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Amber L. Altemose

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COMMENTS

THE ANTI-CONCURRENT CLAUSE AND ITS IMPACT ON TEXAS RESIDENTS AFTER HURRICANE IKE

By Amber L. Altemose

I. INTRODUCTION

A Texas homeowner maintaining a homeowner's insurance policy, a flood insurance policy, and a windstorm insurance policy reasonably expects to have full coverage in the event of a hurricane. But after Hurricane Katrina pummeled the Gulf Coast in 2005, insurance companies in Louisiana and Mississippi began denying claims based on anti-concurrent clauses in their homeowners' insurance policies.[1] Litigation ensued, and the Fifth Circuit held that anti-concurrent clauses

1. *See* Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 426 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1873 (2008); Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346, 349 (5th Cir. 2007).

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are valid and enforceable.[2] As a result, insurance companies in Texas may follow suit and deny claims to Texas homeowners affected by Hurricane Ike based on the anti-concurrent clause.

A homeowner's insurance policy typically contains a section detailing both covered perils and non-covered perils. Covered perils may include wind damage, for example, and non-covered perils may include flood damage. Some insurance policies also contain an anti-concurrent clause, which may be troublesome for some Texas homeowners after Hurricane Ike. The problem an anti-concurrent clause presents is simple—it denies coverage to policyholders for damages caused by a covered peril.[3] By validating anti-concurrent clauses, the Fifth Circuit denied recovery for damages caused by a peril covered under the policy. This Comment will explain the development of Texas case law interpreting insurance policies when concurrent causes of damage occur; the Fifth Circuit's interpretation of anti-concurrent clauses; and the legal effect of the anti-concurrent clause in Texas.

II. BACKGROUND OF THE ANTI-CONCURRENT CLAUSE

The prudent homeowner residing along the Gulf Coast maintains a homeowner's insurance policy, a flood insurance policy, and a windstorm insurance policy.[4] A windstorm insurance policy, and some homeowner's insurance policies, insures damage to the policyholder's roof caused by high winds, as well as water damages resulting from a tear or hole in the roof caused by strong winds.[5] But a homeowner's insurance policy will not cover all types of water damage.[6] For example, most coastal homeowner's insurance policies will not cover water damage[7] caused by "flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water or spray, whether

2. *Leonard*, 499 F.3d at 436; *Tuepker*, 507 F.3d at 356.

3. *See* David J. Rosenberg et al., *Insurance Industry Woes in the Aftermath of Hurricanes Katrina and Rita*, 73 DEF. COUNS. J. 141, 152 (2006).

4. The Author assumes that the homeowner's insurance policy covers windstorm damage, eliminating the need for the homeowner to obtain insurance through the Texas Windstorm Insurance Association. Although some private insurance companies cover windstorm damage in the policy, *see infra* note 5, many insurance companies do not and as a result the Texas Windstorm Insurance Association was created. *See* Texas Windstorm Insurance Association, http://www.twia.org/AboutTWIA.aspx (last visited Aug. 17, 2009).

5. *See* TEX. FARM BUREAU MUT. INS. CO., TEX. HOMEOWNERS POLICY—FORM A 6 provision 3(b) (2003) [hereinafter FARM BUREAU HOMEOWNERS POLICY]; STATE FARM INS., HOMEOWNERS POLICY, 7 provision 2 (1983) [hereinafter STATE FARM HOMEOWNERS POLICY].

6. FARM BUREAU HOMEOWNERS POLICY, *supra* note 5, at 7 provision 1(b); *see also* STATE FARM HOMEOWNERS POLICY, *supra* note 5, at 10 provision 2(c).

7. *See* FEMA, NATIONAL FLOOD INSURANCE PROGRAM, MYTHS AND FACTS ABOUT THE NATIONAL FLOOD INSURANCE PROGRAM 2 (2007), available at http://www.fema.gov/library/viewRecord.do?id=3002 (go to "Resource File" and select "View/Download/Print" link) [hereinafter FEMA MYTHS].

or not driven by wind."[8] In fact, the majority of insurance policies expressly exclude flood claims.[9] As a result, the federal government created the National Flood Insurance Program (NFIP)[10] to provide federally backed flood insurance through private insurance companies.[11]

If a community is eligible to participate in the NFIP, the residents of that community may obtain flood insurance otherwise unavailable in the traditional insurance market.[12] NFIP-supplied flood insurance is separate from a standard homeowner's policy.[13] Therefore, if a homeowner decides against purchasing separate NFIP flood insurance, the house is not protected against water damages resulting from flood, storm surge, tidal wave, etc.[14]

When a homeowner purchases a homeowner's insurance policy and a flood insurance policy, he or she can reasonably expect to be fully covered in the event of a hurricane.[15] In fact, a homeowner can reasonably expect that if wind damage occurs the homeowner's insurance policy will cover the damages. The homeowner can also reasonably expect that if flood damage occurs the flood insurance policy will cover the damages.

But many insurance policies contain anti-concurrent clauses. The following is an example of a typical anti-concurrent clause:

> We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in sequence with the excluded event to produce the loss . . . as a result of any combination of . . . [w]ater [d]amage, meaning . . . flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not.[16]

Anti-concurrent clauses are easier to understand when applying it to recent disasters, such as Hurricane Ike. Hurricane Ike produced

8. FARM BUREAU HOMEOWNERS POLICY, *supra* note 5, at 7 provision 1(b).

9. *See* FEMA MYTHS, *supra* note 7.

10. *See* FEMA, NATIONAL FLOOD INSURANCE PROGRAM DESCRIPTION 1 (2002) http://www.fema.gov/business/nfip/ (Select National Flood Insurance Program link in left column, then select NFIP Program Description link. Scroll down to Resource File and select View/Download/Print link) [hereinafter NFIP DESCRIPTION]. A program similar to the NFIP was proposed in the early 1950s when it was not profitable for private insurance companies to provide flood insurance at an affordable price. *Id.*

11. *See* FEMA MYTHS, *supra* note 7.

12. *Id.*; NFIP DESCRIPTION, *supra* note 10, at 2.

13. *See* FEMA MYTHS, *supra* note 7.

14. *See* FARM BUREAU HOMEOWNERS POLICY, *supra* note 5, at 7 provision 1(b); *see also* STATE FARM HOMEOWNERS POLICY, *supra* note 5, at 10 provision 2(c).

15. In the event that a homeowner's insurance policy does not cover windstorm, a separate windstorm policy should be obtained. *See* Texas Windstorm Insurance Association, *supra* note 4.

