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2003 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2224

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2224

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 01-28-03

Tape Number	Side A	Side B	Meter #
1		xxx	5340
2	xxx		0

Committee Clerk Signature Lisa VanBerkom

Minutes:Chairman Mutch opened the hearing on SB 2224. All Senators present. SB 2224 relates to liability of the insurer for loss.

Testimony in support of SB 2224

Rob Hovland, Chairman of the North Dakota Domestic Insurers, introduced the bill. See attached testimony. He states that the loss ratio in ND in 2001 was appx. 350%. As a result, companies are not writing in North Dakota anymore. There was a four or five month period where State Farm stopped accepting home owners insurance policy. Now they will only write a person if they haven't had a loss in the last 3 years.(meter no 5730, tape 1, side B)

To make matters worse, the North Dakota Supreme Court issued a ruling in a case called Western National Mutual vs. University of North Dakota, a case arising out of the 1997 Grand Forks flood. Hovland believes it will have a tremendous negative impact on North Dakota consumers if legislation is not accepted.

As a result of the flood, water entered the UND sewer systems. UND had purchased sewer backup coverage for *some* buildings, but not the ones affected. The insurance policy issued had generic coverage, with an exclusion which reads: ***Coverage is excluded for loss or damage caused directly or indirectly by flood, regardless of any other cause or event that contributes concurrently on any sequence to the loss.*** Hovland states that this is common language used in insurance policies for sewer backup.

However, the case went to a Grand Forks jury which awarded UND sewer back up coverage, even though it was never purchased. The ND Supreme Court held up the verdict and wrote a pair of statutes written in 1917. This demonstrated the efficient proximate cause doctrine, which provides when two or more causes contributes to damages and one cause of loss is covered by an insurance contract, while another is not, the judge or jury must decide which is the real cause, otherwise known as the "efficient proximate cause."

The time that this case came out, ND is the only state that has specifically prohibited an insurance company from contracting out of the efficient proximate cause doctrine. One other state has said they would.

Since this ruling, *Center Mutual,* has discontinued offering a form 3 policy, which is a comprehensive policy on dwelling fires, which is a home you don't live in. Also, some of the coverages they offer will not be available. (tape 2, side A, meter 0)

The insurance companies are having to cut the coverage and raise the rates. This legislature would prohibit that from happening even more.

If you look at the UND ruling, Rob Hovland states that he doesn't know how anyone could conclude that the sewer backup wasn't caused by the flood. End testimony.

There were no questions from the committee.

Patrick Ward, an attorney with the law firm of Zuger Kirmis & Smith of Bismarck, spoke on behalf of the North Dakota Domestic Insurance Companies and other property and casualty insurers in support of SB 2224. See attached testimony. Patrick spoke of the Western National vs. University of North Dakota case as well. He passed out his written testimony and presented himself for questioning.

There were no questions from the committee.

Senator Nething expresses interest in speaking to someone in the Judiciary committee before taking action on this bill.

Hearing was closed. No action taken at this time.

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2224

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 02-04-03

Tape Number	Side A	Side B	Meter #
2	xxx		1675

Committee Clerk Signature Lisa VanBerkom

Minutes:Chairman Mutch opened the discussion on SB 2224. Senator Heitkamp was absent.

SB 2224 relates to an Act to amend and reenact sections 26.1-32-01 and 26.1-32-03 of the North Dakota Century Code, relating to liability of the insurer for loss.

There was brief discussion among committee members.

Senator Klein moved a DO PASS. Senator Espegard seconded.

Roll Call Vote: 5 yes. 1 no. 1 absent.

Carrier: Senator Klein

Date: 2-4-03
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2224

Senate IBL Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS ~~As Amended~~

Motion Made By Klein Seconded By Espegard

	Senators	Yes	No	Senators	Yes	No
7-	Sen. Duane Mutch, Chairman	X		Sen. Michael Every 5	X	
1-	Sen. Jerry Klein, Vice Chairman	X		Sen. Joel Heitkamp 4	A	
6-	Sen. Duaine Espegard	X				
2-	Sen. Karen Krebsbach	X				
3-	Sen. Dave Nething	~~X~~	X			

Total (Yes) 5 No 1

Absent 1

Floor Assignment Klein

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 5, 2003 1:39 p.m.

