



## **HURRICANE HARVEY AND RECENT INTERPRETATIONS OF THE ANTI-CONCURRENT-CAUSATION CLAUSE**

The devastation of Hurricane Harvey has been nothing short of catastrophic, leaving homeowners in the Houston, Texas area with severely damaged properties caused by the storm's extreme wind and rain. As homeowners face this damage, insurers throughout the country are grappling with the claims and coverage litigation that will likely be present from this storm. Similar to past hurricanes that have affected the nation, such as Hurricane Sandy in New Jersey and New York, and Hurricane Katrina in New Orleans, litigation regarding an insured's right to receive coverage for their damaged property was taken by various courts.

Specifically, one of the issues addressed in this litigation was the interpretation of the anti-concurrent-causation clauses in insurance policies and whether such clauses excluded subsequent flood damage after an insured's home previously sustained wind damage. This article will address Texas' interpretation of anti-concurrent-causation clauses when dealing with wind and flood damage and will compare this to other jurisdictions' interpretations of such clauses when faced with similar hurricane conditions.



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## I. Texas Anti-Concurrent-Causation Clause and Hurricane Harvey

Hurricane Harvey struck the Houston, Texas area this past weekend with wind gusts as high as 100 miles per hour and rain fall as high as 24.44 inches. See Katie Kindelan, Hurricane Harvey Brings Devastation to Texas: By the Numbers, ABC NEWS (Aug. 28, 2017, 3:51 P.M.) <http://abcnews.go.com/US/hurricane-harvey-brings-devastation-texas-numbers/story?id=49465843>. Furthermore, an estimated 30,000 to 40,000 homes in the Houston area have been destroyed by the storm. *Id.* As such, the question arises as to whether insurance coverage is available for these homeowners to cover their damage. Particularly, this issue arises if a homeowner's insurance coverage includes an anti-concurrent-causation clause.

Under Texas law, an anti-concurrent-causation clause located within an insurance policy can “exclude from coverage any damage caused by a combination of wind and water.” *JAW The Pointe, L.L.C. v. Lexington Insurance Company*, 460 S.W.3d 597, 608 (Tex. 2015) (quoting *ARM Properties Management Group v. RSUI Indem. Co.*, 2010 WL 4386787, at \*941 (5th Cir. 2010)). The issue was recently addressed in *JAW The Pointe L.L.C. v. Lexington Insurance Company*, where the plaintiff company purchased an apartment complex which was damaged after Hurricane Ike in 2008. *JAW The Pointe*, 460 S.W.3d at 599-600. After the complex was destroyed, the plaintiff sent a permit application to the city, in accordance with local city ordinances, stating that it would cost over \$6 million to repair the complex's damage. *Id.* at 600. The city also required that the apartments be elevated an additional three feet. *Id.* at 601. When the company later sent a claim to Lexington Insurance Company requesting coverage for the repairs, the insurance company denied the coverage, stating that it did not cover the plaintiff's losses since the damage was caused by a flood. *Id.*



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While the trial court ruled for the plaintiff, claiming that Lexington Insurance Company engaged in “unfair or deceptive acts or practices in the business of insurance” by not settling the claim, the court of appeals and Supreme Court of Texas reversed the ruling based on Lexington’s anti-concurrent-causation clause. *Id.* at 601-02. Specifically, the anti-concurrent-causation clause stated that the insurance company would not pay for any “loss or damage caused directly or indirectly by any excluded cause or event, ‘regardless of any other cause or event that contributes concurrently or in any sequence to the loss.’” *Id.* at 607. The Supreme Court of Texas cited the Fifth Circuit’s interpretation on anti-concurrent-causation, holding that when there is an anti-concurrent-causation clause in an insurance policy and “wind and water syngeristically cause[] the same damage, such damage is excluded.” *Id.* at 607.

