Proximate Cause Rules

After framing the claim as either a "chain of events," "sequential events," or "concurrent events" fact pattern, and after applying the "but for" test to make sure that all of the causes of loss can be legitimately included in the analytical framework, the next step is to apply the appropriate common law proximate cause rule.

Which rule to apply depends on how the fact pattern has been framed.

- For "chain of events" fact patterns, the default rule is that the initial peril that sets the chain of events in motion is the proximate cause.
- For "sequential events" fact patterns, the default rule is that the initial peril that sets the sequence of events in motion is the proximate cause, unless a subsequent peril qualifies as a "superseding cause," in which case the subsequent peril becomes the proximate cause.
- For "concurrent events" fact patterns, the default rule that whichever peril is "predominant," i.e., is the most significant factor in bringing about the loss, is the proximate cause.

The nuances of these rules are explored more fully below.

Chain of Events Default Rule

In "chain of events" fact patterns, where (Cause 1) → (Cause 2) → (Loss) (i.e., where one peril physically causes another peril that causes the loss), the default rule is that Cause 1, the initial peril that sets the chain of events in motion, is the proximate cause. Cause 2, the subsequent peril, is considered to be a mere "instrumentality" through which the initial peril operates to damage the covered property. While the subsequent peril is sometimes called the "immediate cause" and might be considered to be a "cause" in the ordinary dictionary sense of the word, it is not the proximate cause and therefore has no legal significance.

If the proximate cause (Cause 1) is covered, the loss is covered. That is, where (Cause 1) Covered Peril → (Cause 2) Excluded Peril → (Loss) (i.e., where a covered peril causes an excluded peril that causes the loss), courts view this as a loss "caused by" the initial covered peril within the meaning of a property policy's insuring agreement. Courts do not view this as a loss "caused by" the subsequent excluded peril because it is not the proximate cause; it is a mere "instrumentality" through which the initial covered peril operates to damage the covered property.

If the proximate cause (Cause 1) is not covered or is excluded, the loss is not covered or excluded. That is, where (Cause 1) Uncovered Peril → (Cause 2) Covered Peril → (Loss) (i.e., where an initial uncovered peril causes a subsequent covered peril that causes the loss), courts view this as a loss "caused by" the initial uncovered peril, which is outside the insuring agreement. Where (Cause 1) Excluded Peril → (Cause 2) Covered Peril → (Loss) (i.e., where an excluded peril causes a covered peril that causes the loss), courts view this as a loss "caused by" the initial excluded peril within the meaning of a policy exclusion. Courts do not view these types of situations as losses "caused by" the subsequent covered peril because it is not the proximate cause. Courts say that the subsequent
covered peril is a mere "instrumentality" through which the initial uncovered or excluded peril operates to damage the covered property.

Under a named peril policy, the burden of proof in a "chain of events" case is on the insured to do all of the following.

Demonstrate that the loss occurred.
Prove that the initial peril passes the "but for" test.
Establish that the initial peril is covered.

Questions of fact as to the first two items may be for a jury to resolve. Whether the proximate cause is covered depends upon the application of the terms of the policy to the fact pattern, a legal question for a court to decide. Failure by the insured as to any of the three means that the insured has not carried its burden and is therefore not entitled to coverage.

Under an all risks policy, the initial burden of proof in a "chain of events" case is on the insured to demonstrate that the loss occurred, only. Questions of fact in this regard may be for a jury to resolve. Failure to demonstrate that a loss occurred means the insured has not carried its burden and is therefore not entitled to coverage.

If the insured successfully carries its burden of proof, the burden shifts to the insurer to do both of the following.

• Prove that the initial peril passes the "but for" test.
• Establish that the initial peril was excluded.

Questions of fact as to the application of the "but for" test may be for a jury to resolve. Whether the proximate cause is covered depends upon the application of the terms of the policy to the fact pattern, a legal question for a court to decide. Failure by the insurer as to its tasks means that the insurer has not carried its burden, and therefore the insured is entitled to coverage under the policy.

The exhibit below shows various "chain of events" fact patterns and how courts have analyzed them using the default proximate cause rule. The purpose is not to show how these claims would be adjusted under today's coverage forms. Its purpose is to demonstrate how courts apply the common law rule. That is, whenever the proximate cause is covered as shown in the far left column, courts hold that the loss is covered as shown in the far right column. Whenever the proximate cause is not covered or excluded as shown in the far left column, courts hold that the loss is not covered or excluded as shown in the far right column. Whether or not the subsequent peril was covered as shown in the middle column was not legally significant.

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- Prove that the initial peril passes the "but for" test.
- Establish that the initial peril was excluded.

Questions of fact as to the application of the "but for" test may be for a jury to resolve. Whether the proximate cause is covered depends upon the application of the terms of the policy to the fact pattern, a legal question for a court to decide. Failure by the insurer as to its tasks means that the insurer has not carried its burden, and therefore the insured is entitled to coverage under the policy.

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While the Conover court did not specifically discuss the foreseeability of the subsequent flood in that case, it is pretty apparent that the flooding of the Ohio River was unexpected. Remember, an assessment of foreseeability must be made as of the time the policy was issued, not as of the time of the initial peril when the employee negligently left the van at the marina. Looking prospectively from the time of policy issuance, if the employee was negligent in operating the moving van, it would have been foreseeable for him to have caused a collision in which the household goods were damaged, or for him to have left the moving van parked in an area where it might be stolen. Parking the moving van in an area that just so happened to get flooded out by a river was something “out of the blue” that could not have reasonably been foreseen when the policy was issued.

