

Wind vs. Water

David P. Rossmiller

Dunn Carney Allen Higgins & Tongue LLP

DPR@dunn-carney.com

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The “art” of insurance coverage analysis

- Coverage lawyers are artists
- Coverage lawyers are scholars
- Coverage lawyers are fighters
 - Man v. nature
 - Man v. man
 - Man v. himself

The many levels of coverage

- There is no one “right” answer in coverage, only those that are more or less plausible based on an understanding of the text
- A more convincing argument is not based on spin or ideology, but better research into the origins of language
- Textual reading requires knowledge of the history and purpose of the text
- Totality of the policy
- Excellent writing and a helpful, patient attitude toward explaining to the court
- Humility – no one knows or can know everything
- Teach yourself before teaching others
- Attention to detail

Good methods make for good results

- The “best” answer – if ever you search for it with all your heart, you shall surely find it
- Step by step – prove it to yourself and then prove it to others
- Willingness to get lost. When lost, go back to the last place where you knew where you were, and go forward again

Katrina litigation: the perfect storm

- Flood exclusion
- Anti-concurrent cause language
- Allocation of burden of proof
- Valued Policy Law
- Politics
- Media
- Insurer strategy v. plaintiff lawyer strategy

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Corban v. USAA

Hard cases make for bad law?

Not in this instance.

Thank goodness for the clarity and insight of this decision. Judges attentive to detail in hard cases make for good law.

Texts

- Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond, *New Appleman on Insurance: Current Critical Issues In Insurance Law*, October 2007
- Katrina in the Fifth Dimension: Hurricane Katrina Cases in the Fifth Circuit Court of Appeals, *Appleman Critical Issues*, April 2008
- *Appleman on Insurance 2d*, Vol. 32, Chapter 192
- Blog posts: www.insurancecoverageblog.com

Cases citing these texts

- *Corban*
- *Dickinson v. Nationwide*, 2008 WL 941783 (S.D. Miss.)
- *Colorado Intergovernmental Risk Sharing Agency v. Northfield Ins. Co.*, 207 P.3d 839 (Colo. Ct. App. 2008)
- *Maxus Realty Trust v. RSUI Indem. Co.*, 2007 WL 448697 (W.D. Mo.)

Fifth Circuit cases were off the mark on anti-concurrent cause analysis

- Leonard v. Nationwide
- Tuepker v. State Farm

The anti-concurrent clause

SECTION I – EXCLUSIONS

1. 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.

. . .

c. Water damage, meaning:

(1) flood, surface water, waves, tidal water, overflow of a body of water, or

spray from any of these, whether or not driven by wind

The *Corban* court eliminates the precedence of the mistaken views of the Fifth Circuit

Fifth Circuit errors:

- Failed to see that “loss” and damage are different.
- Failed to understand that tangible property comprises multiple elements and therefore can sustain multiple losses from different causes.
- Assumed “concurrent” means “affected by two causes”.
- Misled by false doctrine of “indivisible” damage.

Multiple causes v. single cause

- Is the loss caused by one force or two or more?
- If one, anti-concurrent cause can never apply.
- If multiple, are all covered or all excluded?

Efficient proximate cause

- A default rule only
- Coverage law if the Great Workshop of the Common Law
- Moving, efficient or proximate cause
- Can be overcome if the parties contract around it

Ambiguity

- Can a layman understand anti-concurrent cause language?
- How much in an insurance policy can a layman understand?
- Do people read insurance contracts?
- Insurance policies are a communication between insurers and courts. The consumer is not part of the equation.

A key: “accidental direct physical loss to property”

- What is the “loss”?
- What is the “property”?



Source:
blogs.cfl.org/2007/11/hurricane_damage.jpg

“Loss”: the key to understanding anti-concurrent language

- **SECTION I - PERILS INSURED AGAINST**
- **COVERAGE A - Dwelling and**
- **COVERAGE B - Other Structures**
- *We insure against risks of direct, physical loss to property described in*
- *Coverages A and B; however, we do not insure against loss:*
-
- *4. excluded under SECTION I - EXCLUSIONS.*

What did the *Corban* court say about “loss”

“Loss”

¶29. We first observe that the parties and trial court in this proceeding, as well as other courts in cases cited, have conflated the terms “loss” and “damage.” A “loss” is incurred by an insured and typically, but not always, follows “damage” to his or her property.