16. STATE FARM HOMEOWNERS POLICY, *supra* note 5, at 7 provision 2(a)(1).

strong winds[17] that caused roof damage to many houses. Hurricane Ike also produced a large storm surge that flooded many houses or completely destroyed houses leaving only the concrete slab.[18] Based on the language of the anti-concurrent clause, the insurance company may deny a claim because a covered peril, windstorm, and an excluded peril, storm surge, concurrently caused damage to the house. Although Texas courts are experienced in interpreting insurance policies when concurrent causes of damage result from a hurricane,[19] Texas courts have had little opportunity to grapple with the anti-concurrent clause and how it may affect policyholders in the aftermath of Hurricane Ike.[20]

III. Development of Texas Case Law Interpreting Insurance Policies When Concurrent Causes of Damage Occur

Since the late 1800s, Texas courts have dealt with the issue surrounding concurrent causes of damage and its affect on insurance policies.[21] Because hurricanes produce water and wind, and most insurance policies exclude either water or wind damage,[22] Texas courts are experienced in interpreting insurance policies regarding concurrent causes of damage.[23]

A. *Before Anti-Concurrent Clauses: Development of Texas Case Law Interpreting Insurance Policies When Concurrent Causes of Damage Occur*

1. *Pelican Fire Insurance Company v. Troy Co-Op. Association*

In 1890, the Texas Supreme Court rendered its first decision interpreting an insurance policy's coverage of concurrent causes of damage in *Pelican Fire Insurance Company v. Troy Co-Op. Association*.[24] The insurance policy protected the insured's house from loss caused by fire, but the policy contained an exclusion that prevented the insured

17. FEMA, Hurricane Ike Impact Report 1 (2008), *available at* http://www.fema.gov/pdf/hazard/hurricane/2008/ike/impact_report.pdf [hereinafter Impact Report]. Winds were recorded at 110 mph when Hurricane Ike made landfall. *Id.*

18. *Id.* at 16.

19. *See* Travelers Indem. Co. v. McKillip, 469 S.W.2d 160 (Tex. 1971).

20. *See* Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd., No. Civ. A. 399CV1623D, 2002 WL 356756, at *4 (N.D. Tex. Mar. 5, 2002).

21. Pelican Fire Ins. Co. v. Troy Co-Op. Ass'n., 77 Tex. 225, 226–27, 13 S.W. 980, 981 (1890).

22. *See* Farm Bureau Homeowners Policy, *supra* note 5, at 7 provision 1(b); *see also* State Farm Homeowners Policy, *supra* note 5, at 10 provision 2(c).

23. *See Pelican Fire Ins. Co.*, 77 Tex. at 225, 13 S.W. at 981; Palatine Ins. Co. v. Petrovich, 235 S.W. 929, 930 (Tex. Civ. App.—Galveston 1917, no writ); Palatine Ins. Co. v. Coyle, 196 S.W. 560, 560 (Tex. Civ. App.—Galveston 1917), *aff'd*, 222 S.W. 973 (Tex. Comm'n App. 1920, judgm't adopted); Hardware Dealers Mut. Ins. Co. v. Berglund, 393 S.W.2d 309, 309 (Tex. 1965); *McKillip*, 469 S.W.2d at 160.

24. *Pelican Fire Ins. Co.*, 77 Tex. at 227–28, 13 S.W. at 981.

from collecting on the insurance policy if the fire was caused by a hurricane or if the building fell for any reason other than fire.[25]

The house caught on fire either during or immediately following a hurricane, and soon after the house fell.[26] Evidence established that the fire was caused by falling timbers that broke a lamp in the house.[27] To prevail, the insured had the burden of proving that the fire destroyed the house and that the fire was not caused by the hurricane or the fallen house.[28] Based on the evidence, the court found that the fire was caused by either the hurricane or the fallen house.[29] Therefore, the exclusion in the policy prevented the insured from recovering monetary damages for its loss.[30]

This case established the burden imposed on the insured when challenging an insurance policy. Under *Pelican*, the insured had the burden to prove that the property was destroyed by a covered peril, as well as prove that the loss did not fall within one of the exclusions contained in the policy.[31] The insured was able to prove that the property was destroyed by the covered peril of fire;[32] but the insured could not prove that the fire did not fall under the excluded perils, i.e., that the fire was not caused by a hurricane or the fallen house. Therefore, the insured could not recover.[33]

The burden of proof in *Pelican* was modified in 1940 by Rule 94 of the Texas Rules of Civil Procedure.[34] Rule 94 shifts the burden to the insurance company to prove that the loss was caused by an excluded peril.[35] Once the insurance company proves that the loss was caused by an excluded peril, the burden shifts back to the insured to prove otherwise.[36]

2. *Palatine Insurance Company v. Petrovich*

In 1915 a devastating hurricane that produced high winds and a storm surge hit Galveston Island, Texas. Once again, Texas courts were presented with the issue of concurrent causes of property loss and an insurance policy that excludes one of the causes.

Steve Petrovich obtained an insurance policy from Palatine Insurance Company that insured his house against damage caused by tor-

25. *Id.* at 227–28, 13 S.W. at 981.
26. *Id.* at 227–28, 13 S.W. at 981.
27. *Id.* at 227–28, 13 S.W. at 981.
28. *Id.* at 227–28, 13 S.W. at 981.
29. *Id.* at 227–28, 13 S.W. at 981.
30. *Id.* at 227–28, 13 S.W. at 981.
31. *Id.* at 227–28, 13 S.W. at 981.
32. *See id.* at 227–28, 13 S.W. at 981.
33. *Id.* at 227–28, 13 S.W. at 981.
34. TEX. R. CIV. P. 94.
35. *Id.*
36. *Pelican Fire Ins. Co.*, 77 Tex. at 227–28, 13 S.W. at 981.

nado, windstorm, or cyclone.[37] But the policy excluded damage caused by high water or tidal wave. The hurricane produced a large storm surge that was accompanied by high winds, and because of the combined perils, Petrovich's house was swept away to sea.[38] Petrovich argued that his house was destroyed when the wind was blowing at its highest velocity, and that his house was blown away by the wind and not by high water or tidal wave.[39]

The insurance company defended on the grounds that the parties contracted out of the loss by excluding loss or damages resulting from high water or tidal wave.[40] As a result of the exclusion, the insurance company contended that it did not have to pay for any loss caused by high water.[41]

The Galveston Court of Civil Appeals held that the insurance policy was a policy against wind alone, and not a policy against loss resulting partly by wind and partly by high water.[42] Thus, any damages caused by water and wind combined could not be segregated.[43] Because the water concurrently contributed to the loss of Petrovich's house, the exclusion in the policy prevented Petrovich from holding the insurance company liable.[44] Therefore, Petrovich was unable to collect damages from the insurance company for the loss of his house.