Module No: SR-22-1742
Carrier: Klein
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2224: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **DO PASS** (5 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). SB 2224 was placed on the Eleventh order on the calendar.

(2) DESK, (3) COMM

SR-22-1742

2003 HOUSE INDUSTRY, BUSINESS AND LABOR

SB 2224

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2224

House Industry, Business and Labor Committee

❑ Conference Committee

Hearing Date March 4, 20003

Tape Number	Side A	Side B	Meter #
1	x		36.7-end
1		x	0.0-45.4
Committee Clerk Signature	Judith Hammes		

Minutes: **Chairman Keiser** opened the hearing on SB 2224.

Rod Hovland, Chairman of the North Dakota Domestic Insurers Association, introduced SB 2224 and presented testimony in support of this legislation. **(See attached #1)**

Rep. Ekstrom: What about FEMA's involvement? Their legal people have gotten in touch with me and talked about the fact this sets up a situation for FEMA where insurance companies will step back completely. It's not such a problem for private insurance companies but a big problem for the state. What's your feeling about how FEMA is coming down with this?

Hovland: No, but what I can tell you is that every state that has looked at this issue, there's a reason for why they don't follow what the Supreme Court of ND did. Ultimately, the coverage isn't offered. We've discontinued offering sewer back up on our policies so not only do they not have flood coverage, there not covered for sewer back up anymore either. I don't know what FEMA's reaction is on the commercial side but I can tell you about homeowner's. They expect to

pay for flood damage and don't expect insurance companies to pay. It's an aberration when you think about it, this affects a lot of other endorsements too.

Rep. Kasper: Was the Supreme Court ruling on UND appealable to the US Supreme Court? Or is there no appeal process once the ND Supreme Court ruled in that case?

Hovland: It has to be a constitutional issue.

Rep. Dosch: If the power goes out on the south side, and I have sewer back up, then I am not covered, is that correct?

Hovland: Look at your policy. If a flood caused the lift station not to function, and you have an exclusion in your policy which said that if there is a flood, sewer back up does not apply, you would not have coverage. The scenario you are talking about is why people purchase sewer back up coverage. If something malfunctions, other than a flood, you have coverage. I'd have to read your policy.

Nottestad: Do you see a connection between the tremendous inconsistencies of the insurance companies and their payoffs?

Hovland: There are a lot of issues there. All policies are not the same, they are crafted differently. If that trial had taken place at a neutral site, the result might have been different.

Nottestad: Was a change of venue requested?

Hovland: I don't know. There are a number of states that looked at this, and the negative side of it has greatly outweighed the positive side, which is exactly why most states haven't gone this direction.

Rep. Kasper: So without this bill's passage, the citizens of our state don't have the opportunity to purchase the types of coverages they'd really like that are adequate for their needs. So this

legislation is necessary to protect the insurance market, the insurance companies in the state and the people from having choices in North Dakota? Is that correct?

Hovland: Exactly. What happens now if there's a flood and you don't have flood coverage, you don't have sewer back up either. You want to offer comprehensive policies and put whatever limitations are necessary in it.

Chairman Keiser: What other examples of proximate causes are affected in our state?

Hovland: I don't think there's any question that there has been. Companies are waiting to see what the legislature does with us. It's scary, that the opinion referred to a liability policy. In liability, you want to include as much as you possibly can in the coverage but if we can't make any exclusions, we are headed toward *named peril liability policies* where we stipulate only what coverage is included. The insurance industry does not want that.

Pat Ward, representing North Dakota Domestic Insurance Companies, testified in support of SB 2224. **(See attached #2)**

Rep. Severson: Are we going towards more exclusions if this passes?

