At a Loss:

Concurrent Causation/Ensuing Loss

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I. Introduction

Concurrent causation — Coverage issues involving concurrent causation arise when multiple causes, one or more of which are covered and one or more of which are excluded, come together in some combination to cause a property loss. In such instances, figuring out how coverage of a policy applies can be difficult. As one author stated: "Property insurance coverage disputes can be extremely complex cases when there are multiple concurrent causes in a causal chain of events and when some of these concurrent causes are covered under the policy language but other concurrent causes are excluded from coverage." Peter Nash Swisher, *"Why Won't My Homeowners Insurance Cover My Loss?": Reassessing Property Insurance Concurrent Causation Coverage Disputes*, 88 Tul. L. Rev. 515, 516 (2014). To say the least, the coverage issues presented under these circumstances can be knotty, perhaps even mind-boggling.

Ensuing loss — Ensuing loss provisions of a property policy are intended to address scenarios were damage was caused by an excluded peril, which resulted in damage by an insured peril. Like with concurrent causation, these loss scenarios, and how a policy's ensuing loss provision may apply, can be confounding.

This paper is not a historic overview of or a case survey about concurrent causation or ensuing loss. Rather, the focus is on more recent cases to identify the components helpful to analyzing coverage issues when these policy provisions may be implicated. The goal of the paper is to make that analysis more comprehensible and manageable.

II. Discussion

A. Concurrent Causation

The case, *Bozek v. Erie Ins. Group*, 2015 IL App 2d 150155, 46 N.E.3d 362 (2015), serves as the jump off for discussing concurrent causation. The *Bozek* case was one of first impression in Illinois with regard to applying an anti-concurrent causation provision in an insurance policy. This case succinctly touches on principles of concurrent causation, so it provides a handy framework.

1. When Do Concurrent Causation Situations Arise?

The court in *Bozek* noted that concurrent causation disputes arise when "more than one cause contributes to a loss, some of which are covered and some of which are excluded." *Id.* at 368. In that case, an in-ground swimming pool was damaged when a pressure relief valve failed to operate, allowing pressure of groundwater, following rains, to lift the pool upward. *Id.* at 364. The covered cause under the policy was the failed pressure relief valve; the excluded cause was the hydrostatic pressure. *Id.* at 363, 65.

2. Analytical Approaches to Concurrent Causation

The *Bozek* court recognized that many coverage cases involve determining how substantial or sufficient a causal nexus is needed for coverage to apply. *Id.* The court identified four approaches used in the concurrent causation realm for analyzing coverage. *Id.* The broadest approach is the "but-for or minimally sufficient causation," which provides coverage if a covered cause contributes to the loss, regardless of the dominance or order in the chain of causation. *Id.* A second approach is that of efficient proximate cause, where coverage is provided if an insured risk sets in motion, in an unbroken causal sequence, the events that caused

the loss, even though the immediate cause in the chain of causation is an excluded cause. *Id.* A third approach — the immediate causation approach — is narrower, providing coverage only when the covered cause is the last, immediate cause in the chain of causation. *Id.* The fourth, and most narrow, approach excludes coverage when any excluded cause contributes to the loss, regardless of order. *Id.*

While the immediate-cause approach (the third approach mentioned in *Bozek*) may reflect the traditional insurance rule, the majority of jurisdictions favor the middle ground approach of efficient proximate cause (the second approach mentioned in *Bozek*). *Id. See also*, Mark M. Bell, A Concurrent Mess and a Call for Clarity in First-Party Property Insurance Coverage Analysis, 18 Conn. Ins. L.J. 73, 80 (2011/2012) (The efficient proximate cause approach has been adopted in the majority of U.S. jurisdictions.)

Given the prominence of the efficient proximate cause doctrine, another statement of it is worthwhile. In *Leonard v. Nationwide Mut. Ins. Co.*, 499 F. 3d 419 (5th Cir. 2007), the Fifth Circuit gave this formulation: An insured may recover under an insurance policy for "damages caused concurrently by a covered and an excluded peril...if the covered peril was the 'dominant and efficient cause' of the loss." Id. at 431. In *Leonard*, a Hurricane Katrina case, plaintiffs' home was damaged by wind (insured peril) and water/storm surge (excluded peril). *Id.* at 430, 432.