3. *Palatine Insurance Company v. Coyle*

B. A. Coyle lived on Galveston Island, Texas, and insured his apartment with Palatine Insurance Company.[45] The policy covered loss or damage caused by tornado, windstorm, or cyclone.[46] The policy did not cover loss or damage caused by tidal wave or high water.[47] The hurricane of 1915 that swept Petrovich's house to sea[48] also wreaked havoc on Coyle's apartment.[49] The wind and water from the hurricane caused significant damage to the interior and exterior portions of the apartment.[50] The insurance company denied Coyle's claim and

37. Palatine Ins. Co. v. Petrovich, 235 S.W. 929, 930 (Tex. Civ. App.—Galveston 1917, no writ).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 931.

43. *Id.* at 930.

44. *Id.*

45. Palatine Ins. Co. v. Coyle, 196 S.W. 560, 561 (Tex. Civ. App.—Galveston 1917), *aff'd*, 222 S.W. 973 (Tex. Comm'n App. 1920, judgm't adopted).

46. *Id.*

47. *Id.*

48. *Petrovich*, 235 S.W. at 930.

49. *Coyle*, 196 S.W. at 561.

50. *Id.*

defended on the grounds that water caused the damages—the same exclusion that was at issue in the *Petrovich* case.[51]

During the course of the suit, the parties stipulated that the total loss and damage caused by the storm amounted to $4,512.43.[52] Of that amount, the parties stipulated that $500 of damage was caused by the wind, independent of water.[53] The parties further stipulated that $660 of damage was caused by water or rain that entered through an opening in the roof as a result of the wind damage.[54] Therefore $3,352.43 of the loss was caused by the combined action of wind and water.[55]

Once again, the Galveston Court of Civil Appeals concluded that the insurance policy was a policy against damages caused by wind alone, not damages caused partly by wind and partly by high water.[56] The court based this determination on "elementary rule[s] of [contract] interpretation."[57] The court reasoned that by placing the exclusions in the policy, the insurance company intended to indemnify the insured for losses only attributable to wind.[58]

The court held that the insurance company was not liable for damages caused by the combined action of wind and water.[59] But deviating from the *Petrovich* case, the court segregated the damages to Coyle's apartment based upon the stipulated agreement.[60] The court rendered judgment for Coyle in the amount of $1,160—$500 for the damage caused by wind and $660 for the damage caused by rain that entered through openings in the roof caused by the wind.[61]

Coyle appealed the judgment of the Galveston Court of Civil Appeals, and the Texas Commission of Appeals heard the case.[62] The Commission issued an opinion and affirmed the ruling of the Galveston Court of Civil Appeals.[63] The Texas Supreme Court adopted the opinion of the Texas Commission of Appeals and added that the damage caused concurrently by the water was contracted out of the policy and the only thing left to recover was loss caused solely by the wind.[64]

The insurance policies at issue in the *Coyle* case and the *Petrovich* case were exactly the same, yet the outcomes were different. Factu-

51. *See Coyle*, 196 S.W. at 562; *Petrovich*, 235 S.W. at 930.
52. *Coyle*, 196 S.W. at 561.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 563.
58. *Id.*
59. *Id.* at 565.
60. *Id.*
61. *Id.*
62. Coyle v. Palatine Ins. Co., 222 S.W.973, 973 (Tex. Comm'n App. 1920, judgm't adopted), *aff'g* 196 S.W. 560 (Tex. Civ. App.—Galveston 1917).
63. *Id.* at 975.
64. *Id.* at 976.

ally, the difference between the two cases is the damages sustained to the property. Petrovich lost his entire house,[65] whereas Coyle received substantial damage to his apartment.[66] But the courts come to different conclusions regarding the policies: in *Petrovich*, the court would not segregate the damages because it held the policy was not divisible;[67] in *Coyle*, the court segregated the damages as agreed upon by the parties.[68] The opinion in *Coyle* does not detail why the court segregated the damages, and it may have come down to the fact that Coyle was able to obtain tangible evidence of the causes of damage because his apartment survived the hurricane.

4. *Travelers Indemnity Company v. McKillip*

In 1971 the McKillips owned a poultry house that was insured by Travelers Indemnity Company.[69] The policy covered damages to the poultry house caused by windstorm, but excluded damages caused by snowstorm.[70] A tremendous windstorm swept across the McKillips' property and struck the poultry house.[71] The McKillips, however, failed to inspect the house and testified that that no apparent damage was detected.[72] Six days later, four to five inches of snow fell on the poultry house and the poultry house collapsed.[73]

Because the McKillips alleged that the poultry house was damaged by an insured peril, windstorm, the McKillips had the burden of proving that the damage was caused by the windstorm.[74] Once the McKillips pleaded windstorm damage, the burden shifted to the insurance company to plead an exclusion in the policy to successfully deny coverage.[75] The insurance company pleaded the exclusion of snowstorm, and the burden shifted back to the McKillips to prove "the damage was caused solely by windstorm," or to segregate "the damage caused by [windstorm] from that [damage] caused by the snowstorm."[76]

The jury found that the dominant efficient cause of the damage to the poultry house was caused by windstorm and not solely by the weight of the snow.[77] As a result of this finding, the McKillips were awarded the replacement costs of the poultry house.[78] In affirming

65. Palatine Ins. Co. v. Petrovich, 235 S.W. 929, 930 (Tex. Civ. App.—Galveston 1917, no writ).
66. *Coyle*, 196 S.W. at 560.
67. *Petrovich*, 235 S.W. at 930.
68. *Coyle*, 196 S.W. at 565.
69. Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 161 (Tex. 1971).
70. *Id.* at 161–62.
71. *Id.* at 161.
72. *Id.*
73. *Id.*
74. TEX. R. CIV. P. 94.
75. *McKillip*, 469 S.W.2d at 162.
76. *Id.*
77. *Id.* at 161.
78. *Id.*

the trial court, the Eastland Court of Civil Appeals held that where a loss occurs under a standard windstorm policy and an excluded peril contributes to the loss, the insured can recover if the insured can prove that windstorm was the "dominant efficient" cause of the loss.[79]

The Texas Supreme Court reversed the judgment of the appellate court because the evidence supported a finding that a portion of the loss was caused by snowstorm.[80] To recover the full replacement costs of the poultry house, the evidence must have supported the McKillips' contention that the damage to the poultry house was caused solely by windstorm, and that no damage was caused by the snowstorm.[81] If the damage to the poultry house was the result of windstorm and snowstorm, it was the McKillips' burden to segregate the damage caused by each peril.[82]

