage” is an indication that the policy intended “flood” to not be limited to strictly an overflow of a body of water, but also to have a broader meaning such as “a great stream of something flowing in a steady course” or “a large quantity widely diffused.”⁴⁴

Similarly, the court in *E.K.S., Inc. v. U.S. Fire Insurance Co.*⁴⁵ held that water damage caused by storm water entering a building at ground level fell within the insurance policy’s exclusion for water damage. The court

41. *Id.* at 214 (thus the water from a levy breach fell within the plain and ordinary meaning of the word “flood”). See also *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 563 F.3d 777, 784 (9th Cir. 2008) (water damage to shipyard from Hurricane Katrina fell within dictionary definition of “flood” as overflowing or inundation of water on usually dry land); *Kane v. Royal Ins. Co.*, 768 P.2d 678 (Colo. 1989) (relying on dictionary definitions defining “flood” as overflowing of water on normally dry area in finding that large-scale inundation of water from failure of dam was flood within meaning of policy exclusion); *Bartlett v. Cont’l Divide Ins. Co.*, 697 P.2d 412 (Colo. Ct. App. 1984) (water damage caused by release of water from failed dam was “flood” and therefore excluded from coverage by policy’s water exclusion); *Wallis v. Country Mut. Ins. Co.*, 723 N.E.2d 376 (Ill. App. Ct. 2000) (water damage to house caused by overflow of creek from severe thunderstorm was flood under plain and ordinary meaning of policy’s flood exclusion as shown in dictionary definitions); *Sher v. Lafayette Ins. Co.*, 988 So. 2d 186, 196 (La. 2008).

Of course, the Fifth Circuit’s holding in *Vanderbrook* that the flood exclusion was “unambiguous” was vitally important for purposes of the *contra proferentem* doctrine, i.e., that any ambiguities in the policy language must be construed against the insurer and in favor of the insured.

42. 2005 WL 1864144, at *2 (Ohio Ct. App. Aug. 8, 2005).

43. *Id.*

44. *Id.*

45. 1999 WL 299574 (N.D. Ill. May 3, 1999).

found that dictionary definitions of the term “flood” encompassed “more than the overflow of a natural body of water.”⁴⁶ The court further noted that the policy’s water damage exclusion contained both the term “flood” and the phrase “overflow of any body of water,” both of which would encompass the same meaning if the term “flood” were to be narrowly construed as meaning only the overflow of a body of water.⁴⁷

The decisions in *Walker* and *E.K.S.* appear to be aberrations since they have not been cited by any other courts. As noted in *Vanderbrook*, the majority of dictionaries, legal treatises, and courts agree that “flood” generally means the overflow of a body of water on a normally dry area, regardless of whether the water comes from a natural or man-made source.⁴⁸

B. Definition of “Surface Water” and Case Law Distinctions

Black’s Law Dictionary defines “surface water” as “[w]ater, such as rainfall runoff, that collects and flows on the ground but does not form a watercourse.”⁴⁹ In the absence of a definition in the policy, “surface water” is defined by most courts as water that is on the surface of the ground, generally derived from falling rain or melted snow, and that does not have a permanent existence, has no banks, and follows no defined course or channel.⁵⁰ However, some courts have made distinctions among claims for

46. *Id.* at *3.

47. *Id.*

48. See also *Pantanelli v. State Farm Ins. Co.*, 2008 WL 2597908 (E.D. La. June 25, 2008) (water from broken levees fell within generally prevailing meaning of “flood” as overflow of body of water’s normal boundaries that inundates normally dry land); *Indus. Enclosure Corp. v. N. Ins. Corp. of N.Y.*, 2000 WL 1029192 (N.D. Ill. July 25, 2000) (flood does not become something else merely because its source was water contained in artificial structure); *Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678, 679 (Colo. 1989) (water damage suffered as a result of a dam failure constituted “flood” and was thus excluded); *Wallis v. Country Mut. Ins. Co.*, 723 N.E.2d 376 (Ill. App. Ct. 2000) (plain meaning of “flood” includes escape of water from any watercourse, natural or artificial, so that water flows over adjoining property in no regular channel, ending up in area where it would not normally be expected); *Corban v. United Servs. Auto. Ass’n*, 20 So. 3d 601, 611 (Miss. 2009) (“[S]torm surge’ is plainly encompassed within the ‘flood’ or ‘overflow of a body of water’ portions of the ‘water damage’ definition, and no other ‘logical interpretation’ exists” and rejecting insureds’ argument that storm surge had to be specifically listed among the various meanings included in the water damage exclusion); but see *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 701 S.E.2d 33 (S.C. 2010) (rainwater that exited an incomplete stormwater drainage system was not flood water because it did not breach containment, but instead it was deliberately channeled and cast upon the insured’s land).

49. BLACK’S LAW DICTIONARY 1585 (7th ed. 1999).

50. See *Am. Fam. Mut. Ins. Co. v. Schmitz*, 793 N.W.2d 111, 116 (Wis. Ct. App. 2010) (defining surface water as “water which is derived from falling rain or melting snow, or which rises to the surface in springs, and is diffused over the surface of the ground, while it remains in such diffused state, and which follows no defined course or channel, which does not gather into or form a natural body of water, and which is lost by evaporation, percolation, or natural drainage” in accord with other jurisdictions (citation and quotations omitted)). See also *Heller v. Fire Ins. Exch.*, 800 P.2d 1006 (Colo. 1990); *Hirschfield v. Cont’l Cas. Co.*, 405 S.E.2d 737

property damage caused by “surface water” based upon differences in the way in which the water accumulated and caused the property damage.

The distinctions fall into three categories: rainwater runoff, rainwater collected on a roof top, and rainwater after it has reached the ground and been channeled or contained. Looking first at cases involving water runoff, courts have uniformly held that surface water is not limited to rain falling directly on “soil of the earth,” but also includes rain falling on paved areas and water that travels some distance across the ground before entering the building.⁵¹ By contrast, there is a split among courts regarding whether rainfall that accumulates on a roof constitutes “surface water.” Some courts have found that rainwater that collects on a roof is surface water.⁵² Other courts have held that “surface water” only means water that collects on the ground; therefore, water that collects on a roof cannot be “surface water” within the meaning of the water exclusion.⁵³

(Ga. Ct. App. 1991); *Smith v. Union Auto. Indem. Co.*, 752 N.E.2d 1261, 1267 (Ill. App. Ct. 2001); *Fenmode, Inc. v. Aetna Cas. & Sur. Co.*, 6 N.W.2d 479 (Mich. 1942); *Wellman v. Kelley*, 252 P.2d 816 (Ore. 1953); *Georgetowne Square v. U.S. Fid. & Guar. Co.*, 523 N.W.2d 380 (Neb. Ct. App. 1994); *State v. N.D. State Univ.*, 694 N.W.2d 225, 230 (N.D. 2005); *State Farm Lloyds v. Marchetti*, 962 S.W.2d 58, 61 (Tex. App. 1997).