The state of Texas also ruled on the issue of the anti-concurrent-causation clause regarding wind and flood damage in *ARM Properties Management Group v. RSUI Indem. Co.* In this case, the plaintiff purchased property insurance for apartment complexes. *ARM Properties Management Group v. RSUI Idemn. Co.*, 2010 WL 4386787, at \*1 (5th Cir. 2010). After Hurricane Katrina, nine of the plaintiff’s properties sustained damage. *Id.* For each of these properties, there were three ‘layers’ of insurance coverage, including a Primary Policy that contained an anti-concurrent-causation clause and water exclusion provision. *Id.* The court held that when read together, the anti-concurrent-causation clause and the water exclusion provision excluded any coverage that could be provided as a result of damage caused by wind and water. *Id.* at \*3 Again citing the Fifth Circuit, the court in *ARM Properties Management Group* held that the plaintiff could not obtain coverage because damage from the property occurred due to a combination of wind and water. *Id.*



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### II. Hurricane Katrina and the Anti-Concurrent Causation Clause

Similar to the present devastation of Hurricane Harvey, Hurricane Katrina left numerous individuals with damaged or destroyed homes. Around 800,000 housing units were destroyed after Hurricane Katrina, making it one of the most deadliest hurricanes in United States history. See Katrina Impacts: Hurricanes: Science and Society, THE UNIVERSITY OF RHODE ISLAND, <http://hurricanescience.org/history/studies/katrinacase/imapcts/>. Because of the damaged homes affected by the hurricane, litigation developed in Mississippi and Louisiana regarding insurance coverage for these damaged homes. Again, one of the issues debated in these cases was the interpretation of an insurance policy's anti-concurrent-causation clause.

In *Leonard v. Nationwide Mut. Ins. Co.*, the ground floor of the plaintiff's home was flooded after Hurricane Katrina. *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 424 (5th Cir. 2007). In the case, the Fifth Circuit overruled the Southern District of Mississippi's ruling, stating that the anti-concurrent-causation clause did not apply. *Id.* at 430. It argued that the district court did not recognize three discrete categories of damage applicable here: "(1) damage caused exclusively by wind; (2) damage caused exclusively by water; and (3) damage caused by wind "concurrently or in any sequence" with water." *Id.* Consequently, concurrent wind and water damage is particularly evident following a hurricane. *Id.* As the court stated, "when wind and water synergistically cause[] the same damage, such damage is excluded." *Id.* Therefore, because the anti-concurrent-causation clause involved in the plaintiff's policy excluded coverage where there is water damage "even if another peril - - e.g., wind - - contributed concurrently or in any sequence to cause the loss", the plaintiff was not provided with coverage. *Id.*



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However, this ruling contradicts a more recent case held by the Supreme Court of Mississippi, *Corban v. United. Servs. Auto. Ass'n*. In this case, the plaintiff's residence in Long Beach, Mississippi sustained physical damage after Hurricane Katrina. *Corban v. United. Servs. Auto. Ass'n*, 20 So.3d 601, 605 (Miss. 2009). When the plaintiff tried to receive coverage for the wind and flood damage sustained by the residence, United Services Automobile Association Insurance Agency denied their claim. *Id.* The defendant denied the coverage because the majority of the damage sustained to the property was from flooding, which was not covered under the plaintiff's policy. *Id.*

The plaintiff then filed a lawsuit against United Services Automobile Association Insurance Agency, which focused on the policy's water damage exclusion and the anti-concurrent-causation clause. *Id.* The circuit court ruled that the anti-concurrent-causation clause should be applied as analyzed by the Fifth Circuit in *Leonard*, barring coverage for damage caused by water which was caused "concurrently or sequentially by wind and water in combination." *Id.*

However, the Supreme Court of Mississippi reversed the circuit court's ruling and took a different approach on the anti-concurrent-causation clause in a hurricane scenario. First, the Supreme Court of Mississippi agreed with the Fifth Circuit in that if two perils, such as winds and floods, act in conjunction at the same time to cause physical damage, then anti-concurrent-causation clause would apply. *Id.* at 614. Nonetheless, the various perils from a hurricane usually result in separate damage, meaning that if the insured's property is damaged by a covered peril at a separate time than an excluded peril, the anti-concurrent-causation clause will not apply. *Id.*



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The court looked to *Dickinson v. Nationwide Mut. Fire Ins. Co.* in its interpretation of the anti-concurrent-causation clause which held that wind and flood damage were not concurrent causes of damage meaning that the clause did not apply. *Id.* at 616 (citing *Dickinson v. Nationwide Mut. Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 34354, at \*2 (S.D. Miss. 2008)). Similarly here, the Supreme Court of Mississippi held that the wind and flood damage to the plaintiff's property after Hurricane Katrina was not concurrent causes such that the anti-concurrent-causation clause would apply. *Id.* at 617-18. Finally, this was also concluded because the court interpreted certain provisions in the anti-concurrent-causation clause as ambiguous. See *Lombardi v. Universal N. Am. Ins. Co.*, 2015 Conn. Super. LEXIS 138, at \*1 (Jan. 21, 2015) (recognizing Corban court's interpretation of "in any sequence" in anti-concurrent-causation clause ambiguous).