The McKillips, however, did not produce any evidence relating to the damage caused by the wind.[83] No inspection of the poultry house was made after the windstorm, and the McKillips did not attempt to estimate the damages caused directly by the wind.[84] Because the McKillips failed to meet their burden of producing evidence that would "afford a reasonable basis for estimating the amount of damage . . . caused by a risk covered by the insurance policy," the Texas Supreme Court reversed the judgment.[85]

The *McKillips* case illustrates the importance of producing evidence to support the burden of proof. The McKillips had the burden of proving that a covered peril damaged the poultry house and the extent of the damage the covered peril caused. In the event of litigation, it is important for insureds to determine what caused the damage to their house, and it is even more important to determine the dollar amount of damage caused by each peril. Because an insured will recover only for losses that were caused by the covered peril, it is vital to produce evidence demonstrating loss caused by the covered peril when a covered peril and an excluded peril concurrently cause damage so the jury can segregate damages—unless the policy contains an anti-concurrent clause.

B. *Post Anti-Concurrent Clauses: Development of Texas Case Law Interpreting the Anti-Concurrent Clause*

Texas law is settled regarding concurrent causes of damage: as long as the insured can segregate the damage caused by a covered peril from the damage caused by an excluded peril, the insured can recover.

79. *Id.* at 162.
80. *Id.*
81. *Id.* at 163.
82. *See id.* at 163.
83. *Id.*
84. *Id.*
85. *Id.*

But, Texas law is new and unsettled when it comes to the anti-concurrent clause.

1. *Wong v. Monticello Insurance Company*

Choi Leng Wong obtained an insurance policy for her restaurant located in the Moke Building in San Antonio, Texas.[86] After an explosion occurred in an adjacent building, the city ordered the Moke Building to be demolished.[87] Under Wong's insurance policy, the restaurant was covered for damages caused by explosion or high winds; but the policy excluded damages that resulted from government-enforced demolition of the property.[88]

The policy also included an anti-concurrent clause that stated the insurance company would not pay for damages caused by demolition "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[89] Based on the language of the policy, if the explosion damaged the restaurant and the extent of the damage caused the restaurant to be demolished, the anti-concurrent clause would give the insurance company the right to completely deny coverage.[90]

In 2003 the San Antonio Court of Appeals denied coverage to Wong based on the anti-concurrent clause.[91] The court reasoned that even though a covered peril (explosion) combined with a non-covered peril (demolition) to damage the restaurant, the anti-concurrent clause excluded coverage.[92]

This case is an example of the problem an anti-concurrent clause presents to the insured. Wong purchased insurance coverage for her restaurant to include any damage caused by explosion or high wind. As a result of explosion and high wind, the building where her restaurant was located was ordered demolished, which was an excluded peril. Even if Wong was able to segregate the damage and provide evidence proving the extent of damage caused by high winds and explosion, the insurance company could still successfully deny her claim based on the anti-concurrent clause.

86. Wong v. Monticello Ins. Co., No. 04-02-00142-CV, 2003 WL 1522938, at *1 (Tex. App.—San Antonio Mar. 26, 2003, pet. denied).
87. *Id.*
88. *Id.*
89. *Id.*
90. *See id.*
91. *Id.*
92. *Id.*

2. *Lexington Insurance Company v. Unity/Waterford-Fair Oaks, Limited*

Texas One insured its Oak Meadow Apartments through Lexington Insurance Company.[93] The second floor of the apartments sustained water damage from roof leaks after a severe rainstorm.[94] The insurance policy contained the following anti-concurrent clause: "[t]his agreement does not insure against 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."[95] The policy then listed exclusions, including property maintenance.[96]

Lexington argued that the roof leaks that caused the damage were caused in part by inadequate maintenance.[97] Lexington's expert concluded that the roof leaks were caused by a "lack of proper and adequate maintenance of the roof" and Texas One's expert concluded that "the roofs evidenced a lack of maintenance."[98]

Consistent with Rule 94 of the Texas Rules of Civil Procedure,[99] the Northern District of Texas placed the burden of proof on Lexington to prove that the damages fell within the exclusionary language contained in the anti-concurrent clause.[100] Thus, Lexington had to prove that inadequate maintenance was a contributing cause to the roof leaks.[101] If Lexington could show that inadequate maintenance of the roof contributed to the roof leaks, Lexington would be "exempt from all liability for all damages caused directly or indirectly by the inadequate maintenance of the roof" based on the anti-concurrent clause.[102]

Because the *Lexington* case was litigated in federal court, the court conducted an *Erie* analysis and applied Texas state law.[103] But there was no Texas precedent analyzing the anti-concurrent clause, the clause's validity, and whether damages could be segregated because *Wong* was decided one year after the *Lexington* opinion was issued in

93. Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd., No. Civ. A. 399CV1623D, 2002 WL 356756, at *4 (N.D. Tex. Mar. 5, 2002).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at *4–5.

99. TEX. R. CIV. P. 94.

100. *Lexington Ins. Co.*, 2002 WL 356756, at *4.

101. *Id.*

102. *Id.*

103. *Id.* Under the *Erie* doctrine, when a state claim is litigated in federal court, for example a breach of contract claim, the federal court applies the substantive state law by making an "*Erie*" guess as to how the state supreme court would resolve the issue. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78–79 (1938).

2002.[104] Therefore, the court looked at how other jurisdictions treated the legal effect of the anti-concurrent clause.[105] According to the court, the weight of the authority in other jurisdictions supported the court's holding that the anti-concurrent clause completely barred coverage to the insured.[106]

3. *Claunch v. Travelers Lloyds Insurance Company*

Claunch, a 2008 case that was decided in the Northern District of Texas, examined whether the policy's water-exclusion clause barred coverage to the insured.[107] The court held that the water-exclusion clause was not ambiguous and barred the insured's claim.[108]

Although this case did not turn on whether the anti-concurrent clause barred coverage, the court noted that "the [p]olicy's 'anti-concurrent cause' provision further supports [the] conclusion, providing that the 'loss or damage . . . is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.'"[109] Thus, despite the water-exclusion clause, the insured's claim would not have survived because of the anti-concurrent clause.

C. *Conclusion of Texas Case Law Development on Concurrent Causes and the Anti-Concurrent Clause*

The previous cases demonstrate the development of Texas case law regarding concurrent causation. Since the 1800s, Texas courts have limited an insured's recovery to damages that the insured could prove was caused by a covered peril. One reason courts have taken this stance is the parties' intent. For example, if the parties contracted to only pay for and provide coverage for wind damage, the insurance company should not be responsible for water damage that also occurred.