Ward: Yes. It might be more difficult to enforce exclusions, you will see more and more items excluded and specific perils addressed.

Rep. Nottestad: Do you think this bill would be here if that UND situation hadn't occurred?

Ward: No, I don't think so. I think this case is an aberration.

Rep. Severson: So if I'm sold an insurance policy and it excludes a sewer backup, for example, and I say no, I want sewer backup covered, if I agree to pay a higher premium, I can still get that covered, correct?

Ward: I believe so. It just depends on what the market would dictate. There are probably coverages and endorsements you can pay extra for.

Rep. Froseth: When a bill like this passes, do insurance companies notify all their policy holders so those customers are aware of exactly what coverage they have?

Ward: If there is a change in the policy, the companies notify their policy holders to inform them of those changes. Probably there are policies still out there that have the efficient proximate clause doctrine and now that it has been interpreted this way by the Supreme Court, it may have changed how it will be applied. But if it was placed in a policy before, they would be given notice of new provisions added to their policy.

Rep. Zaiser: Does a local agent follow up that written notification, and speak to his clients?

Ward: That depends on the individual agent. That's why the company always sends written notifications directly to their policy holders. Often it comes with the premium payment notices.

As there was no one else present to testify in support of SB 2224, **Chairman Keiser** called for testimony in opposition to SB 2224.

Paula Grossinger, North Dakota Trial Lawyers Association, presented testimony in opposition to SB 2224. **(See attached #3).** She stated that previous testimony this morning gives the committee some idea why this legislation is unnecessary. She quoted Pat Ward who said, "Contracts should say what they mean and mean what they say". "Isn't that what the Supreme Court found? The jury's decision in Grand Forks was upheld by the Supreme Court. The NDTL Association thinks that insurance companies should specify exactly what they intend to exclude from coverage. That is the essential argument. I don't feel that it is necessary to change the statute concurrently and turn the principle on its head when insurance companies, at their

disgression, can write these policies the way they see fit. This really weights things in favor of the insurance industry to the disadvantage of the insured. The insured may think they have coverage for something in a situation with concurrent events. This also removes the ability for the insured to go to the courts and get a decision about what exactly was covered. I trust the juries in North Dakota to make the right and reasonable decision. I think Western National's arguments were flawed. They looked at the timeline with regard to the flood and determined that sewer back up wasn't necessarily concurrent with the flooding because they looked at the issue of whether the buildings on the UND Campus had succumbed to overland flooding. That wasn't the issue there because the sewer backup preceded that. We are putting something into this particular bill or we would prefer to change the statute so that actually the last phrase "and totally unrelated causes contribute to the loss". That gives insurance companies such broad disgression to find that something was a related cause and not have to provide coverage".

Rep. Kasper: You said that legislation "removes the ability for the insured to go to the courts and get a decision about what exactly was covered". How does that occur? Anyone in this state can initiate a lawsuit for any reason if you find an attorney who will take your case.

Grossinger: I think that most attorneys would not take a case that has no merit and this would now make it very difficult, a lawyer would look at this and have less chance of prevailing at court.

Rep. Kasper: So if this law that clarifies coverages goes into effect, the attorneys would be less likely to take on a lawsuit because it has no merit, so does this not, then, clarify the market, make it easier for the insured to know what they are purchasing and make it more difficult to bring forth frivolous lawsuits?

Grossinger: This isn't about frivolous lawsuits, this was a meritorious case. This would change the law and weight things in favor of the insurance companies. One of the principles in insurance is that you can't write broad general exclusions. And that is exactly what this bill is designed to do. The Supreme Court recognized that in adhesion contracts, language as far as coverage needs to be general but terms of exclusionary contracts, language needs to be specific.

Chairman Keiser: How many other states have similar statutes that follow what our Supreme Court decided?

Grossinger: I don't know that off the top of my head, I can research and get that information for you. I'll bring you a copy of the decision, if you like. **(See attached #4 and #5)**

Rep. Ruby: Do you think current law is better to keep the concept in place. Do you not believe that the wording of proximate cause would define better what is causing the confusion and disputes?