Not only is it a correct application of the common law superseding cause rule, the court's decision in the Conover case makes sense from an underwriting and ratemaking perspective. If the homeowners insurer extends coverage for household goods that are away from the insured’s residence under the "vehicle" peril, the insurer would naturally expect to be covering all of the foreseeable risks that would be most likely to be associated with that activity, such as collision and theft. However, by extending coverage under the "vehicle" peril, the insurer would probably not have expected to be covering an unforeseeable risk of flood.

By far, most court cases considering "sequential events" fact patterns hold that the subsequent peril is foreseeable and thus is not the superseding cause of loss. Accordingly, they fall back on the common law rule that the initial peril is the proximate cause of the loss, as the exhibit below shows. Again, the purpose is not to show how these kinds of claims would be adjusted under today's coverage forms. Its purpose is to demonstrate that, where the subsequent peril is foreseeable, the superseding cause exception does not apply.

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Concurrent Events Default Rule

In a "concurrent events" fact pattern, where (Cause 1) + (Cause 2) → (Loss) (i.e., where two physically unrelated perils combine to simultaneously cause the loss), the default rule is that the "predominant cause"—the peril that was the most significant factor in bringing about the loss—is the proximate cause.

If the "predominant cause" is covered, the loss is covered. That is, where (Cause 1) Covered Peril [Predominant] + (Cause 2) Uncovered/Excluded Peril [Contributing] → (Loss) (i.e., where a predominant covered peril combines with an uncovered/excluded peril), courts view this as a loss "caused by" the predominant covered peril. Courts do not view this as a loss "caused by" the uncovered/excluded peril, which is considered to be merely a "contributing factor," not the proximate cause.

If the "predominant cause" is uncovered or excluded, the loss is uncovered or excluded. That is, where (Cause 1) Covered Peril [Contributing] + (Cause 2) Uncovered/Excluded Peril [Predominant] → (Loss) (i.e., where a covered peril combines with a predominant uncovered/excluded peril), courts view this as a loss "caused by" the predominant uncovered/excluded peril. Courts do not view this as a loss "caused by" the covered peril, which is only a "contributing factor."

Under a named peril policy, the burden of proof in a "concurrent events" case is on the insured to do all of the following.

- Demonstrate that the loss has occurred.
- Prove that one of the concurrent perils was a more significant factor than the other perils in bringing about the loss and thus qualifies as the "predominant cause."
- Show that the "predominant cause" passes the "but for" test.
- Establish that the "predominant cause" is covered.

Questions of fact as to the first three items may be for a jury to resolve. Whether the "predominant cause" is covered depends upon the application of the terms of the policy to the fact pattern, a legal question for a court to decide. Failure by the insured as to any of these tasks means that the insured has not carried its burden and therefore is not entitled to coverage under the policy.

Under an all risks policy, the burden of proof in a "concurrent events" case is on the insured to demonstrate that the loss occurred, only. Questions of fact in this regard may be for a jury to resolve. Failure to demonstrate that a loss occurred means the insured has not carried its burden and is therefore not entitled to coverage.

If the insured successfully carries its burden of proof, the burden shifts to the insurer to do all of the following.

- Prove that one of the concurrent perils was a more significant factor in bringing about the loss than the others and thus qualifies as the "predominant cause."
- Show that the "predominant cause" passes the "but for" test.
Establish that the "predominant cause" is excluded.

Questions of fact as to the first two insurer tasks may be for a jury to resolve. Again, whether the "predominant cause" is covered is a legal question for a court to decide. Failure by the insurer as to any of these tasks means that it has not carried its burden, and therefore the insured is entitled to coverage.

Rules of Thumb
The best way to determine the "predominant cause" would be to ask a jury to separately allocate the percentage of responsibility for the happening of the loss to each concurrent peril. The "predominant cause" would be the concurrent peril to which the jury allocates the most responsibility. Determining which concurrent peril is the "predominant cause" is a highly fact-dependent inquiry. However, there are a few rules of thumb that can be derived from the case law.

- If concurrent perils have different durations, one long-term and the other short-term, fact finders tend to pick the short-term peril as the "predominant cause."
- The tendency for fact finders to pick the short-term peril as the "predominant cause" can be overcome by clear and convincing evidence that the long-term peril was a more significant factor in causing the loss.
- Where the two concurrent perils have similar durations, i.e., both short or both long, whichever peril is the "predominant cause" is a jury question.

First Rule of Thumb. First, when comparing perils with effects having different durations, one long-term and the other short-term, fact finders tend to pick the peril with the shorter duration as the predominant one.

For example, in Colorado Intergovernmental Risk Sharing Agency v. Northfield Ins. Co., 207 P.3d 839 (Colo. Ct. App. 2008), the roof over the insured municipality's hot springs pool collapsed during a large snowstorm in May 2001. The insurer argued that, ever since the roof was built in 1981, dampness from the hot springs continually decayed or corroded the wooden trusses holding up the roof; that the moisture, decay, and corrosion were the proximate cause of the collapse; and that the loss was therefore excluded. At trial, the jury found the cause of the roof's collapse was 10 percent due to the continuous structural impairment caused by the moisture, decay, and corrosion (the long-term peril) and 90 percent due to the weight of the snow (the short-term peril).

The reason for this trend is that people seem to believe that if the covered property had withstood the effect of the long-term peril for all that time, then it must have been something about the short-term peril that made the difference in producing the loss.

The exhibit below shows additional cases where the effects of a long-term peril acted concurrently with the effects of a short-term peril. The purpose is not to show how these types of losses would be adjusted under today's coverage forms. Its purpose is to show the tendency of fact finders to select the short-term peril as the "predominant cause" in "concurrent events" fact patterns.