Additionally, courts want to limit recovery to covered perils because the insurance companies base their premiums on those covered perils. Insurance companies set aside a certain amount of money to pay for covered perils based on the risk of that covered peril occurring. For example, if the insured lives on the Gulf Coast and main-

104. *See* Wong v. Monticello Ins. Co., No. 04-02-00142-CV, 2003 WL 1522938, at *1 (Tex. App.—San Antonio Mar. 26, 2003, pet. denied).

105. *Id.* In determining that coverage was barred because of the anti-concurrent clause, the court relied on the following cases to support its holding: State Farm Fire & Cas. Co. v. Bongen, 925 P.2d 1042, 1045 (Alaska 1996); Pakmark Corp. v. Liberty Mut. Ins. Co., 943 S.W.2d 256, 259–62 (Mo. App. 1997) (each holding that when a covered peril concurrently combines with an excluded peril to create the loss, coverage is barred because of the anti-concurrent clause).

106. *Wong*, 2003 WL 1522938, at *1.

107. Claunch v. Travelers Lloyds Ins. Co., No. 4:07-CV-548-A, 2008 WL 114844, at *1 (N.D. Tex. Jan. 10, 2008).

108. *Id.* at *4.

109. *Id.* at *4 n.4.

tains windstorm insurance, the insurance company will set aside a certain amount of money to pay for windstorm damage in the event of a hurricane. The insurance companies do not set aside money for flood damage if flood damage is excluded from the policy. Therefore, courts are rightfully unwilling to require insurance companies to pay for losses that the insurance companies are unable to anticipate.

Based on these reasons, it is logical for the damages to be segregated when covered perils combine with excluded perils to create the loss. But as the law stands in Texas, the anti-concurrent clause may completely deny coverage for Hurricane Ike victims whose houses were damaged by a covered peril.

IV. THE FIFTH CIRCUIT'S PERCEPTION OF THE ANTI-CONCURRENT CLAUSE

After Hurricane Katrina destroyed much of the Louisiana/Mississippi coast, litigation ensued when homeowners were denied coverage partly because of the anti-concurrent clause. The following cases decided by the Fifth Circuit are important to Texas residents in the event Hurricane Ike litigation reaches the federal courts.

A. Leonard v. Nationwide Mutual Insurance Company

In 2005 the Leonards owned a two-story house in Mississippi.[110] The storm surge that accompanied Hurricane Katrina caused the Leonards' house to sustain significant damage to the first floor.[111] The second floor was virtually unscathed.[112] Wind also accompanied Hurricane Katrina and caused the house to receive modest damage, such as broken roof shingles; damaged garage walls; and a golf-ball-sized hole in a window.[113]

Nationwide Mutual Insurance Company insured the Leonards' house.[114] The insurance policy insured the house for wind damage, excluded water damage, and contained an anti-concurrent clause.[115] After an adjuster evaluated the Leonards' house, Nationwide tendered $1,661.71 to the Leonards for damage caused solely by wind, but denied all other damage-based claims because of the anti-concurrent clause.[116] As a result, the Leonards sued Nationwide.

The Southern District of Mississippi entered judgment in favor of the Leonards in the amount of $1,228.16, which represented the dam-

110. Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 424 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1873 (2008).
111. *Id.* at 426.
112. *Id.*
113. *Id.*
114. *Id.* at 424.
115. *Id.* at 424–25.
116. *Id.* at 426.

ages caused solely by wind.[117] But the court refused to enforce the anti-concurrent clause because it was ambiguous.[118] The district court further stated that "wind damage was recoverable 'even if it occurred concurrently or in sequence with the excluded water damage.'"[119]

Under this ruling, an insured could recover for damages caused by wind, despite situations where wind combined concurrently or sequentially with water to create the loss.[120] The district court based this view on Mississippi precedent that allows an insured to recover for losses caused by a covered peril that concurrently combines with an excluded peril.[121]

On appeal, the Fifth Circuit held that the anti-concurrent clause was not ambiguous, as determined by the district court, and that Mississippi law does not preempt the clause.[122] Further, based on the plain language of the anti-concurrent clause, the Fifth Circuit held that an insured cannot recover for any wind damage that occurred concurrently or sequentially with water.[123] Thus, an insured cannot recover for any damage caused by wind if water combined with the wind concurrently or sequentially to create the loss.[124] As a result, the court affirmed the district court's award of $1,228.16 to the Leonards for the damages caused solely by wind.[125]

To make the interpretation of the anti-concurrent clause more coherent, the Fifth Circuit provided an example:

> If, for example, a policyholder's roof is blown off in a storm, and rain enters through the opening, the damage is covered. Only if storm-surge flooding—an excluded peril—then inundates the *same* area that the rain damaged is the ensuing loss excluded because the loss was caused concurrently or in sequence by the action of a covered and an excluded peril.[126]

It is this interpretation of the anti-concurrent clause that will make it difficult for homeowners to recover for wind loss after a major hurricane where storm surge and high winds occur. As stated earlier, windstorm coverage will normally cover water damage to the house in the event strong winds tear an opening in the roof and rain enters through the opening.[127] But in the event that rain does enter the house

117. *Id.*
118. *Id.*
119. *Id.*
120. *See* Craig A. Cohen & Mark H. Rosenberg, *After the Storm: Courts Grapple with the Insurance Coverage Issues Resulting from Hurricane Katrina*, TORT TRIAL & INS. PRAC. L.J. 139, 147–48 (2008).
121. *Id.* at 147.
122. *Leonard*, 499 F.3d at 430.
123. *Id.*
124. *See* Cohen & Rosenberg, *supra* note 120, at 148.
125. *See Leonard*, 499 F.3d at 423.
126. *Id.* at 431.
127. *See* STATE FARM HOMEOWNERS POLICY, *supra* note 5.

through a tear in the roof (covered peril), and the same part of the house is inundated with storm surge or some other form of water (excluded peril), all damages are excluded based on the Fifth Circuit's interpretation of the anti-concurrent clause, regardless of the fact that the rain damage was a covered peril.