51. See, e.g., *Front Row Theatre, Inc. v. Am. Mfr.'s Mut. Ins. Cos.*, 18 F.3d 1343, 1348 (6th Cir. 1994) (water that overflowed from driveway and ran through front door of theater was “surface water” and therefore excluded from coverage); *Cali v. Republic Fire & Cas. Ins. Co.*, 2009 WL 5064469, at *4 (E.D. La. Dec. 16, 2009) (rainwater that accumulated on ground and seeped into house through weep holes in brick façade was “surface water” within policy exclusion); *Anderson v. State Farm Fire & Cas. Co.*, 2009 WL 2385089, at *2 (D. Ariz. July 31, 2009) (rainwater that flowed across land and into house was “surface water” under policy exclusion); *Angott v. Great N. Ins. Co.*, 2006 WL 1328874, at *4 (E.D. Mich. May 15, 2006) (rainwater that fell into excavation and flowed into finished basement was “surface water” within meaning of policy exclusion); *Cameron v. USAA Prop. & Cas. Ins. Co.*, 733 A.2d 965, 970 (D.C. 1999) (water from melted snow and rain that flowed from patio into basement was surface water); *Smith*, 752 N.E.2d at 1268 (rainwater that accumulated on ground, flowed into window wells, and flooded basement was “surface water” under policy exclusion); *Casey v. Gen. Accident Ins. Co.*, 578 N.Y.S.2d 337, 338 (N.Y. App. Div. 1991) (rainwater that collected at lowest point in backyard was “surface water” within policy exclusion); *Crocker v. Am. Nat'l Gen. Ins. Co.*, 211 S.W.3d 928, 936 (Tex. App. 2007) (ordinary meaning of “surface water” in policy exclusion reasonably included rainwater that collected on patio surface and drained into house); *State Farm Fire & Cas. Co. v. Paulson*, 756 P.2d 764, 771–72 (Wyo. 1988) (rainwater that accumulated on ground and entered basement through broken windows was “surface water” within policy exclusion).

52. See *Bringham v. O'Donnell*, 124 A. 795 (Del. Ch. 1924) (a roof is to be regarded as “artificial elevation” of earth’s surface and therefore rain collected on roof is surface water within meaning of exclusion); *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 2010 WL 1380252 (Del. Super. Ct. Apr. 8, 2010) (“[I]t would defy common sense to exclude precipitation falling on a roof from a definition of ‘surface water’”); *Sherwood Real Estate & Inv. Co. v. Old Colony Ins. Co.*, 234 So. 2d 445 (La. Ct. App. 1970) (water collected on roof was surface water since “[i]t would indeed be a strained interpretation to hold that surface water is confined to that portion of rain water which falls directly on the ground”); *Nathason v. Wagner*, 179 A. 466 (N.J. Ch. 1935).

53. See *Delta Theaters, Inc. v. Alliance Gen. Ins. Co.*, 1997 WL 313413 (E.D. La. June 9, 1997) (policy’s water exclusion did not apply to damage from water coming in through roof of theater); *McCorkle v. Penn Mut. Fire Ins. Co.*, 213 So. 2d 272 (Fla. Dist. Ct. App. 1968) (water

Similarly, there is a split of authority regarding whether rainwater loses its character as surface water once it becomes diverted, channeled, or contained. A majority of courts hold that water that becomes contained or collected after it falls on the ground is no longer surface water.⁵⁴ However, in several cases, courts have held that water does not lose its character as “surface water” if the diversion or containment was not intended to carry water or if the diversion or containment is merely temporary. For example, in *American Family Mutual Insurance Co. v. Schmitz*,⁵⁵ the court considered whether the policy’s water exclusion applied where rainwater had fallen into an excavation beside the house foundation and subsequently washed away soil under the house, causing the house to collapse. The court held that the water exclusion did apply (thus barring coverage) because the rainwater became “surface water once it touched the ground, and it did not stop being surface water when it got to the trench on [the insured’s] property.”⁵⁶ In reaching that conclusion, the court reasoned that if any water touching something humanly created ceases to be surface water, the surface water exclusion would become virtually useless.⁵⁷ The court further found that the “trench” in this case, while humanly created, was not created for the purpose of diverting water and therefore did not create “a defined channel” as in other cases.⁵⁸

Likewise, the court in *State v. North Dakota State University*⁵⁹ held that rainwater that came through an underground steam tunnel did “not lose

exclusion did not apply to damage caused by water on roof that accumulated after hurricane); *Am. Ins. Co. v. Guest Printing Co.*, 152 S.E.2d 794 (Ga. Ct. App. 1966); *Cochran v. Travelers Ins. Co.*, 606 So. 2d 22 (La. Ct. App. 1992) (rainwater that collected on roof, overflowed, and seeped into building was not included in policy’s surface water exclusion).

54. See *Heller*, 800 P.2d at 1006 (water from snow melt runoff lost its character as surface water when it was diverted by trenches and therefore was not within water exclusion); *Selective Way Ins. Co. v. Litig. Tech., Inc.*, 606 S.E.2d 68 (Ga. Ct. App. 2004) (water that accumulated in an excavation pit and flowed into building through underground pipe was not surface water); *Aetna Fire Underwriters Ins. Co. v. Crawley*, 207 S.E.2d 666 (Ga. Ct. App. 1974) (water that entered house through sewer and appliances in house was not surface water because water was not flowing on surface of ground at time of entry into house); *Georgetown Square*, 523 N.W.2d at 380 (rainwater and snowmelt that flowed off the roof of an adjoining building ceased to be surface water once it was channeled through an underground drainage pipe; therefore, policy’s water exclusion did not apply); *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 701 S.E.2d 33 (S.C. 2010) (water that came through drains and damaged hotel was no longer surface water after it was collected in storm water system); *Gross v. Conn. Mut. Life Ins. Co.*, 361 N.W.2d 259 (S.D. 1985) (water accumulated in irrigation pond that drained onto nearby property was not surface water); *Marchetti*, 962 S.W.2d at 58 (rainwater ceased to be surface water when it flowed into underground sewage lines and entered house through drain).

55. 793 N.W.2d 111 (Wis. Ct. App. 2010).

56. *Id.* at 118.

57. *Id.* at 117–18 (citing *Smith v. Union Auto. Indem. Co.*, 752 N.E.2d 1261 (Ill. App. Ct. 2001)).

58. *Id.* at 118 (distinguishing *Heller*, 800 P.2d 1006).

59. 694 N.W.2d 225, 233 (N.D. 2005).

its character as surface water simply by being artificially channeled underground.” The court also found that, unlike some trenches that created “a defined channel,” the underground steam tunnels were not meant to carry water.⁶⁰ Therefore, the court held that the water that damaged these structures was surface water and did not lose its character as surface water by being diverted underground through man-made structures.⁶¹

C. *The Anti-Concurrent Causation Clause*

In many flood cases, claims for coverage under a property insurance policy may involve multiple causes of loss, some of which are covered and others are excluded. For example, as previously discussed in Part II.B, some property policies containing a water exclusion also contain a water backup endorsement that reinstates coverage under the policy for water that backs up from a sewer or drain. In some circumstances, coverage is provided under the endorsement even if the water exclusion also is applicable.⁶²

Courts have reached different conclusions in claims for flood damage that involve multiple causes of loss, based on whether the court applies the concurrent causation doctrine or the efficient proximate cause doctrine. The concurrent causation doctrine allows for recovery where the loss essentially is caused by an insured peril with the contribution of an excluded peril merely as part of the chain of events leading to the loss.⁶³

60. *Id.* at 232.

61. *Id.* at 233. *See also* *Noran Neurological Clinic, P.A. v. Travelers Indem. Co.*, 229 F.3d 707 (8th Cir. 2000) (rainwater that accumulated in atrium due to blocked drain was still “surface water” and thus excluded from coverage; the blocked drain exception only applied to water or sewage that caused damage from backing up or overflowing from a sewer, drain, or sump); *Myers v. Encompass Indem. Co.*, 863 N.E.2d 1083 (Ohio Ct. App. 2006) (rainwater that backed up from catch basin and drain on adjacent property and flowed onto insured property was within definition of “surface water” and therefore excluded under policy); *Reith v. McGill Smith Punshon, Inc.*, 840 N.E.2d 226 (Ohio Ct. App. 2005) (rainwater temporarily channeled underground through pipes remained surface water and did not change character until it emptied into ditch and flowed into river).