The Florida Supreme Court, in *Sebo v. Am. Home Assur. Co.*, 208 So. 3d 694 (Fla. 2016), held that when independent perils converge and no single cause can be considered the sole or proximate cause, the concurrent causation doctrine applies, *i.e.*, coverage exists when one of the concurrent causes is insured, even if that cause was not the prime or efficient cause. *Id.* at 997-98, 700. Of note, the policy that applied in *Sebo* did not have anti-concurrent causation language with regard to the exclusion in question. *Id.* at 700. The court suggested that had there been such language, the concurrent causation doctrine may not have applied. *Id. See, Jones v. Federated Nat'l Ins. Co.*, 2018 Fla. App. LEXIS 561, *7 (Fla. App. January 17, 2018) (The "Florida Supreme Court in *Sebo II* contemplated that it would have applied the efficient proximate cause doctrine had there been anti-concurrent cause provisions in the insurance contract.")

Anti-concurrent causation provisions will now be discussed.

3. Purpose of Anti-Concurrent Causation Language

The *Bozek* case also discussed anti-concurrent causation provisions. Insurance companies started putting anti-concurrent causation language into their policies in response to the concurrent causation disputes that were arising. *Bozek*, 46 N.E.3d at 368. In fact, the purpose of the anti-concurrent causation wording was to avoid covering a loss because the efficient or dominant cause was covered. *Id.* at 369. *See also, Leonard*, 499 F. 3d at 433 n. 7 (Insurers developed anti-concurrent causation clauses specifically in response to court decisions applying the efficient proximate cause doctrine to losses involving concurrently caused perils); *Valle v. New York Prop. Ins. Underwriting Assn.*, 2016 N.Y. Misc. LEXIS 1547, *48 (April 25, 2016) (unpublished) (An anti-concurrent provision reflects an intent to contract out of the application of the efficient proximate cause doctrine). When an anti-concurrent causation clause is applied to the facts of a claim, no coverage is provided as long as one contributing cause was an excluded cause or peril. *Bozek*, 46 N.E.3d at 369. In other words, under an anti-concurrent causation provision "where a loss is caused by a combination of excluded and covered perils, the entire loss is excluded." *Erie Ins. Prop. v. Chaber*, 801 S.E.2d 207, 213 (W.Va. 2017).

4. Examples of Anti-Concurrent Causation Wording

The policy at issue in *Bozek* had this lead-in paragraph: "We do not pay for loss resulting directly or indirectly from any of the following, even if other events or happenings contributed concurrently, or in sequence, to the loss:" *Id.* at 365. This lead-in language was then followed by a number of excluded causes or events.

The *Chaber* case, *supra,* involved soil and rock sliding down a hill and damaging the insured's motorcycle shop. 801 S.E.2d at 209. The policy had an exclusion for "earth movement" and the anti-concurrent causation clause provided that the excluded loss was excluded "regardless of any cause or event that contributes concurrently or in any sequence to the 'loss.'" *Id.* at 209, 213.

The policy in *Leonard*, a Hurricane Katrina case, excluded "water" and had this anti-concurrent causation language:

> 1. We do not cover loss to any property 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.

Leonard, 499 F. 3d at 425.

5. The Multiple Causes Must Be Concurrent

According to the court in *Bozek*, when "two perils converge at the same point in time, contemporaneously and operating in conjunction, there is a 'concurrent' cause or event." 46 N.E.3d at 369. The court further stated that the term "in sequence" in the anti-concurrent causation provision functions as the adverb "sequentially" and also modifies "contribute[]." *Id.* The court declared that, as far as sorting out any order or sequence or timing, the salient point was when the cause contributed to the loss, not when the cause came into existence. *Id.* In *Bozek*, the court did not look at the time when the pressure relief valve failed; rather, it looked at the time when the valve failure contributed to the loss. The court determined that the failed valve and hydrostatic pressure contributed concurrently to the loss. *Id.* Therefore, no separate or different loss by a covered event was involved. The court did not agree with the Bozeks' contention that the loss was covered because the cause was the failed pressure relief valve, a covered cause, and coverage could not be undone by a subsequent excluded event. *Id.* at 371. The court concluded that no loss occurred until the failed pressure valve converged with the excluded event, the hydrostatic pressure, which lifted the pool. Thus, prior to the excluded event, no loss, for which coverage vested, had occurred. *Id.* Rather, the uplift of the pool resulted from the hydrostatic pressure *and* the valve's failure to relieve pressure, *i.e.*, the convergence of two causes. *Id.* Accordingly, the two causes "contributed concurrently" to the loss. For this reason, the anti-concurrent causation clause, as a matter of law, applied and precluded coverage. *Id.* at 371-72.