The only way an insured may prevail against the anti-concurrent clause in situations like the Leonards and many Hurricane Ike victims, according to the Fifth Circuit, is to demonstrate that the anti-concurrent clause is prohibited by "caselaw, statutory law, or public policy."[128] The sparse Texas case law examined earlier has thus far upheld anti-concurrent clauses.[129] Further, statutory law will most likely not help the insureds because the policies are examined and approved by the Texas Insurance Commissioner.[130] Therefore, according to the Fifth Circuit, the only way insureds in Texas will prevail is to argue that the anti-concurrent clause is against public policy.[131]

B. Tuepker v. State Farm Fire & Casualty Company

While *Leonard* is the seminal case dealing with the anti-concurrent clause and the legal effects the clause has on hurricane-ravaged houses, *Tuepker* is a "slab case" and its ruling is important for the slab cases that may arise in the event of Hurricane Ike litigation.[132]

The Tuepkers' house was completely destroyed by Hurricane Katrina, which left nothing but the slab of the house.[133] The house was insured by State Farm for loss caused by windstorm, but excluded loss caused by water.[134] The policy also contained an anti-concurrent clause.[135] Based on the policy, State Farm denied the Tuepkers' claim.[136]

The Southern District of Mississippi held that the anti-concurrent clause was ambiguous because the provision purported to exclude the covered loss of wind when the wind combined with water, an excluded loss.[137] Because the policy purported to provide coverage for wind and simultaneously purported to exclude coverage for wind when

128. *Leonard*, 499 F.3d at 431.

129. *See* Wong v. Monticello Ins. Co., No. 04-02-00142-CV, 2003 WL 1522938 at *1 (Tex. App.—San Antonio Mar. 26, 2003, pet. denied); Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd., No. Civ. A. 399CV1623D, 2002 WL 356756, at *4–5 (N.D. Tex. Mar. 5, 2002).

130. TEX. INS. CODE ANN. art. 5.35 (Vernon 2009).

131. *See Leonard*, 499 F.3d at 431; *see* discussion *infra* Part V.A.3.

132. A "slab case" refers to the type of case where the house or building was completely destroyed and all that remains is the concrete slab. See Sharon M. Mattox & David G. Wall, *Class Certification for Environmental and Toxic Tort Claims*, 2008 A.L.I.-A.B.A. ENVTL. & TOXIC TORT LITIG. 3, 18.

133. Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346, 348 (5th Cir. 2007).

134. *Id.* at 349.

135. *Id.*

136. *Id.*

137. *Id.*

water is involved, the court held the anti-concurrent clause ambiguous and ineffective.[138]

Because *Leonard* governed the case, the Fifth Circuit held that the anti-concurrent clause was not ambiguous and should be enforced.[139] According to the court, "indivisible damage caused by both excluded perils and covered perils or other causes is not covered" under the anti-concurrent clause.[140]

The difference between *Tuepker* and *Leonard* is that the Tuepkers did not have a house to evaluate the damages caused solely by wind. At least in *Leonard*, the homeowners were able to recover for the loss caused exclusively by wind, albeit a small amount.[141] In *Tuepker*, it was impossible to determine the damage caused by the wind prior to the storm surge.[142] This is the problem that Hurricane Ike litigants may face. Without speculating how much damage was caused solely by wind, it is impossible to ascertain the exact amount of damage and recover the segregated amount.

Another problem that arises in slab cases is the actual cause of the loss. Almost all hurricanes produce tornados[143] and it is not out of the question for a house to be completely leveled by a tornado prior to a storm surge, leaving the possibility open that a covered peril destroyed the house rather than an excluded peril.

C. Broussard v. State Farm Fire & Casualty Company

The Broussards lost their house in 2005 to Hurricane Katrina.[144] The house was insured through State Farm and the policy covered damage caused by windstorm.[145] The policy also contained an anti-concurrent clause.[146] Defending on the anti-concurrent clause, State Farm denied the Broussards' claim.[147] Subsequently, the Broussards filed suit arguing that their house was destroyed by "tornadic winds."[148]

The Southern District of Mississippi found that the Broussards' house was "destroyed during Hurricane Katrina," that the hurricane was a "windstorm," and that windstorm was covered under the insur-

138. *Id.*
139. *Id.* at 354.
140. *Id.*
141. Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 426 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1873 (2008).
142. *Tuepker*, 507 F.3d at 348.
143. Bill McCaul, FAQ: Hurricanes, Typhoons, & Tropical Cyclones http://www.aoml.noaa.gov/hrd/tcfaq/L3.html (last visited Sept. 7, 2009).
144. Broussard v. State Farm Fire & Cas. Co., 523 F.3d 618, 622 (5th Cir. 2008).
145. *Id.* at 622–23.
146. *Id.* at 623.
147. *See id.* at 623–24.
148. *Id.*

ance policy.[149] Because the house was destroyed by a covered peril, according to the court, State Farm had the burden to prove the loss was the result of an excluded peril.[150] State Farm's expert could not distinguish between the damage caused by wind from the damage caused by water because the house was completely destroyed.[151] As a result, the court held that State Farm did not meet its burden of proof that the destruction was caused by an excluded peril.[152]

In reversing the district court, the Fifth Circuit held that "Hurricane Katrina's winds were not strong enough to cause structural damage to the home" and remanded the case for a new trial.[153]

Broussard is a good example of the battle of the experts and what Texas courts may do in the event of Hurricane Ike litigation surrounding slab cases. The Fifth Circuit looked at the testimony of the experts to determine that the wind produced by Hurricane Katrina was not strong enough to completely destroy the house.[154] Similarly, Texas courts will likely rely on expert testimony in determining whether Hurricane Ike's winds were strong enough to create a total loss. Because slab cases leave nothing on which to base an expert opinion, these cases will likely be a battle of the experts.

The Katrina litigation that has transpired in the Fifth Circuit has paved a road for the Texas courts to uphold anti-concurrent clauses in future Hurricane Ike litigation. The problem the anti-concurrent clause presents to policyholders is that it has the effect of denying coverage for damages that are covered under the policy, especially in the event of a hurricane. The slab cases are the most vulnerable because of the lack of damage to examine in determining wind from water damage.

V. Problems and Proposed Solutions to the Anti-Concurrent Clause

As discussed earlier, Texas courts have been dealing with concurrent causes of damage since at least the late 1800s.[155] Consistently, Texas courts will not allow an insured to recover for damages caused by an excluded peril.[156] Rather, the courts, and later Rule 94 of the

149. *Id.* at 623.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 625.
154. *Id.*
155. Pelican Fire Ins. Co. v. Troy Co-Op. Ass'n., 77 Tex. 225, 226–27, 13 S.W. 980, 981 (1890).
156. *See id* at 226–27, 13 S.W. at 981; Palatine Ins. Co. v. Petrovich, 235 S.W. 929, 930 (Tex. Civ. App.—Galveston 1917, no writ); Coyle v. Palatine Ins. Co., 222 S.W. 973, 976 (Tex. Comm'n App. 1920, judgm't adopted); Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 163 (Tex. 1971).