62. *See, e.g., Myers*, 863 N.E.2d at 1083 (although rainwater that backed up through drain was within water exclusion’s definition of “surface water,” water backup endorsement provided coverage for loss). *But see Hirschfield v. Cont’l Cas. Co.*, 405 S.E.2d 737 (Ga. Ct. App. 1991) (rainwater that flowed into basement was surface water within policy’s water exclusion; therefore, coverage precluded despite policy’s water backup endorsement).

63. *See TNT Speed & Sport Ctr. v. Am. States Ins. Co.*, 114 F.3d 731 (8th Cir. 1997) (although Missouri courts recognize efficient proximate cause doctrine, policy’s concurrent causation language reflected intent to contract out of application of efficient proximate cause doctrine); *Bao v. Liberty Mut. Fire Ins. Co.*, 535 F. Supp. 2d 532 (D. Md. 2008) (adopting concurrent causation rule and rejecting efficient proximate cause rule for first-party property claims); *T.H.E. Ins. Co. v. Charles Boyer Children’s Trust*, 455 F. Supp. 2d 284 (M.D. Pa. 2006) (upholding insurance policy’s concurrent causation clause and finding efficient proximate cause doctrine inapplicable to claim for water damage); *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901 (W.D. Tenn. 2001); *Exec. Corners Office Bldg. v. Md. Ins. Co.*, 1999 WL 33283330 (D.N.D. Apr. 30, 1999) (concurrent causation

In contrast, the efficient proximate cause doctrine allows coverage if an insured peril is the proximate cause of the loss, even if other contributing causes specifically are excluded from coverage.⁶⁴ Under the efficient proximate cause doctrine, “if a policy covers wind damage but excludes water damage, the insured may recover for damages if it can show that the wind (the covered peril) proximately or efficiently caused the loss, notwithstanding that there were other excluded causes contributing to that loss like flooding.”⁶⁵ For example, in *SEACOR Holdings, Inc. v. Commonwealth Insurance Co.*,⁶⁶ the court considered whether property damage was a “loss caused directly by the peril of a Named Windstorm,” i.e., Hurricane Katrina.⁶⁷ In the absence of contrary policy language (such as an anti-concurrent causation clause), Louisiana state law equates the term “direct loss” with “proximate or efficient cause.”⁶⁸ The court thus concluded that wind was the proximate or efficient cause of the loss even though flood—an excluded peril under the policy—also was a contributing factor.⁶⁹

To circumvent the concurrent causation doctrine and the efficient proximate cause doctrine, insurers began including anti-concurrent causation clauses⁷⁰ in property policies. These clauses provide that coverage is excluded for any cause of loss listed in the policy’s exclusions regardless of any other cause or event that contributes concurrently or in any sequence to the loss.⁷¹ The typical ACC clause is included as part of the “Property Exclusions” section and provides that “[w]e do not cover loss to any prop-

language in water exclusion clearly and unambiguously excluded coverage for water damage regardless of any other cause or event that contributed concurrently or in any sequence to loss); *Lower Chesapeake Assocs. v. Valley Forge Ins. Co.*, 532 S.E.2d 325 (Va. 2000) (upholding concurrent causation doctrine).

64. See *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 356 (5th Cir. 2007) (under Mississippi’s efficient proximate cause doctrine, “when a loss is caused by the combination of both covered and excluded perils, the loss is fully covered by the insurance policy if the covered risk proximately caused the loss”); *Burgess v. Allstate Ins. Co.*, 334 F. Supp. 2d 1351 (N.D. Ga. 2003); *Assurance Co. of Am., Inc. v. Jay-Mar, Inc.*, 38 F. Supp. 2d 349 (D.N.J. 1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903 (Cal. 2005); *Hartford Accident & Indem. Co. v. Phelps*, 294 So. 2d 362 (Fla. Dist. Ct. App. 1974); *Bowers v. Farmers Ins. Exch.*, 991 P.2d 734 (Wash. Ct. App. 2000); *Graham v. Pub. Emps. Mut. Ins. Co.*, 656 P.2d 1077 (Wash. 1983).

65. *Tuepker*, 507 F.3d at 356 (citing *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 432 (5th Cir. 2007)).

66. 635 F.3d 675, 679 (5th Cir. 2011).

67. *Id.* at 682.

68. *Id.*

69. *Id.* at 682–83.

70. Also referred to as the “anti-concurrent cause clause” or the “ACC clause.”

71. See *Preferred Mut. Ins. Co. v. Meggison*, 53 F. Supp. 2d 139, 142 (D. Mass. 1999) (anti-concurrent causation provisions “have appeared in recent years in response to the concurrent causation doctrine, under which some courts have found that insurers are ‘obligated to pay for damages resulting from a combination of covered and excluded perils if the efficient proximate cause is a covered peril’”) (quoting Stephen P. Pate, *Recent Developments in Property Insurance Law*, 33 TORT & INS. L.J. 659 (1998)).

erty resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.⁷²

It appears that the majority of courts have held that anti-concurrent causation clauses are unambiguous and enforceable.⁷³ However, several other courts have held that ACC clauses are not enforceable in states that have statutorily adopted the efficient proximate cause rule.⁷⁴ At least one court has found the anti-concurrent causation clause to be ambiguous and thus unenforceable when the policy also included a special endorsement that was triggered.⁷⁵

National litigation concerning the proper interpretation of the ACC clause is likely to continue in the wake of three controversial post-Hurricane Katrina cases from Mississippi. The first decision came from the U.S. Court of Appeals for the Fifth Circuit in *Leonard v. Nationwide Mutual Insurance Co.*⁷⁶ The court considered a claim for damages caused by wind and storm surge from Hurricane Katrina where the insured's policy covered wind damage but contained an exclusion for water damage.

72. See, e.g., *Leonard v. Nationwide Mut. Ins. Co.*, 438 F. Supp. 2d 684, 688–89 (S.D. Miss. 2006) (quoting policy language at issue).

73. See *Ark. Valley Drilling, Inc. v. Cont'l W. Ins. Co.*, 703 F. Supp. 2d 1232, 1239 (D. Colo. 2010) (although Colorado had previously adopted the efficient moving cause rule, the "concurrent or sequential cause" provision of the policy was valid and enforceable); *State Auto. Mut. Ins. Co. v. R.H.L., Inc.*, 2010 WL 909073 (W.D. Tenn. Mar. 12, 2010) (under anti-concurrent causation language contained in policy barring coverage where one or more enumerated causes were contributing cause, coverage was precluded because loss was caused at least partially by events falling within water exclusion); *Sunshine Motors, Inc. v. N.H. Ins. Co.*, 530 N.W.2d 120 (Mich. Ct. App. 1995) (no coverage for water damage caused by blocked drainage system because anti-concurrent causation clause in policy's water exclusion applied to preclude coverage, regardless of whether blocked drainage system was direct or indirect cause of loss); *Pakmark Corp. v. Liberty Mut. Ins. Co.*, 943 S.W.2d 256 (Mo. Ct. App. 1997) (policy's anti-concurrent causation clause unambiguously excluded coverage for loss caused directly or indirectly by flooding regardless of any sewage backup that contributed concurrently or in any sequence to loss); *Casey v. Gen. Accident Ins. Co.*, 578 N.Y.S.2d 337 (N.Y. App. Div. 1991) (policy's anti-concurrent causation clause in policy's water exclusion excluded coverage for damage caused by surface water even though other factors, such as clogged drain and sloping roof, may have contributed to loss).

74. See *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903 (Cal. 2005) (applying statutory efficient proximate cause doctrine, court will consider (1) how perils mingle or concatenate distinct risks and (2) whether they provide a fair result within the reasonable expectations of both the insured and the insurer); *W. Nat'l Mut. Ins. Co. v. Univ. of N.D.*, 643 N.W.2d 4 (N.D. 2002) (property insurer could not contractually preclude coverage when efficient proximate cause of loss was covered peril because North Dakota codified efficient proximate cause doctrine); *Safeco Ins. Co. of Am. v. Hirschmann*, 773 P.2d 413 (Wash. 1989) (en banc) (insurers cannot circumvent efficient proximate cause doctrine by including anti-concurrent causation clause in policies).