Analogously in *Orleans Parish Sch. Bd. v. Lexington Ins. Co.*, property owned by the plaintiff was destroyed after Hurricane Katrina. *Orleans Parish Sch. Bd. v. Lexington Ins. Co.*, 123 So. 3d 787, 788 (Ct. App. La. 2013). In this case, the Louisiana Court of Appeals agreed with the Corban court that if a covered peril under an insurance policy results in damage, coverage "is not changed by any subsequent cause or event." *Id.* at 803 (quoting Corban, 20 So.3d at 613). This is true even with language in an anti-concurrent-causation clause, stating that a "loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." *Id.* Therefore, the court held that the anti-concurrent-causation clause could not be used to exclude coverage for damages that were attributed initially to a loss covered under the policy. *Id.*



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### III. Hurricane Sandy and Other Anti-Concurrent Causation Clause Interpretations

Many other jurisdictions throughout the nation have also weighed in on their interpretation of the anti-concurrent-causation clause. For example, in *Valle v. New York Prop. Ins. Underwriting Assn.*, the plaintiff's house was destroyed after Hurricane Sandy. *Valle v. New York Prop. Ins. Underwriting Assn.*, 2016 N.Y. Misc. LEXIS 1547, at \*1 (Sup. Ct. NY 2016). When the plaintiff later sought coverage for the house's damage, the defendant denied this claim under the policy's anti-concurrent-causation clause. *Id.* at \*2. The plaintiff then filed a breach of contract action, while the defendant responded with a motion for summary judgment. *Id.* at \*1. The court then explained that other courts throughout the state have used anti-concurrent-causation clauses in insurance policies in concluding that coverage can be excluded. *Id.* at \*8. Further, these courts also hold that anti-concurrent-causation clauses are not ambiguous. *Id.* However, because the evidence conflicted over whether the damage resulted from two separate causes, the court did not grant the summary judgment motion for the defendant. *Id.* at \*18.

Further, in *Lombardi v. Universal N. Am. Ins. Co.*, Mr. Lombardi's home was destroyed after Tropical Storm Irene. *Lombardi v. Universal N. Am. Ins. Co.*, 2015 Conn. Super. LEXIS 138, at \*1 (Jan. 21, 2015). When the insurance company subsequently denied his claim based on the policy's anti-concurrent-causation clause, Mr. Lombardi filed a complaint. *Id.*



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He claimed that the clause was void and unenforceable. *Id.* at \*5-6 Although the courts in *Corban* and *Orleans Parish Sch. Bd.* did not apply the anti-concurrent-causation clause, the *Lombardi* court held that the majority of cases, in fact, have upheld anti-concurrent-causation provisions to circumvent the efficient cause doctrine. *Id.* at \*7. The efficient cause doctrine was applied in the *Leonard* case, which held that in a policy excluding water damage but covering wind damage, “it is sufficient to show that wind . . . was the proximate or efficient cause of the loss . . . notwithstanding other factors contributed. . . .” *Id.* at \*8, 34-35. Therefore, the *Lombardi* court did not declare that the anti-concurrent causation clause was null and void. *Id.* at \*37.

### IV. Conclusion

Hurricane Harvey has damaged and destroyed an unprecedented number of homes in the Houston, Texas area. In the aftermath of this tragic storm, insurers throughout the nation will be faced with coverage and claims litigation for the indefinite future. One of the issues that will arise in this litigation is the interpretation of a policy’s anti-concurrent-causation clause. While various courts, such as *Corban* and *Orleans Parish Sch. Bd.*, did not provide for an exclusion in accordance with the anti-concurrent-causation clause, a majority of courts have recognized this exclusion. This is particularly true in Texas when an insured’s home is damaged in hurricane-like conditions, as seen in *JAW The Pointe L.L.C.* and *ARM Properties Management Group*. Therefore, while insurers should note various jurisdictions’ interpretations of the anti-concurrent-causation clause, Texas courts have historically interpreted anti-concurrent causation clauses to be enforceable consistent with the clear and unambiguous language of such clauses.



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