Texas Rules of Civil Procedure, require the insured to segregate the damages caused by included and excluded perils.[157]

While exclusionary clauses allow the insured to segregate and recover damages caused by a covered peril,[158] anti-concurrent clauses do not.[159] Essentially, the anti-concurrent clause allows coverage to be denied for covered perils if the covered peril combines concurrently or sequentially with an excluded peril. Thus, even if damage is obviously the result of wind, the wind damage cannot be segregated from the water damage if it combined with the water to create the loss.

Although Texas courts have come across anti-concurrent clauses,[160] there is not a single case in Texas that has applied the anti-concurrent clause to slab cases. In a situation like a slab case, it is impossible to determine how much damage was caused solely by wind, solely by water, and how much damage was caused by the combination of wind and water.[161] As a result, homeowners (or former homeowners) affected by Hurricane Ike may not recover anything for the loss of their house. Because anti-concurrent clauses have the legal effect of denying claims for a loss that was covered under the insurance policy, Texas courts should not uphold the clause.

A. *Courts Should Render the Clause Unenforceable*

Texas courts should render the anti-concurrent clause unenforceable as one solution. The Fifth Circuit held that the policyholders can prevail over the anti-concurrent clause by proving that the clause is contrary to "caselaw, statutory law, or public policy."[162] The following section discusses the probability of prevailing over the anti-concurrent clause in Texas courts in the manner required by the Fifth Circuit.

1. Texas Case Law

According to the Fifth Circuit, one way to prevail over an anti-concurrent clause is to have case law that does not allow an insurance company to preclude recovery for concurrent causes of damage.[163] But, policyholders are unlikely to prevail over the anti-concurrent

157. Palatine Ins. Co. v. Coyle, 196 S.W. 560, 560 (Tex. Civ. App.—Galveston 1917), *aff'd*, 222 S.W. 973 (Tex. Comm'n App. 1920, judgm't adopted); *McKillip*, 469 S.W.2d at 163; TEX. R. CIV. P. 94.

158. *See Coyle*, 196 S.W. at 565; *McKillip*, 469 S.W.2d at 163.

159. *See* Wong v. Monticello Ins. Co., No. 04-02-00142-CV, 2003 WL 1522938 at *1 (Tex. App.—San Antonio Mar. 26, 2003, pet. denied); Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd., No. Civ. A. 399CV1623D, 2002 WL 356756, at *4–5 (N.D. Tex. Mar. 5, 2002).

160. *See Wong*, 2003 WL 1522938, at *1; *Lexington Ins. Co.*, 2002 WL 356756, at *4.

161. *See* Cohen & Rosenberg, *supra* note 120, at 157.

162. *See* Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 426 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1873 (2008).

163. *Id.*

clause by relying on Texas case law. Based on the decisions in *Wong* and *Lexington*, in which Texas courts have held the anti-concurrent clause is enforceable,[164] future Hurricane Ike litigation will likely uphold and enforce the clause.

Further, Texas courts may seem reluctant to render the anti-concurrent clause unenforceable because it will limit the parties' freedom to contract. By rendering the anti-concurrent clause unenforceable, insurance companies may have to raise insurance premiums in the event they have to pay for concurrent causes of damage that they would not otherwise be required to pay. Some consumers may wish to take the risk of having the anti-concurrent clause in the policy in exchange for lower premiums. Rendering the clause unenforceable would limit the consumer's ability to take that risk and freely contract.

Although Texas courts may hesitate to limit the freedom to contract, insurance policies are not the type of negotiable contracts that allow consumers to freely dictate the terms of the contract. An insurance policy is an adhesion contract and the consumer can take it or leave it. Thus, hesitation by the courts to limit the freedom to contract is somewhat unwarranted because the consumer never had the freedom to negotiate the policy.

Because of the unwarranted fear of limiting the freedom to contract, coupled with the *Wong* and *Lexington* decisions,[165] Texas courts are unlikely to render the anti-concurrent clause unenforceable based on Texas case law.

2. Texas Statutory Law

Another way to prevail over the anti-concurrent clause, according to the Fifth Circuit, is to show that the clause violates statutory law.[166] But Texas statutory law requires that insurance policies be adopted by the Texas Insurance Commissioner.[167] The commissioner may disapprove a policy if it contains provisions that are unjust, deceptive, or violate public policy.[168]

In *Leonard*, the Fifth Circuit held that the anti-concurrent clause did not violate statutory law because the clause was approved by the state insurance commissioner.[169] Hurricane Ike litigants will most likely not prevail over the anti-concurrent clause by arguing it violates Texas statutory law based on the reasoning in *Leonard* and current Texas statutory law.

Although the current state of Texas statutory law is stacked against policyholders, Texas residents should urge the Texas Legislature to

164. *Wong*, 2003 WL 1522938, at *1; *Lexington Ins. Co.*, 2002 WL 356756, at *4–5.
165. *Wong*, 2003 WL 1522938, at *1; *Lexington Ins. Co.*, 2002 WL 356756, at *4–5.
166. *Leonard*, 469 F.3d at 431.
167. TEX. INS. CODE ANN. art. 5.35(a) (Vernon 2009).
168. *Id.* art. 5.35(g)(1)(B).
169. *Leonard*, 469 F.3d at 435–36.

change the current law. The legislature can create a law that prohibits insurance policies from containing anti-concurrent clauses. Until the Texas Legislature creates new law, policyholders are unlikely to prevail by arguing the anti-concurrent clause violates Texas statutory law.