The case, *Tuepker v. State Farm Fire & Cas. Co.*, 507 F. 3d 346 (5th Cir. 2007), involved the destruction of plaintiff's home in Mississippi by Hurricane Katrina. *Id.* at 348. Like in *Leonard, supra,* wind was an insured peril and water damage was an excluded peril. The 5th Circuit found that all damage caused by water or by wind acting concurrently or sequentially with water was excluded. *Id.* at 354. The court also found that the anti-concurrent causation provision was clear and provided that "indivisible damage caused by both excluded perils and covered perils or other causes [was] not covered." *Id.* Any damage, however, caused exclusively by the insured peril, wind, and not concurrently or sequentially with water, was covered by the policy. *Id.* The court gave this example: If wind first blew off the roof of the house and later a storm surge destroyed the remainder of the house, the roof loss would still be covered because it occurred in absence of the excluded period, the storm surge (water). *Id.*

The case, *Corban v. United Servs. Auto. Ass'n*, 20 S. 3d 601 (Miss. 2009), involved damage to a home by Hurricane Katrina. *Id.* at 605. At the outset, the Mississippi Supreme Court focused on when the insured property was physically damaged and by what. *Id.* at 613. The court stated that, if the loss occurred because of the covered peril (wind) or the excluded peril (water), that loss was not changed by a subsequent cause or event. *Id.* No loss can be excluded after the insured loss has been suffered, and no loss by an excluded peril can

be changed by a subsequent covered peril or event. *Id.* The insured's right to be indemnified for a covered loss vests at the time of loss and cannot be extinguished by a later cause or event. *Id.*

The Mississippi Supreme Court then discussed the policy's anti-concurrent causation language and stated that it would apply only to a loss in which an excluded peril acted in conjunction with an insured peril, as an indivisible force, that is, occurring at the same time to cause the physical damage. Such a loss would be excluded from coverage under the anti-concurrent causation language. *Id.* at 614. The court, however, found that the loss before it did not involve such a convergence of causes, *i.e.*, an "indivisible force" (wind and flood) occurring at the same time to cause the physical damage. *Id.* Rather, the perils involved acted in sequence (at different times), and not concurrently, causing different damage and, thus, separate losses. *Id.* at 614-15. Accordingly, the anti-concurrent causation provision did not apply. *Id.* at 617. Rather, in that case, loss caused by wind would be covered, while the loss caused by storm surge would be excluded. *Id.* at 617-18.

6. Anti-Concurrent Causation Provisions Are Enforced—For the Most Part

As shown in *Bozek, supra*, Illinois enforces anti-concurrent causation provisions. The 5th Circuit in *Leonard, supra*, found the anti-concurrent causation clause in question to be unambiguous and enforced it. 499 F. 3d at 430, 436. Further, the 5th Circuit stated that the majority of cases that have considered anti-concurrent causation provisions have enforced them. *Id.* at 434. *See also, Tuepker*, 507 F. 3d at 356; *Silvers v. New York Prop. Ins. Underwriting Assn.*, 2017 N.Y. Misc. LEXIS 2444, *4 (June 20, 2017) (unpublished) (New York courts have found that anti-concurrent causation clauses are unambiguous and have excluded coverage based on them).

Four jurisdictions do not enforce anti-concurrent causation provisions: California, North Dakota, Washington, and West Virginia. California and North Dakota codify the efficient proximate cause doctrine (Cal. Ins. Code §§530, 532); N.D. Cent. Code §26.1-32-01, 26.1-32-03), which cannot be abridged by policy language. Washington and West Virginia, by case law, do not allow the efficient proximate cause rule to be circumvented by an anti-concurrent causation clause. *Safeco Ins. Co. v. Hirshmann*, 112 Wash. 2d 621, 773 P. 2d 413, 414, 417 (1989); *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 509 S.E.2d 1, 12-15 (1998).