75. See *Bishops, Inc. v. Penn Nat'l Ins.*, 984 A.2d 982 (Pa. Super. Ct. 2009) (concurrent cause exclusion became ambiguous and unenforceable when read together with special endorsement for sewer/drain backup).

76. 499 F.3d 419 (5th Cir. 2007).

The policy also contained an anti-concurrent causation clause, which barred coverage for losses caused by excluded causes of loss “even if another peril or event contributed concurrently or in any sequence to cause the loss.”⁷⁷ The court found that the ACC clause was unambiguous:

The clause unambiguously excludes coverage for water damage “even if another peril”—e.g., wind—“contributed concurrently or in any sequence to cause the loss.” 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.”⁷⁸

The court also took an “*Erie* guess” that the anti-concurrent causation clause was not prohibited or preempted by Mississippi law regarding the efficient proximate cause doctrine.⁷⁹ Therefore, the court held that the insured’s claim for flood-induced damages was precluded by the policy’s water exclusion, regardless of the contribution of wind.⁸⁰

The Fifth Circuit reached a similar result in *Tuepker v. State Farm Fire & Casualty Company*.⁸¹ The insured’s residence had been completely destroyed by Hurricane Katrina, and the insurer denied the entire claim based on the water damage exclusion and the anti-concurrent causation clause.⁸² Under the anti-concurrent causation clause, “excluded losses . . . will not be covered even if a nonexcluded event or peril acts ‘concurrently

77. *Id.* at 425.

78. *Id.* at 430.

79. *Id.* at 436 (“[W]e conclude that use of an ACC clause to supplant the default causation regime is not forbidden by Mississippi caselaw, . . . statutory law, or public policy.”). The insureds had asked to certify questions of state law to the Mississippi Supreme Court, but the Fifth Circuit denied the request within five days and without Nationwide even filing a response. See Merlin, *supra* note 15, at 131 n.17.

80. *Leonard*, 499 F.3d at 437–38. However, “[u]nder applicable Mississippi law, in a situation such as this, where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss), the insured may recover that portion of the loss which he can prove to have been caused by wind.” *Id.* at 426. See also *Lott v. State Farm Fire & Cas. Co.*, 2006 WL 2728695 (S.D. Miss. Sept. 19, 2006) (although water damage from storm surge flooding during Hurricane Katrina was excluded from coverage, wind damage was covered under the policy); *Buente v. Allstate Ins. Co.*, 422 F. Supp. 2d 690 (S.D. Miss. 2006) (part of losses attributable to wind and rain covered under insurance policy, although part of losses attributable to flooding not covered under policy).

81. 507 F.3d 346 (5th Cir. 2007).

82. *Id.* at 349. Such situations are often referred to as “slab cases” and present a difficult burden of proof issue since there is simply no evidence left to determine precise causation, i.e., what was caused by wind and what was caused by water. In very general terms, the insurer bears the burden of proof in “open peril” or “all risk” policies, and the insured bears the burden of proof in “named peril” policies. See Merlin, *supra* note 15, at 137–41 (also arguing that insurers attempted to unfairly shift the burden of proof by using a wind/water protocol to deny most Hurricane Katrina claims); Jennifer McNair, Note, *The Winds of Change: The Mississippi Supreme Court Examines Concurrent Causation in Hurricane Katrina Claims*, 30 *Miss. C. L. REV.* 579, 588, 602–03 (2012) (also arguing in favor of an apportionment rule).

or in any sequence' with the excluded event to cause the loss in question," and the court found the provision to be unambiguous and enforceable under Mississippi law.⁸³ The court went on to explain:

As the *Leonard* opinion directs, any damage caused *exclusively* by a nonexcluded peril or event such as wind, not concurrently or sequentially with water damage, is covered by the policy, while all damage caused by water or by wind acting concurrently or sequentially with water, is excluded. Thus, the ACC Clause in combination with the Water Damage Exclusion clearly provides that indivisible damage caused by both excluded perils and covered perils or other causes is not covered. However, as State Farm has conceded in its briefs here and below, the ACC Clause by its terms applies only to "any loss which would not have occurred in the absence of one or more of the below listed excluded events," and thus, for example, if wind blows off the roof of the house, the loss of the roof is not excluded merely because a *subsequent* storm surge later completely destroys the entire remainder of the structure; such roof loss *did* occur in the absence of any listed excluded peril.⁸⁴

Following *Leonard* and *Tuepker*, insurers "took the position that whenever property that was damaged by wind was subsequently damaged by flood, the insured could recover nothing."⁸⁵ Pundits even stated that *Leonard* and *Tuepker* "provide a basis for insurance companies to expect their limiting language in policies would be enforced" unless there was a legislative reform.⁸⁶

In the aftermath of *Leonard* and *Tuepker*, the Mississippi Supreme Court eventually turned the ACC clause analysis on its head.⁸⁷ In

83. *Tuepker*, 507 F.3d at 354.

84. *Id.* at 354. Again, the Fifth Circuit refused to certify questions of state law to the Mississippi Supreme Court. *Id.* at 357, n.12.

85. Merlin, *supra* note 15, at 133 (citing *Dickinson v. Nationwide Mut. Fire Ins. Co.*, 2008 WL 1913957, at *1 (S.D. Miss. Apr. 25, 2008) ("Nationwide contends that the ACC provision precludes recovery for wind damage to any item of insured property that was later damaged by storm surge flooding. Nationwide contends that because wind damage preceded the damage from storm surge flooding, and therefore occurred in a sequence of events, the 'in any sequence' language in the ACC invalidates the plaintiffs' claim for wind damage. In other words, Nationwide takes the position that the ACC policy provision applies to exclude coverage for any wind damage that preceded damage from the excluded peril of flooding")) and *Maxus Realty Trust, Inc. v. RSUI Indem. Co.*, 2007 WL 4468697, at *2 (W.D. Mo. Dec. 17, 2007) ("Defendant seeks a ruling that any damages to the Waverly caused exclusively, concurrently or in any sequence of the loss, by flood, are excluded from coverage under the RSUI policy. . . . In essence, Defendant argues the ACC precludes recovery for damage that would have inevitably occurred anyway as a result of the ensuing flood, even if the flood damage was preceded by wind damage.")).

86. Rick Cornejo, *The Tide Turned*, BEST'S REV., June 2010, at 30–31.

87. "It took nearly four years for this issue to reach the Mississippi Supreme Court because most insurers removed the Katrina cases to federal court based on diversity jurisdiction. As a member-owned financial services entity, USAA did not have diversity of citizenship, so it could not remove the case." Merlin, *supra* note 15, at 133 n.27. As noted above, the Fifth Circuit also denied requests to certify questions of Mississippi state law.