Grossinger: This bill won't materially alter the way that insurance companies write their contracts. If this principle is changed, you are allowing companies to write policies, accept payment for that contract and then when a claim is filed against the policy, the coverage becomes illusory because that insured person won't be able to collect on his claim. I'm referring to the section that states "the efficient proximate cause doctrine applies only if separate distinct and totally unrelated causes contribute to the loss". They could say that anything is related, the insurance companies have such broad interpretation here of causality.

Chairman Keiser: On the other side, how would trial lawyers identify as to when efficient proximate causes are involved versus aren't involved. They want to be specific.

Grossinger: These things can belabor causality. I still go back to the concept that the insurance companies have the disgression to write exclusions.

Grossinger introduced **David Bliss, Bismarck attorney,** who offered written testimony **(See attached #6)** and spoke extemporaneously in support of SB 2224. He supported Grossinger's testimony and urged a Do Not Pass on SB 2224. This bill guts the law. Efficient proximate cause is in statute. It is North Dakota law now. Nothing needs to be done other than not pass this bill out of committee.

Rep. Kasper: If that's the case, what's the problem with adding the language that clarifies the efficient proximate cause doctrine with the words "separate, distinct and totally unrelated"? Wouldn't it eliminate the need for trials and frivolous lawsuits?

Bliss: The efficient proximate cause doctrine is there to address grey areas. You can't negotiate with insurance adjusters. Consumers have no choice but to try litigation which is expensive and emotionally and financially draining to take something to trial.

Rep. Kasper: Would this, making it more black and white, influence more trial lawyers to reject cases?

Bliss: This would eliminate more options for the consumer to bring a lawsuit. Trial lawyers are the messengers, the policy holders bring the action. If something goes wrong, it's the grey area that efficient proximate cause comes into play for.

Rep. Kasper: The Law of Actuarial Science is what insurance companies base rates on, are you familiar with that? If the industry can become more certain on what claims need to be paid and which claims need not be paid, they can develop better rates and determine better risks and ultimately lower premiums. Do you see that potential?

Bliss: That's a possibility. But does this committee want to eliminate the insured? The people who carry these policies, do you want to strike their rights to get relief in a grey area?

Rep. Klein: How does this compare with other states?

Bliss: I'm not familiar with what other states are doing, our director will bring you that information. It's working well now in our state.

Rep. Thorpe: It's a hard market for insurance companies now. If we don't pass this, are we causing continuing troubles for them? Will premiums be increased as a reason for this not passing?

Bliss: Everybody is having economic downturns in their investments. Insurance companies made bad investments too. Companies need to continue providing their services. Whether or not there is a correlation between efficient proximate cause doctrine and that company leaving the state or raising its rates I can't say.

Chairman Keiser: From the precedent setting standpoint, the Supreme Court ruled on this, all future actions won't be subject to a fresh beginning. It will go back to this case and whether the Supreme Court was right or wrong, it is now part of our legal history. As such, it will now be the precedent on which future decisions will be based to some degree, right?

Bliss: This efficient proximate cause doctrine is not new, this is being used as a tool to address grey areas, that's all.

Rep. Nottestad: If this passes, do you expect that homeowners will be stuck with limited amount of coverage they have now?

Bliss: I can't say what insurance companies will do, that's where free market comes into play.

Rep. Kasper: This bill, if passed, won't take away the right of the consumer to sue their insurance company, will it?

Bliss: That depends on what basis the consumer has to bring an action. In circumstances that we've talked about, no. But can they still sue? But given these facts, when they are grey and uncertain, that's what we're talking about with this doctrine. And they would not be able to sue regarding this.

Rep. Thorpe: What does the Insurance Commissioner's office have to say about this? Will someone from their office be able to come in during committee work to weigh in on this?

As there was no one else present to testify in opposition to SB 2224, the hearing was closed.