7. Burden of Proof

As a general rule, the insured has the initial burden of proving that claimed damage falls within the coverage of an insurance policy. *See, JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 603 (Tex. 2015). The burden of proof then shifts to the insurer to show that the loss falls within an exclusion to coverage. *Id.* If the insurer proves an exclusion applies, the burden shifts backs to the insured to prove that an exception to the exclusion applies, bringing the claimed damage back into coverage. *Id.* When a loss is caused by both covered and excluded causes, the insurer will have the burden to show that the anti-concurrent causation provision excludes coverage. *Id.* at 610. *See also, Tuerpker*, 507 F. 3d at 356; *Corban*, 20 S. 3d at 618; *Allen v. State Farm Lloyd's*, 2017 Tex. App. LEXIS 7211, *33-34 (August 1, 2017).

8. Pointers

Here are questions to consider if confronted with a loss that may raise concurrent causation issues:

1. Were multiple causes involved in causing the loss?
2. Among the multiple causes, were some causes insured against and some excluded?
3. Was the loss truly from concurrent causes, that is, a convergence of causes and not separate causes?
4. What approach to concurrent causation is taken in the jurisdiction involved?

5. Does the policy have an anti-concurrent causation provision? If so, what does it state?
6. Does the given jurisdiction enforce anti-concurrent causation provisions?
7. Who has the burden of proof — the insured or the insurer — on establishing whether the loss from concurrent causes is covered?

B. Ensuing Loss

Property insurance policies typically list a number of causes that are excluded from coverage, but these exclusions may also provide an exception whereby coverage is afforded for loss from a covered cause that ensues or results from the excluded cause. This policy language is commonly referred to as an ensuing loss provision.

1. Purpose of Ensuing Loss Provisions

An ensuing loss provision provides coverage for certain losses occasioned by events, but the entire loss is not covered by the ensuing loss provision. *Chaber*, 801 S.E.2d at 214. The court in *Chaber* went on to state:

> ...In other words, an ensuing loss provision provides coverage for specific types of losses that are otherwise covered in the policy when that loss is a result of the occurrence of an excluded peril. For example, a policy may provide that it does not cover any loss caused by earth movement; however, any ensuing loss by fire which is not excluded or excepted is covered. This means the policy covers loss caused by fire that would not have occurred but for the earth movement; however, other damage caused by the earth movement is not covered.

Id., quoting, 11 Couch on Insurance §153:70(3d ed. 2014). An ensuing loss provision "generally applies when an event that is excluded from coverage causes a subsequent event that is covered." *Performing Arts Cmty. Improvement Dist. v. Ace Am. Ins. Co.*, 2015 U.S. Dist. LEXIS 71592, *10 (W.D. Mo., June 3, 2015). If there is only one event and only one loss, nothing ensues, and the exception to coverage does not apply. *Id.* at *11.

2. Wording of Ensuing Loss Provisions

The wording of ensuing loss provisions vary among policies. Most, however, employ wording conveying this concept — a loss will not be paid if caused by certain exclusions listed in the policy, but, if loss or damage from a covered cause of loss results, coverage will be provided for that resulting loss or damage. (Note — more than one ensuing loss provision may be in a policy, *i.e.*, the wording may be found in different exclusions.)

3. Interpretation of Ensuing Loss Provisions

a. Was There a Separate and Independent Peril?

Many cases hold that there is no ensuing loss if there is no resulting loss from a separate and independent peril. For instance, in *Russell v. NGM Ins. Co.*, 2017 N.H. LEXIS 218 (N.H., Nov. 15, 2017), mold and moisture were found in the attic of a home, which resulted from faulty workmanship. *Id.* at *1. The New Hampshire Supreme Court noted that, in the context of an exclusion for faulty workmanship, the ensuing loss clause applies when there is a significant attenuation between the direct result of the defect and the ultimate loss for which coverage is sought usually due to an independent cause. *Id.* at *15. An ensuing loss provision would not apply to the normal results of defective construction but only to distinct, separable, and ensuing losses. *Id.* at *15-16. *See, Taja Invs. LLC v. Peerless Insurance Co.*, 2017 U.S. App. LEXIS 19855, *6 (4th Cir., Oct. 11, 2017).