Corban v. United Services Automobile Association,⁸⁸ the court considered an anti-concurrent causation clause providing: “We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.”⁸⁹ The court noted that since a “loss” occurs when the insured suffers deprivation, physical damage, or destruction of his property, the loss cannot be changed by subsequent events: “The insured’s right to be indemnified for a covered loss vests at time of loss. Once the duty to indemnify arises, it cannot be extinguished by a successive cause or event.”⁹⁰ Thus, the ACC clause only applies when a covered peril (such as wind) and an excluded peril (such as water) truly act “concurrently,” meaning “in conjunction, as an indivisible force, occurring at the same time, to cause direct physical damage resulting in loss.”⁹¹ As such, the additional phrase “in any sequence” contained in the ACC clause conflicted with other provisions in the policy, such as a provision allowing the insurer to determine the value of covered property at the time of a loss.⁹² Rejecting the Fifth Circuit’s “*Erie* guesses,” the Mississippi Supreme Court held that the ACC clause was ambiguous and unenforceable with respect to the phrase “in any sequence.”⁹³ In short, the court held that

[t]he ACC clause applies only if and when covered and excluded perils contemporaneously converge, operating in conjunction, to cause damage resulting in loss to the insured property. If the insured property is separately damaged by a covered or excluded peril, the ACC clause is inapplicable. If damage is caused by a covered peril, the insured is entitled to indemnification for the covered loss, as the insured’s right to recover for the loss has vested.⁹⁴

The *Corban* decision remains good law in Mississippi.⁹⁵ Parties have cited *Corban* before the U.S. Court of Appeals for the Fourth Circuit, Louisiana state and federal courts, and Oregon state court.⁹⁶

Depending on the specific terms in the insurance policy, claims involving losses due to multiple causes of loss, including flood, likely are ex-

88. 20 So. 3d 601 (Miss. 2009) (en banc).

89. *Id.* at 612. For more on the facts and procedural history, see *id.* at 605–08.

90. *Id.* at 613. The court focused on “loss” as opposed to mere “damage.”

91. *Id.* at 614.

92. *Id.* at 615.

93. *Id.*

94. *Id.* at 616.

95. See *Spansel v. State Farm Fire & Cas. Co.*, 683 F. Supp. 2d 444 (S.D. Miss. 2010) (noting that the Mississippi Supreme Court had rejected the Fifth Circuit’s “*Erie* guess” on ACC clause and thus giving the *Leonard/Tuepker* line of cases no weight); *Robichaux v. Nationwide Mut. Fire Ins. Co.*, 81 So. 3d 1030, 1037 (Miss. 2011) (denying summary judgment to insurer under ACC clause because a question of fact remained as to wind damage).

96. See *Shepard’s Report*, Aug. 21, 2012 (on file with author).

cluded from coverage where the policy contains an anti-concurrent causation clause and also excludes coverage for water damage. However, following *Corban*, insureds across the nation have a new arrow in their quiver to argue that the ACC clause is unenforceable.⁹⁷ For example, as Hurricanes Isaac and Sandy claims continue to be evaluated, the ACC clause most likely will remain a source of debate.

D. *Business Income Coverage and Flood Losses*

Commercial property and business owners policies commonly contain additional coverage provisions that cover loss of business income.⁹⁸ The purpose of a business income loss provision is to indemnify insureds for lost income resulting from those events covered by their insurance policy, but only to the extent to which income would have been earned had no interruption occurred.⁹⁹ While the policy is aimed at protecting the insured, it is also designed to prevent the insured from being placed in a better position than if no loss or interruption of the business had occurred.¹⁰⁰

The business income and extra expense coverage form in a standard commercial property policy provides, in pertinent part:

A. Coverage

1. Business Income

Business Income means the:

- a. Net Income (Net Profit or Loss before Income Taxes) that would have been earned or incurred; and
- b. Continuing, normal operating expenses incurred, including payroll. . . .

* * *

We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration.” The “suspension” must be caused by direct physical loss

97. While the *Corban* decision has been called “a hollow victory because it came far too late for most Katrina victims to benefit from it,” Merlin, *supra* note 15, at 142, the case will undoubtedly be used to support insureds in future disputes. See McNair, *supra* note 82, at 579–80 (“[T]he *Corban* opinion was not only important to the parties involved, it also established modern Mississippi law on causation, which will affect insurers and insureds in future cases.”).

98. As noted above, the NFIP does not offer coverage for business income, civil authority, or dependent property.

99. See *Associated Photographers, Inc. v. Aetna Cas. & Sur. Co.*, 677 F.2d 1251 (8th Cir. 1982); *Berk-Cohen Assocs., LLC v. Landmark Am. Ins. Co.*, 2009 WL 2777163 (E.D. La. Aug. 27, 2009); *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594 (S.D. Fla. 1997); *Archer-Daniels-Midland Co. v. Phoenix Assur. Co.*, 975 F. Supp. 1124 (S.D. Ill. 1997); *Liberty Mut. Ins. Co. v. Sexton Foods Co.*, 854 S.W.2d 365 (Ark. Ct. App. 1993); *Cont’l Ins. Co. v. DNE Corp.*, 834 S.W.2d 930 (Tenn. 1992).

100. See *Polymer Plastics Corp. v. Hartford Cas. Ins. Co.*, 389 F. App’x 703 (9th Cir. 2010); *B.F. Carvin Constr. Co. v. CNA Ins. Co.*, 2008 WL 5784516 (E.D. La. July 14, 2008); *United Land Investors, Inc. v. N. Ins. Co.*, 476 So. 2d 432 (La. Ct. App. 1985).

of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.¹⁰¹

In general, business interruption coverage operates to compensate the insured for losses stemming from the business interruption: lost profits, loss of earnings, and continuing expenses during the period of repair or restoration of property damaged or destroyed by reason of a covered peril.¹⁰² To establish coverage for lost profits or lost earnings under business interruption coverage provisions, the insured must establish

that it sustained property damage that is covered under the policy and that the damage was caused by a covered cause of loss; that there was an interruption to the business (“suspension of operations”) which was caused by the property damage; and that there was an *actual loss of business income* during the period of time necessary to restore the business; and that the loss of income *was caused by* the interruption of the business and not by some other factor or factors.¹⁰³

The phrase “necessary suspension of operations” is generally understood to mean a total cessation of business activity, so that a complete shutdown or cessation of the insured’s business is required for the insured to recover lost business income.¹⁰⁴ On the other hand, some courts have

101. MILLER’S STANDARD, *supra* note 27, § A.1, at 458.8 (ISO Form CP00300402). Similarly, the standard business owners policy contains additional coverage for business income, which provision provides, in pertinent part:

(1) Business Income

- (a) We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your “operations” during the period of restoration. The suspension must be caused by actual physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. . .
- (c) Business Income means the:
 - (I) Net Income (Net Profit or Loss before Income Taxes) that would have been earned or incurred if no physical loss or damage had occurred. . . .
 - (II) Continuing normal operating expenses incurred, including payroll.

Id. § 1.A.5.f.1, at 502.6 (ISO Form BP00030106).

102. *Buxbaum v. Aetna Life & Cas. Co.*, 126 Cal. Rptr. 2d 682 (Ct. App. 2002).

103. *Dictionomatic, Inc. v. U.S. Fid. & Guar. Co.*, 127 F. Supp. 2d 1239, 1242 (S.D. Fla. 1999); *see also St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.*, 1999 WL 33537191 (N.D. Miss. Nov. 4, 1999) (no coverage for loss of business income where no physical damage occurred to insured property from bridge closure).