More *Corban* on “loss”

“Property damage” is defined within the policy as “physical damage to, or destruction of tangible property, including loss of use of this property.” *See* Appendix. The policy does not cover or exclude “damage,” but rather covers or excludes “loss,” and it is to “loss” that the deductible is applied. . . .

More “loss”

¶31. Based upon policy usage and the “ordinary and popular meaning,” *Noxubee County*, 883 So. 2d at 1165, we find that loss occurs at that point in time when the insured suffers deprivation of, physical damage to, or destruction of the property insured.

A key insight

¶32. No reasonable person can seriously dispute that if a loss occurs, caused by either a covered peril (wind) or an excluded peril (water), that particular loss is not changed by any subsequent cause or event. Nor can the loss be excluded after it has been suffered, as the right to be indemnified for a loss caused by a covered peril attaches at that point in time when the insured suffers deprivation of, physical damage to, or destruction of the property insured. An insurer cannot avoid its obligation to indemnify the insured based upon an event which occurs subsequent to the covered loss. 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. See *Bland v. Bland*, 629 So. 2d 582, 589 (Miss. 1993) (“[b]enefits *vest* under a casualty policy when the event occurs”) (emphasis added); *Pitts v. Am. Sec. Life Ins. Co.*, 931 F.2d 351, 358 (5th Cir. 1991) (“[s]ince the policy . . . was in full force at the time Pitts was injured, his benefits under the policy *vested*.”) (emphasis added). The same principle applies in reverse. In the case of a loss caused by an excluded peril, that particular loss is not changed by any subsequent covered peril or event. Nor can that excluded loss become a covered loss, after it has been suffered.

Property can consist of many elements

¶33. “Loss to property can consist of *many losses* because property can consist of *many elements*, and ‘loss’ need *not* refer *only* to the *totality of the damage* and in fact *should not when different forces have caused different damage.*” Appleman on Insurance § 192.03[H] (2009) (emphasis added). The subject homeowner’s policy insures “for direct, physical loss” to property. Following the policy language and the principles enumerated herein, the Corbans are entitled to recover for all covered “direct, physical loss[es]” to the property, not otherwise excluded.

What does “such loss” mean?

SECTION I - EXCLUSIONS

1. We do not insure for *loss* caused directly or indirectly by [water damage]. Such loss [from water damage] is excluded regardless of any other cause or event [wind damage] contributing concurrently or in any sequence to the loss [from water damage].

(Emphasis added.) *See also Dickinson v. Nationwide Mut. Fire Ins. Co.*

Indivisible damage – does it exist?

- Not a helpful term.
- Extra-textual.
- False doctrine, not a form of analysis but rather a justification applied to a conclusion rather than an understanding of the words that are actually in the text.

What do “concurrent” and “in sequence” mean?

- Concurrent: two or more independent causes that combine to cause the same loss. The loss could not have happened but for their combination.
- In sequence: two or more causes that are dependent. One cause triggers the other.

Examples of “concurrent”

- A garage’s framing has been weakened by uncovered rot, and covered wind blows it down. If the wind would not otherwise have blown it down, it is concurrent. *Palucci v. Liberty Mutual Fire Ins. Co.*, 190 F.Supp.2d 1312 (M.D. Fla. 2002).
- Firing mechanism filed to a hair trigger, discharged because of negligent driving. *State Farm v. Partridge*, 10 Cal.3d 94 (1973).

Examples of “in sequence”

- Lightning (covered) strikes and triggers a landslide (uncovered). *State Farm v. Slade*, 747 So.2d 293 (Ala. 1993).
- Water pipe bursts (potentially covered) and causes a landslide (uncovered).