In *Performing Arts, supra*, a retaining wall between a garage and rock face was defectively designed, allowing more pressure behind the wall than the wall could withstand. 2015 U.S. Dist. LEXIS 71592 at *2, 9. According to the court, an ensuing loss must be distinct and subsequent to the excluded loss. In other words, two events must occur, an event that is excluded and a distinct event causing the ensuing loss. *Id.* at *11. In the case at hand, the wall was defectively designed and failed. There was no other ensuing event causing the wall to fail. *Id.* at *14.

In *TMW Enterprises, Inc. v. Federal Ins. Co.*, 619 F.3d 574 (6th Cir. 2010), contractors were hired to remove a building's exterior, but, during the course of this work, the contractors discovered that the exterior walls of the building had been improperly constructed, allowing water infiltration that corroded the steel structure and weakened the structural integrity of the building. *Id.* at 575. The insured acknowledged that the faulty workmanship allowed water to seep into the building but claimed the water damage was a covered ensuing loss. *Id.* at 576. The court stated that, when a policy excludes faulty workmanship or construction, it should be no "surprise that the botched construction will permit the elements — water, air, dirt — to enter the structure and inside of the building and eventually cause damage to both." *Id.* The insured argued that the water was the final causative agent of the damage, not the faulty construction. *Id.* The court remarked that the very risk raised by the faulty construction came to pass and pointing to other elements as the last causative agents of damage would eliminate the exclusion. *Id.* at 577.

In *Swire Pacific Holdings, Inc. v. Zurich Insurance Co.*, 845 So. 2d 161 (Fla. 2003), plaintiff was the owner of a high-rise condominium building and, as a result of design defects, had to spend approximately $4.5 million to correct structural defects. *Id.* at 163. The insurer denied coverage for "the cost of correcting a design defect." *Id.* The court determined that the loss caused by the design defect was not covered, but then addressed whether coverage was afforded under the ensuing loss provision of the design defect exclusion. *Id.* at 166. The court declared that no loss separate from or as a result of the design defect occurred. *Id.* at 167. Accordingly, plaintiff was not entitled to recover the expenses associated with repairing the design defect.

b. Was There a Second Loss?

This point is closely related to that of an ensuing loss must involve a separate and independent peril. Some courts, however, express this in terms of needing a second loss. In *Barg v. Encompass Home & Auto Ins. Co.*, 2018 U.S. Dist. LEXIS 8951 (E.D. Pa., Jan. 19, 2018), heating oil leaked from a furnace line. *Id.* at *1. The court found that the heating oil that leaked was a contaminant and, therefore, was excluded under the policy's pollution exclusion. *Id.* at *12-13. Plaintiffs maintain that they were entitled to coverage under an ensuing loss provision because the heating oil was ensuing damage to the home and underlying soil. *Id.* at *14. The court noted that the ensuing loss provision did not cover excluded losses but only covered certain secondary losses ultimately caused by the excluded peril. *Id.* at *14. The court concluded that plaintiff suffered no secondary loss, just the contamination of their property by the leaking heating oil. This was not an ensuing loss. *Id.* at *15.

The case, *Travco Insurance Co. v. Ward*, 715 F. Supp. 2d 699 (E.D.Va 2010), dealt with a homeowner's claim for alleged damage relating to the presence of Chinese drywall. *Id.* at 702-03. The court noted that, for a loss to be an ensuing loss, it must occur subsequent in time to the initial loss. *Id.* at 718. With regard to the Chinese drywall claim, the court concluded that only a single loss occurred — the Chinese drywall released sulphur gases, which harmed the insured and damaged personal property inside the home. *Id.* at 718-19.

c. Was There an Ensuing Loss Resulting Loss from a Covered Cause?

This inquiry marks a more lenient approach to coverage, under ensuing loss provisions, taken by some courts. For example, in *Sunwood Condo. Ass'n v. Travelers Cas. Ins. Co. of Am.*, 2017 U.S. Dist. LEXIS 189892 (W.D. Wash. Nov. 16, 2017), a claim was made for damage from water intruding through stucco exte-

rior walls. The insurer cited a number of exclusions, including defective construction. *Id.* at *2-6. The court stated that, under an ensuing loss clause, any loss from a covered cause, that ensues after an uncovered event, remains covered. *Id.* at *11. The court noted that, if an excluded peril (such as defective construction) brings about a covered peril (water intrusion, water seepage, water damage), the resulting damage is covered. *Id.* at *12. The court then stated that whether a covered loss ensued was a question fact. *Id.* at *13, 26.