104. *See Taste Treats, Inc. v. U.S. Fid. & Guar. Co.*, 2010 WL 4919606 (S.D. W. Va. Nov. 29, 2010) (insured was not entitled to recover lost business income because Dairy Queen remained at least partially operational after loss), *aff’d*, 474 F. App’x 101 (4th Cir. 2012); *Madison Maidens, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 2006 WL 1650689 (S.D.N.Y. June 14, 2006) (insured not entitled to recover for business income loss because no complete and total cessation of insured’s business operations occurred as result of water leak, as

construed slightly different policy provisions that state “necessary or *potential* suspension” of business operations or “necessary interruption of business, whether total or *partial*” to allow coverage for a partial cessation of business without requiring a total business shutdown.¹⁰⁵

Damage resulting from a covered cause of loss is a prerequisite for business income coverage, which means that business income claims caused by flood are not covered unless the policy provides flood coverage.¹⁰⁶ For example, in *Valley Forge Insurance Co. v. Hicks Thomas & Lilienstern, L.L.P.*,¹⁰⁷ the court held that the disputed loss of business income was not covered under the policy because the loss resulted from flood or surface water, an excluded cause of loss.

required for coverage); *Am. States Ins. Co. v. Creative Walking*, 16 F. Supp. 2d 1062 (E.D. Mo. 1998) (insured only entitled to reimbursement for lost business income during thirteen-day period in which its business operations were necessarily suspended and extra expense associated with relocation of headquarters); *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987 (D. Kan. 1995) (complete cessation of insured’s business was required to trigger coverage under business income coverage provision); *Buxbaum v. Aetna Life & Cas. Co.*, 126 Cal. Rptr. 2d 682 (Cal. Ct. App. 2002) (law firm could not recover business income loss following flood because law firm continued to operate; therefore, no “suspension” of operations); *Howard Stores Corp. v. Foremost Ins. Co.*, 441 N.Y.S.2d 674 (App. Div. 1981) (recovery denied for lost business income following water damage to business because there was no actual suspension of business, but instead alleged adverse effect on continuing sales); *Keetch v. Mut. of Enumclaw Ins. Co.*, 831 P.2d 784 (Wyo. 1992) (no coverage for business interruption loss sought by motel after eruption of Mount St. Helens because motel did not suspend business activities and its business was not interrupted as required for coverage).

105. See, e.g., *Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.*, 949 F.2d 690, 692 (3d Cir. 1991) (holding that a hospital was covered under a policy that provided for coverage in the event of a “necessary or potential suspension” and allowed for coverage up until the hospital resumed “normal operations,” where hospital shut down briefly the morning of a fire and quickly resumed scaled-down operations at an alternative site); *Azstar Corp. v. U.S. Fire Ins. Co.*, 224 P.3d 960, 966–67 (Ariz. Ct. App. 2010) (casino was covered for business interruption under “partial suspension” language in policy even though a portion of the casino remained open when one building of the casino collapsed, causing a decrease in patronage of the casino); *Studley Box & Lumber Co. v. Nat’l Fire Ins. Co.*, 154 A. 337, 338 (N.H. 1931) (holding that insured’s business was covered as a whole when a fire destroyed a stable and horses used in operating the insured’s sawmill business, where policy expressly allowed for partial suspension of business operations); *Lite v. Firemen’s Ins. Co.*, 104 N.Y.S. 434, 435–36 (App. Div. 1907) (holding that policy language providing for loss of profits in case of fire damage “without total destruction” should be construed to allow coverage for partial losses).

106. See *Berk-Cohen Assocs., LLC v. Landmark Am. Ins. Co.*, Nos. 07-9205, 07-9207, 2009 WL 3738152 (E.D. La. Nov. 5, 2009) (policy’s flood exclusion endorsement precludes claim for loss of business income resulting from flood); *WMS Indus. v. Fed. Ins. Co.*, 2009 WL 2408833 (S.D. Miss. Aug. 4, 2009) (insured entitled to recover for lost income causally connected to the physical damages and loss of operations at insured casino caused by Hurricane Katrina), *aff’d*, 384 F. App’x 372 (5th Cir. 2010); *For Kids Only Child Dev. Ctr., Inc. v. Phila. Indem. Ins. Co.*, 260 S.W.3d 652 (Tex. App. 2008) (policy provided for loss of business income arising from covered cause of loss, but policy unambiguously excluded coverage for drain and sewer backup experienced by insured).

107. 174 S.W.3d 254 (Tex. Ct. App. 2004).

E. Civil Authority and Flood Losses

Business income provisions in property policies also may contain additional coverage for losses caused when civil authorities prevent access to an insured property due to an emergency, including floods. The civil authority provision contained in the business income and extra expense coverage form of a standard commercial property policy provides, in pertinent part:

5. Additional Coverages

a. Civil Authority

We will pay you for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.¹⁰⁸

Thus, the civil authority clause is triggered only if all of the following elements are met: (1) there is a loss of earnings by the insured and (2) access to the business is specifically prohibited (3) by an action of civil authority (4) as a result of direct physical loss to property other than a covered location (5) that was caused by a covered loss.¹⁰⁹

108. MILLER'S STANDARD, *supra* note 27, § A.5.a, at 459.0 (ISO Form CP00300402). Similarly, the civil authority provision in the standard business owners policy provides, in pertinent part:

i. Civil Authority

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

Id. § 1.A.5.i, at 502.8 (ISO Form BP00030106). Some policies use the phrase “by order of civil authority” or other similar language instead. *See, e.g.*, Zurich Am. Ins. Co. v. ABM Indus., Inc., 397 F.3d 158 (2d Cir. 2005) (policy covered an “order or action” of civil authority); Penton Media, Inc. v. Affiliated FM Ins. Co., 2006 WL 2504907 (N.D. Ohio Aug. 29, 2006) (policy covered “order of civil authority”), *aff'd*, 245 F. App'x 495 (6th Cir. 2007); Abner, Herrman & Brock, Inc. v. Great N. Ins. Co., 308 F. Supp. 2d 331 (S.D.N.Y. 2004) (policy applied “when a civil authority prohibits access”).

109. The civil authority clause “can be distilled into four elements: (1) The losses must be caused by an action of a civil authority that (2) prohibits access to the described premises (3) due to a direct physical loss or damage to property other than at the described premises, and (4) the loss or damage to the property other than at the described premises must be caused by or result from a ‘covered cause of loss.’” *Narricot Indus. v. Fireman's Fund Ins. Co.*, 2002 WL 31247972, at *4 (E.D. Pa. Sept. 30, 2002). “The Civil Authority clause in the insurance policy requires two things in order for [the insured] to recover lost business

Disputes involving the civil authority provision generally focus on three central issues: (1) whether access to the business was specifically prohibited, (2) whether the civil authority action was due to direct physical loss or damage (and not mere loss of use), and (3) whether the denied access was truly caused by action of civil authority.

In determining whether access to the property has been “prohibited,” courts have held that coverage under an insurance policy’s civil authority provision is available only when the civil authority prevents the property from being accessed at all. For example, in *Dixson Produce, LLC v. National Fire Insurance Co.*,¹¹⁰ an Oklahoma court found that a claim for lost income due to the city’s closure of several streets following a tornado was insufficient to find prohibited access to the insured’s business. The court held that, although travel to the insured’s business may have been made less convenient as a result of the street closings following the tornado, access was not prohibited, and therefore the civil authority provision did not apply.¹¹¹

Similarly, the court in *Ski Shawnee, Inc. v. Commonwealth Insurance Co.*¹¹² held that the Pennsylvania Department of Transportation’s closure of a bridge for repairs on a road that provided the primary means of access to a ski resort did not “prohibit” access to the ski resort under the meaning of the civil authority provision. The court said that, even if most of the resort’s customers were hindered or dissuaded from accessing the resort while the bridge was being repaired, the policy’s civil authority provision did not apply because there was not a complete inability to access the premises or a forced closing of the premises.¹¹³

income: (1) that the loss was caused by a civil authority action which prohibited access to [the] insured premises, and (2) that the civil authority action which prohibited access was due to the direct physical loss of or damage to property other than the insured premises.” Assurance Co. of Am. v. BBB Serv. Co., 576 S.E.2d 38, 56 (Ga. Ct. App. 2002).

110. 99 P.3d 725 (Okla. Civ. App. 2004).

111. *Id.* at 728; *see also* TMC Stores, Inc. v. Federated Mut. Ins. Co., 2005 WL 1331700 (Minn. Ct. App. June 7, 2005) (civil authority provision did not apply to claim for business interruption losses caused by construction that tore up a parking lot adjacent to the insured’s store because the construction simply limited access and did not completely prohibit access).

112. 2010 WL 2696782 (M.D. Pa. July 6, 2010).