3. Texas Public Policy

A third way for courts to render the anti-concurrent clause unenforceable is to conclude that the clause is against public policy. In *Puckett v. United States Fire Insurance Company,* the insurance company sought a determination that it was not obligated to pay damages arising out of a deadly plane crash.[170] The insurance policy contained a clause that allowed the insurance company to suspend coverage "if the aircraft . . . airworthiness certificate is not in full force and effect."[171] A certificate is issued when all maintenance requirements are conducted through an inspection.[172] Although the certificate had lapsed, the failure to inspect the plane did not cause the plane to crash.[173]

The estate of the insureds argued that to allow an insurance company to escape liability when the breach of contract did not contribute to the loss is unconscionable and against public policy.[174] The Texas Supreme Court agreed, and held that it would be against public policy to allow an insurance company to avoid liability on a technicality.[175] The court further stated that to hold otherwise would be to allow the insurance company to "collect a premium but . . . have no exposure to risk because the policy would no longer be effective."[176]

The estate of the insureds in *Puckett* successfully argued that the clause at issue was against public policy. Policyholders dealing with anti-concurrent clauses could use this argument to their advantage. It could be argued that to allow the insurance company to avoid liability for wind damage because of an anti-concurrent clause is against public policy because the insurance company is collecting a premium, yet insulating itself from risk. By insulating itself from any claim that involves wind and water damage concurrently, the insurance company has no exposure to risk, which according to *Puckett* is against public policy in Texas.[177]

If Hurricane Ike litigants are going to argue that the anti-concurrent clause should not be enforced, Texas courts, and specifically federal courts, may follow the Fifth Circuit holding and require litigants to

170. Puckett v. U.S. Fire Ins. Co., 678 S.W.2d 936, 937 (Tex. 1984).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 938.
175. *Id.*
176. *Id.*
177. *Id.*

prove that the clause violates Texas "caselaw, statutory law, or public policy."[178] Based on the current state law and statutory law in Texas, litigants are unlikely to prevail over the anti-concurrent clause. A public policy argument may be the only route available for litigants to invalidate the anti-concurrent clause.

B. *If Courts Uphold the Clause, the Clause Should be Made Apparent to Policyholders*

Another problem with the anti-concurrent clause is that it is another clause stuck in an adhesion contract that the average layperson is unable to decipher. Most policyholders probably do not know that the clause is in their policy.

Although the parties to a contract are deemed to know and understand the terms of the contract and its legal effects,[179] the Texas legislature should require that insurance companies make the clause apparent. This can be done by placing the clause in a larger and bolded font. Or it could be done by requiring the policyholder to sign an acknowledgement that he or she has read the clause and understands its legal effect.

By making the clause apparent to the policyholder, the policyholder is cognizant of the type of coverage that the insurance company is providing. Some policyholders do not even realize that their homeowner's insurance policy excludes flood or that they must obtain flood insurance through a separate policy backed by the National Flood Insurance Program.[180] In fact, sixty-one percent of Texas residents affected by Hurricane Ike did not have flood insurance.[181] By making the clause apparent to the policyholder, the policyholder understands the clause and its legal effects, as well as understands that a separate policy to cover flood damage is needed.

C. *Establish a New, Single Form of Insurance*

Under the current system of insurance coverage, the prudent homeowner who lives on the Texas Gulf Coast should obtain a homeowner's insurance policy, a flood insurance policy, and a windstorm insurance policy (if windstorm is not covered under the homeowner's insurance policy). But, the current system is broken. After a major disaster strikes, the windstorm insurance policy is pointing the finger at the flood insurance policy. The flood insurance policy is pointing the finger at the windstorm insurance policy. And the homeowner's

178. Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 430 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1873 (2008).

179. *In re* Big 8 Food Stores, Ltd., 166 S.W.3d 869, 878 (Tex. App.—El Paso 2005, orig. proceeding).

180. *See* FloodSmart.gov, Resources: Flood Facts, http://www.floodsmart.gov/floodsmart/pages/flood_facts.jsp.

181. *See* IMPACT REPORT, *supra* note 17, at 2.

insurance policy is pointing the finger at both the windstorm and flood insurance policy. Stuck in the middle of all of this finger pointing is the prudent homeowner who is burdened by chasing around the different insurance companies in the hopes that one of the companies will "pay up."

Therefore, another solution to the anti-concurrent clause is to create a new form of insurance that covers any and all damage that is the result of a hurricane, such as wind, water, tornado, etc. The Texas Supreme Court suggested creating a new type of insurance in *Hardware Dealers Mutual Insurance Company v. Berglund.*[182] One way, according to the Court, is to lobby the insurance industry and regulatory authorities.[183] Instead of having an "all risks" policy or a "named peril" policy with exclusions, regulatory authorities could issue hurricane insurance policies that cover any and all damages caused by a hurricane, including water damage.[184] Homeowners can purchase peace of mind by knowing that their house is protected, and insurers will be able to charge the necessary premium to ensure it can cover any losses caused by a hurricane.

A policy that covers all hurricane damage will (1) decrease the need for insurance companies to set aside costs for litigation; (2) eliminate the need for experts used to segregate damages; (3) eliminate the need to obtain different types of insurance for different types of damage; and (4) decrease the amount of litigation which will in turn reduce the amount of judicial resources necessary to withstand litigation after a major hurricane.

VI. The Insurance Companies' Argument

Although this comment discusses the unfairness of the anti-concurrent clause and why the clause should not be enforced, the insurance companies have an interest in making a profit and protecting themselves from claims in which the insurance companies did not set aside money to cover. An example of such claims is concurrent causes of damage caused by covered and non-covered perils.

The insurance companies cannot be blamed for wanting to insulate themselves from claims they did not intend to cover. As unfair as the consumer may believe the insurance companies are acting, the consumer had the opportunity to educate himself or herself of the contents and legal effects of the insurance policy.

VII. Conclusion

After Hurricane Katrina, the anti-concurrent clause was used by insurance companies to deny recovery to homeowners along the Gulf

182. Hardware Dealers Mut. Ins. Co. v. Berglund, 393 S.W.2d 309, 314 (Tex. 1965).
183. *See id.*
184. *Id.*

Coast.[185] The clause allowed the insurance companies to deny recovery because concurrent causes of damage, water and wind, combined to damage or destroy the insured's house.

The damage and destruction that Texas homeowners received after Hurricane Ike are similar to those received by Hurricane Katrina. Because water and wind combined currently to damage or destroy houses, insurance companies may try to deny recovery based on an anti-concurrent clause in the policy.

Although the San Antonio Court of Appeals and the Northern District of Texas have upheld the anti-concurrent clause, the Texas Supreme Court has not ruled on the issue. The Texas Supreme Court should invalidate the anti-concurrent clause because it denies recovery for a peril that is covered under the insurance policy. Further, upholding the clause violates public policy because it allows the insurance company to insulate it from exposure to risk. Instead of validating the anti-concurrent clause and denying recovery to the insured, the court should continue to allow the segregation of damages in the event of concurrent causation.

By invalidating the anti-concurrent clause and requiring insurance companies to pay for damages that are covered under the insurance policy, Texas will send a message to insurance companies to fix the broken system. Not only should the judiciary invalidate the anti-concurrent clause, but the legislature should create a single form of insurance that covers any and all damage caused by a hurricane. This way, the prudent homeowner can realistically purchase peace of mind.

185. Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 430 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1873 (2008); Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346, 349 (5th Cir. 2007).