In *Leep v. Trinity Ins. Co.*, 2017 U.S. Dist. LEXIS 86759 (D. Mont., June 6, 2017), a home was damaged by hailstorm, which was repaired by a contractor, but the repairs were improper or defective. As a result, moisture intruded into the home, causing water damage and mold. *Id.* at *2-5. The claim was denied due to the defective workmanship or repair. *Id.* at *7. The policy contained an ensuing loss provision, which the court described as operating as an exception to a policy exclusion. *Id.* at *14. The court, applying Montana law, determined that the faulty workmanship exclusion excluded the property damage caused by faulty workmanship, but the ensuing loss provision provided "coverage for any otherwise covered loss that took place afterward or as a consequence or result of the faulty workmanship." *Id.* at *27-28. The court concluded that the cost to repair or replace the faulty repairs was not covered under the policy, but the damage caused by the water intrusion was an ensuing loss that was covered. *Id.* at *31-32.

Defective workmanship was also involved in *James McHugh Constr. Co. v. Travelers Prop. Cas. Co. of Am.*, 223 F. Supp. 3d 462 (D. Md., Dec. 20, 2016). In that case, as part of construction, a contractor was engaged to clean dirt and debris from the surface of windows. In the process of doing that, the contractor scratched the surface of the windows. The insurer denied coverage under the exclusion for faulty workmanship. *Id.* at 465-66. The court concluded that the contractor's faulty workmanship damaged the glass and, therefore, that exclusion applied. *Id.* at 473. The court then analyzed the ensuing loss clause, noting that such a clause operates to insure coverage for damage from a covered cause of loss that results from an excluded cause of loss. *Id.* The court, however, did not apply the ensuing loss provision because it determined that the damaged glass was the result of faulty workmanship, and there was no damage that ensued from the faulty workmanship. *Id.* at 473-74.

The court in *Moda Furniture, LLC v. Chi. Title Land Trust Co.*, 35 N.E.3d 1139 (Ill. App. 2015), found a covered resulting loss within the exception to an ensuing loss provision. In that case, a contractor was replacing a roof at the plaintiff's rug and carpet business. *Id.* at 1141. The roofer removed the roof without adequately protecting plaintiff's property, which was damaged by gravel and dirt. *Id.* The insured denied the claim on the ground that the roofer's work was faulty and, therefore, excluded under the policy. *Id.* at 1142. The court agreed that the roofer's work fell within the exclusion for faulty workmanship but went on to consider whether any covered loss resulted from the roofer's faulty workmanship. *Id.* at 1146-47. The court engaged in a lengthy survey of cases interpreting ensuing loss provisions. Ultimately, the court held that it could find at least two plausible ways in which a covered cause of loss resulted from the faulty workmanship. Accordingly, the court found coverage within the exception to the policy's faulty workmanship exclusion as provided in the ensuing loss clause. *Id.* at 1154-55.

In *Estate of Konell v. Allied Prop. & Cas. Ins. Co.*, 2013 U.S. Dist. LEXIS 101081 (D. Ore., July 19 2013), plaintiff contended that a windstorm caused fuel oil to leak from a line at their home, which had been temporarily disconnected for repair but not capped. *Id.* at *2. The insurer maintained that no coverage was provided under the faulty workmanship exclusion. Plaintiff sought coverage under the ensuing loss provision, arguing the windstorm occurred after the faulty workmanship and, therefore, was a covered ensuing loss. *Id.* at *2-3. The court noted that courts have disagreed about when ensuing loss provisions provide coverage. *Id.* at *5. The court determined that the ensuing loss exception to the faulty workmanship exclusion was broadly worded and covered any loss resulting from the faulty workmanship if that loss was caused by an otherwise covered

event. *Id.* at *13. Therefore, the court held that coverage existed under the ensuing loss provision if the windstorm, a covered peril, caused the fuel oil to leak. *Id.* at *14. Whether the windstorm caused the oil leak, however, was a question of fact. *Id.*