113. *Id.* at *5; *see also* S. Hosp., Inc. v. Zurich Am. Ins. Co., 393 F.3d 1137, 1140 (10th Cir. 2004) (civil authority provision did not apply to claim for lost hotel revenues because FAA order grounding planes after the September 11 attacks “prohibited access to airplane flights; it did not prohibit access to hotel operations”); BY Dev., Inc. v. United Fire & Cas. Co., 2006 WL 694991 (D.S.D. Mar. 14, 2006) (no coverage under civil authority provision because governor’s evacuation order due to wildfire had only the indirect effect of restricting or hampering access to the business premises and did not completely prevent access as required for coverage); Paradise Shops, Inc. v. Hartford Fire Ins. Co., 2004 WL 5704715 (N.D. Ga. Dec. 15, 2004) (civil authority provision was not applicable to claim for lost hotel revenue because insured did not establish that access to the hotel was prohibited by any order of civil authority following September 11 attacks); Abner, Herrman & Brock, Inc. v. Great N. Ins. Co., 308 F. Supp. 2d 331, 336 (S.D.N.Y. 2004) (civil authority provision

Numerous cases have found that a mandated closing of an insured's business effectively "prohibits access" to the business, so that the critical issue then became whether the action of civil authority was "due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss." For instance, in *Narricot Industries, Inc. v. Fireman's Fund Ins. Co.*,¹¹⁴ the insured claimed business losses after two of its plants were shut down by order of civil authority following Hurricane Floyd. The court found that, with respect to the insured's North Carolina plant, the county's act of prohibiting the plant from operating and barring access to the road on which the plant was located clearly were actions of civil authority that prohibited access to the insured premises.¹¹⁵ Moreover, the court found that the damage was caused by flood and hurricane, both covered causes of loss under that insurance policy, so the loss to the North Carolina plant was covered under the policy's civil authority clause; the North Carolina plant had added a special flood endorsement to its policy.¹¹⁶ However, the court found that the loss to the Virginia plant was not covered under the civil authority clause because, even though the civil authority ordered that the Virginia facility be closed and prevented road travel as a result of both hurricane and flood, flood was not a covered cause of loss under the Virginia policy; the standard policy in place excluded flood damages.¹¹⁷

On the other hand, there is no coverage if the civil authority action was not based on damage to property other than the insured premises. In *Jones v. Chubb Corp.*,¹¹⁸ the civil authority provision was not triggered because, even though the hurricane evacuation order prohibited access to the insured property, it did not do so based upon actual property damage. In other words, "the Policy was designed to address the situation where damage occurs and the civil authority *subsequently* prohibits access."¹¹⁹

provided coverage for the period from September 11, 2001, through September 14, 2001, during which access to the insured's business in lower Manhattan was prohibited by civil authority, but did not cover subsequent period of time during which vehicular access was restricted but pedestrian traffic was permitted); 730 Bienville Partners, Ltd. v. Assurance Co. of Am., 2002 WL 31996014 (E.D. La. Sept. 30, 2002) (while FAA's closure of airports and cancellation of flights following September 11, 2001, may have prevented guests from getting to insured's hotels, FAA did not prohibit access to hotels).

114. 2002 WL 31247972 (E.D. Pa. Sept. 30, 2002).

115. *Id.* at *4.

116. *Id.* at *5.

117. *Id.* at *6-7.

118. 2010 WL 4026375 (E.D. La. Oct. 12, 2010).

119. *Id.* at *3. *But see* Assur. Co. of Am. v. BBB Serv. Co., 593 S.E.2d 7 (Ga. Ct. App. 2003) (insured presented sufficient evidence that evacuation order from Hurricane Floyd was based on actual damage to property other than insured premises, as opposed to mere threat of damage).

Similarly, a curfew imposed following the assassination of Martin Luther King Jr. was not predicated upon damage to or destruction of either an insured premises or adjacent property.¹²⁰ Thus, there was no insurance coverage under the civil authority provision.

Finally, the business interruption must be “caused by action of civil authority” as opposed to some other type of cause. The phrase “civil authority” encompasses “‘civil officers in whom a portion of the sovereignty is vested and in whom the enforcement of municipal regulations or the control of the general interest of society is confided.’”¹²¹ In *Penton Media, Inc. v. Affiliated FM Insurance Co.*,¹²² the district court ruled that the civil authority clause did not apply where the insured could not hold a trade show at a convention center leased to a federal agency responding to the September 11 terrorist attacks. Whether a certain event constitutes “an order of civil authority is not a question of fact, but a question of law.”¹²³ The government action in dispute was the lease of a convention center, and “a lease is a voluntary agreement, not an order.”¹²⁴

All of the above principles are applicable to a claim for coverage for flood losses under the civil authority provision. The civil authority provision is applicable if the insured sustained a loss of business income due to the action of a civil authority that prevented access to the insured premises, and the action of the civil authority was caused by direct physical loss to other property that resulted from a covered cause of loss under the policy. Therefore, coverage under the civil authority provision is provided for a flood-related loss only if the policy provides some form of coverage for flood losses.

F. *Dependent Property and Contingent Business Interruption Coverage*

Some commercial property and business owners policies provide business income and extra expense coverage where damage to a third party's prop-

120. *Two Caesars Corp. v. Jefferson Ins. Co.*, 280 A.2d 305 (D.C. 1971). *See also* *Bros., Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611, 614 (D.C. 1970) (a curfew imposed by city officials during the civil disorders of April 1968 did not trigger civil authority coverage because it “did not prohibit access to the premises because of damage to or destruction of adjacent property”).

121. *Narricot Indus.*, 2002 WL 31247972, at *4 (quoting *Princess Garment Co. v. Fireman's Fund Ins. Co. of S.F.*, 115 F.2d 380, 382 (6th Cir. 1940)). Thus, police officers closing a street and letters barring operation of plant constituted an “action of civil authority” even though it might not qualify as an “order of civil authority.” *Id.* “Stopping people from entering a road and instructing business to halt operations plainly are ‘actions’ in any ordinary use of English.” *Id.*

122. 2006 WL 2504907 (N.D. Ohio Aug. 28, 2006), *aff'd*, 245 F. App'x 495 (6th Cir. 2007).

123. *Id.* at *7.

124. *Id.*

erty results in increased expenses for the insured.¹²⁵ This coverage is known as “dependent property” or “contingent business interruption” coverage.¹²⁶ The courts have explained that regular business interruption insurance replaces profits lost as a result of physical damage to the insured’s plant or other equipment, while dependent property and contingent business interruption coverage goes further, protecting the insured against the consequences of suppliers’ problems.¹²⁷

The business income and extra expense coverage form in a standard commercial property policy provides coverage for dependent property by providing, in pertinent part: “We will pay for the actual loss of Business Income you sustain due to direct physical loss or damage at the premises of a ‘dependent property’ not described in the Schedule caused by or resulting from any Covered Cause of Loss.”¹²⁸ Thus, the dependent property clause is triggered only if all of the following elements are met: (1) there is a loss of earnings by the insured (2) during the restoration period (3) when the business is interrupted (4) by direct physical loss (5) caused by a covered peril (6) at a dependent property.

A contingent business interruption endorsement in a standard commercial property policy provides, in pertinent part:

This endorsement extends coverage to loss directly resulting from the necessary interruption of business conducted on the premises occupied by the Insured, caused by damage to, or destruction of, any real or personal property, not otherwise excluded by this policy, and referred to as “contributing property(ies)” and which is/are not operated by the Insured, by peril(s) insured against during the term of this Policy, which wholly or completely prevents delivery of material to Insured and results directly in the necessary business interruption of the Insured’s business.¹²⁹

There appear to be few reported decisions construing dependent property or contingent business interruption coverage provisions¹³⁰ and even fewer construing a contingent business interruption provision involving a

125. See *Zurich Am. Ins. Co. v. ABM Indus.*, 397 F.3d 158, 168 (2d Cir. 2005) (“Entities that rely on ‘third parties’ sometimes purchase CBI coverage as a policy extension in case their income is disrupted by damage to third party property.”) (citation omitted).