The final case discussed, *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wash. 2d 501, 267 P. 3d 300 (2012), is an oft-cited case, including in the cases just mentioned. This case involved the construction of a condominium project in Tacoma. A subcontractor supplied shoring to temporarily support poured concrete slabs. Several weeks after the shoring was installed, a subcontractor began pouring concrete for the first floor. Shortly after finishing the first section of the first floor, the shoring gave way and newly poured concrete crashed down onto the lower level parking area. *Id.* at 302. The insurer denied the claim on the ground that the loss was due to faulty workmanship. *Id.* at 303. The Supreme Court of Washington noted that coverage may be excluded when a certain peril causes loss, but a resulting or ensuing loss provision may operate to carve out an exception to the exclusion. *Id.* at 307. Thus, ensuing loss clauses limit the scope of an otherwise excluded cause. *Id.* The court then stated that any ensuing loss, which is otherwise covered, will remain covered, but the uncovered event is never covered. *Id.* at 307. The dispositive question for the court was whether the loss that ensued from the excluded event was covered or excluded. *Id.* The court determined that the loss, which ensued from the faulty workmanship, was a collapse, which was covered under the ensuing loss provision of the policy. *Id.* at 308.

4. The Exception in the Ensuing Loss Provision Should Not Swallow the Exclusion

A number of cases express concern that the exception to the ensuing loss provision for a loss resulting from a covered cause should not be allowed to override or nullify the cause that the policy excluded. In other words, the excluded cause must remain excluded, and that exclusion should not be undone. For instance, the court in *Chaber, supra*, remarked that an ensuing loss provision should not be applied to make an excluded loss reappear as a covered loss. Moreover, the ensuing loss provision does not revive coverage for an excluded cause. The ensuing loss provision simply carves out a narrow exception to the exclusion. 201 S.E.2d at 215. Further, an ensuing or resulting loss may be covered, but the uncovered cause itself is not covered. *Id.* In *Barg, supra*, the court gave no credence to plaintiffs' argument that the leaking of heating oil was covered as an ensuing loss to the pollution exclusion. That interpretation, said the court, would render the policy exclusion meaningless and cautioned that an exception to an exclusion cannot be construed so broadly that the exception will swallow the exclusion. 2018 U.S. Dist. LEXIS 8951 at *13-14. The court in *Russell, supra*, made a similar point. It stated that ensuing loss clauses should not be interpreted so that the exception supersedes the exclusion. The court also noted that the ensuing loss provision did not create a "grant-back" by which the originally excluded loss becomes covered. 2017 N.H. LEXIS 2018 at *16-17. In *Taja, supra*, the court stated that the faulty workmanship exclusion should not be written out of a policy and warned that virtually any damage caused by defective workmanship could be re-characterized as a resulting loss restoring coverage. That, however, was not how the ensuing loss clause was to be applied. 2017 U.S. App. LEXIS 19855 at *7. In *Amtrak v. Aspen Speciality Ins. Co.*, 661 Fed. Appx 10 (2d Cir. August 31, 2016), the court noted that the ensuing loss provision did not create a grant-back of coverage and did not resurrect coverage from an excluded peril. *Id.* at *14. Lastly, the court in *Swire, supra*, stated that the ensuing loss provision could not be applied to completely eviscerate and consume the design defect exclusion. 845 S. 2d at 167.

5. The Burden of Proof

As mentioned above, the insurer will have the burden of proving that a claimed loss falls within an exclusion. Under an ensuing loss clause, however, the insured will have the burden of proving that the damage

falls within an exception to the exclusion. *James McHugh*, 223 F. Supp. 3d at 473; *Platek v. Town of Hamburg*, 24 N.Y.3d 688, 694, 26 N.E.3d 1167, 1171, 3 N.Y.S.3d 312, 316 (2015).

6. Pointers

In analyzing coverage issues under an ensuing loss provision, consider these questions:

1. How is the ensuing loss provision worded?
2. Was there a loss separate and independent of the excluded loss?
3. Was there a covered cause that resulted from the excluded cause?
4. How does the given jurisdiction handle ensuing loss situations?
5. Is the covered cause that supposedly resulted actually part and parcel of the original excluded cause? Would recognizing the so-called "covered cause" swallow or eliminate the excluded cause?
6. Can the insured meet its burden under an ensuing loss provision of showing that a covered loss resulted from an excluded cause, thereby falling within the exception to the exclusion?

III. Conclusion

Sorting through coverage questions involving concurrent causation and ensuing loss can be challenging. This paper has set out components to use in such an analysis. Hopefully, they are enlightening and will aid the coverage analysis.