126. Thus, this coverage is sometimes called “CBI coverage.”

127. *Zurich Am. Ins. Co.*, 397 F.3d at 168–69; see also *CII Carbon, L.L.C. v. Nat’l Union Fire Ins. Co. of La.*, 918 So. 2d 1060 (La. Ct. App. 2005); *Archer Daniels Midland Co. v. Hartford Fire Ins. Co.*, 243 F.3d 369 (7th Cir. 2001).

128. MILLER’S STANDARD, *supra* note 27, § A.3.g, at 458.9 (ISO Form CP00300402). Similarly, a standard business owners policy provides, in pertinent part: “We will pay for the actual loss of Business Income you sustain due to physical loss or damage at the premises of a dependent property not described in the Schedule caused by or resulting from any Covered Cause of Loss.” *Id.* § A.3.g, at 458.9 (ISO Form CP00300402).

129. *Id.* § H, at 459.7 (ISO Form CP00300402).

130. See *Zurich Am. Ins. Co.*, 397 F.3d at 168 (“CBI coverage is a relatively recent development in insurance law and its scope has not yet been fully delineated by the courts.”).

flood loss. In *Archer-Daniels-Midland Co. v. Phoenix Assurance Co.*,¹³¹ the court reviewed whether an all risk policy's language extended to losses suffered as a result of floods that disrupted rail and road transportation of the insured's corn. The policy's contingent business interruption provision insured against losses "caused by damage to or destruction of real or personal property . . . of any supplier of goods or services which results in the inability of such supplier to supply an insured location."¹³² The court held that the phrase "any supplier of goods or services" denoted an "unrestricted group of those who furnish what is needed or desired."¹³³ Therefore, the court found that the plain language of the contingent business interruption provision provided coverage for the losses suffered by suppliers that were not in direct privity of contract with the insured, including the U.S. Army Corps of Engineers, the Coast Guard, and Midwestern farmers, all of which were suppliers of goods and services within the meaning of the contingent business interruption provision.¹³⁴

A similar issue formed the basis of the court's decision in *Pentair, Inc. v. American Guarantee & Liability Insurance Co.*,¹³⁵ although the court reached the opposite conclusion. In *Pentair*, the insured sought coverage for business losses sustained from manufacturing delays when an earthquake struck Taiwan and disabled a substation that provided electric power to factories that supplied products to the insured's subsidiary. The court held that, although the substation supplied power to the factories, the Taiwanese power company did not supply a product or service ultimately used by the insured and thus was not a supplier for purposes of the contingent business interruption coverage.¹³⁶

Many of the decisions construing contingent business interruption and dependent property provisions have involved claims stemming from the terrorist attacks of September 11, although the courts in each of those cases developed and used different tests in analyzing whether the provisions applied to the claimed losses. For instance, the court in *Arthur Andersen LLP v. Federal Insurance Co.*¹³⁷ examined a corporation's claim under a contingent business interruption provision for lost revenue following the attacks. The court focused on whether the claimed business losses were caused by damage to property that "'directly or indirectly prevent[ed]" a client from accepting or receiving the corporation's services. The court found that the corporation "neither identified any inter-

131. 936 F. Supp. 534 (S.D. Ill. 1996).

132. *Id.* at 540.

133. *Id.* at 541.

134. *Id.* at 543-44.

135. 400 F.3d 613 (8th Cir. 2005).

136. *Id.* at 615.

137. 3 A.3d 1279 (N.J. Super. Ct. App. Div. 2010).

ruption of its business nor any customer who was unable to receive services as a result of property damage to the [World Trade Center] or Pentagon,” and therefore held that the contingent business interruption provision provided no coverage.¹³⁸

By way of contrast, the court in *Southern Hospitality, Inc. v. Zurich American Insurance Co.*¹³⁹ looked at whether an insured’s claim for lost hotel revenue after the Federal Aviation Administration suspended flights due to the attacks involved a loss to “dependent property.” The court held that the lost revenue was not covered under the policy’s dependent property provision because there was no evidence of direct physical loss or damage to “dependent property.”¹⁴⁰

The court in *Zurich American Insurance Co. v. ABM Industry*¹⁴¹ also considered a claim for losses incurred after the collapse of the World Trade Center under the policy’s contingent business interruption provision. The court based its determination on whether the claim involved “properties not operated by the Insured.” The insured, which provided extensive janitorial, lighting, and engineering services at the World Trade Center, submitted a claim for all of its lost income resulting from the destruction of the World Trade Center, including equipment it owned and used to perform its janitorial and maintenance services; its offices and warehouses in which the insured operated and stored its supplies; the insured’s on-site call center; the freight elevators, janitorial closets and slop sinks to which the insured had exclusive access; the common areas; and the spaces occupied by the tenants the insured serviced.¹⁴² The court held that the insured, through its operation of the infrastructure of the World Trade Center, also operated the physical spaces that it and other tenants occupied.¹⁴³ The court noted:

We recognize that CBI coverage usually encompasses destroyed property of the insured’s customers, and the tenants here were “direct receiver[s] of . . . services from the Insured” as contemplated under the CBI provision in § 7.F(2). Yet the case before us involves a unique set of circumstances where the insured’s customers occupied a building that the insured itself operated, thus rendering the CBI provision inapplicable.¹⁴⁴

Based upon the case law, a claim for coverage for flood losses under the policy’s dependent property or contingent business interruption provision

138. *Id.* at 1288.

139. 2003 WL 23416117 (W.D. Okla. Sept. 30, 2003), *aff’d*, 393 F.3d 1137 (10th Cir. 2004).

140. *Id.* at *3–4.

141. 397 F.3d 158 (2d Cir. 2005).

142. *Id.* at 161–63.

143. *Id.* at 169.

144. *Id.* at 169–70.

is available if the insured has sustained a business income loss due to a physical loss or damage to a supplier's property caused by a covered cause of loss under the policy. As with the civil authority provision, coverage under the dependent property or contingent business interruption provision is provided for a flood-related loss only if the policy provides some form of coverage for flood losses.

IV. CONCLUSION

First-party claims by property owners for damages resulting from flood and other water-related losses present a number of issues that may affect or bar coverage. Although flood insurance coverage may be available through the federal government's National Flood Insurance Program, most private insurance policies exclude coverage for flood losses. However, there are several exceptions under which an insured may obtain coverage for flood and other water damage losses: (1) a flood coverage endorsement that adds "flood" to the policy's covered causes of loss; (2) an exception to the policy's water exclusion that reinstates coverage for the specified exceptions; and (3) a flood insurance policy from a private carrier, although many carriers do not write flood policies or will write flood policies only in excess of NFIP flood policy limits. In addition, each jurisdiction's definition of "flood" and "surface water" may have a substantial impact on coverage.

In many flood cases, claims for coverage under a property insurance policy may involve multiple causes of loss, some of which are covered causes of loss and others are excluded. Some courts follow the concurrent causation doctrine, so that flood and water losses are covered unless the flood or water was the initial cause of the loss. Other courts follow the efficient proximate cause doctrine and allow coverage for flood and water losses only if a covered cause of loss is the proximate cause of the loss. However, most insurance policies now are written containing anti-concurrent causation clauses, so that flood and water damages are excluded from coverage regardless of whether covered causes of loss also exist. Following the controversial *Corban* decision in Mississippi, the proper interpretation of the anti-concurrent causation clause will remain in the spotlight.

Furthermore, coverage usually is not available for flood and water damages under a policy's business interruption coverage, civil authority provision, or dependent property and contingent business interruption coverage provisions unless the policy provides coverage for flood or water losses.