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2224

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date March 5, 2003

Tape Number	Side A	Side B	Meter #
1		x	37.9-end
2	x		0.0-18.1
Committee Clerk Signature	Judith Hammer		

Minutes: **Chairman Keiser** opened the hearing on SB 2224.

Rep. Ekstrom moved a Do Not Pass on SB 2224.

Rep. Zaiser seconded the motion.

Rep. Ruby: I resist the motion. I think this bill clears up the grey area and I think customers could still make their case before the courts if need be.

Rep. Kasper: I also urge the committee to resist the motion. This clarifies what insurance contract language covers and doesn't cover. Many states have adopted this type of statute. If we don't do this, we have the Supreme Court legislating rather than interpreting statute. This will result in lower premiums and is good for the citizens of the state.

Rep. Ekstrom referenced the flurry of e-mails she's received regarding this issue.

Copies of the court decision and other materials requested from individuals who testified at the hearing on March 4 were distributed to the committee.

Rep. Tieman: I've practiced insurance for eleven years. I make it routinewhen dealings with my clients to carefully review policies with them and I specifically point out exclusions so that it is understood exactly what coverage they are paying for with their premiums.

Rep. Klein: Is it fair to consumers if we don't pass this? Are we doing the right thing? I'm going to resist this motion.

Rep. Kasper: It's most likely correct that efficient proximate cause is adopted from common law. But on the third page of Mr. Ward's testimony, he discussed the doctrine. The majority of states that recognize this doctrine have upheld that parties are free to contract out of the efficient proximate cause doctrine. This is upheld in ten states. So that negates that. From my perspective, regarding the issue of the FargoDome, preventative maintenance was not performed. The crew was negligent. This current law as it stands will apply to that case if we resist this motion and pass SB 2224. If we don't pass this, ambiguity remains, if we pass it we rid the statute of ambiguity. I resist the motion and instead support a motin to urge a do pass.

Rep. Nottestad: I support the motion for a do not pass.

Representatives Boe and Zaiser voiced support for the motion.

Rep. Ekstrom stated that the current law has worked fine for a long time. Forty other states have similar existing law like ours. Insurance is insurance.

Rep. Kasper: Yes, current law was working fine until the Supreme Court legislated from the bench. To protect the consumers, we have to pass this bill or rates will go up and lots of ambiguity will surface.

Rep. Thorpe: Insurance policies for UND and NDSU will be rewritten without this legislation. But should we pass something that is going to steer the outcome of a lawsuit? I'll vote against this and support the motion for a do not pass.

Rep. Ekstrom: I feel consumers are losing protection if we change the law. This gives the insurance industry one more reason to deny a claim.

Rep. Nottestad: The Supreme Court upheld a decision that the District Court made. Innuendoes have been made here that it was a prejudiced jury and that the Court is inept. I question all this talk.

Rep. Severson: I agree with Rep. Kasper on this. Does State Fire and Tornado insure NDSU? Traditionally, if and when the Courts interpret the law differently than it was intended, this body comes to the forefront and makes a change. If we don't address this in a policy way, the consumers will pay for this. I have to resist this motion.

Rep. Zaiser: Conversely, this will preclude the filing of claims, in many respects for the consumers when they have situations that are grey areas.

Rep. Kasper: This bill will put the law back the way it was before the Supreme Court intervened and threw the industry into a frenzy.

Rep. Ekstrom: It's not expanding the definition that bothers me the most, it's the fact that we're giving them the option to opt of proximate cause entirely. The consumer loses here.

Chairman Keiser: I have tremendous respect for our Supreme Court. The sufficient proximate cause law was working. The insurance companies can write definite policies that contain exclusions. That's what all their lawyers do for them. The Cadillac policies won't be available anymore. Reduced premiums will result but for the wrong reasons. Policies will be so specific

there will be no need to file claims in the future, there will be no grey areas. I will resist the

motion as well.

Rep. Ekstrom: All these scare tactics, insurance is for the unknowns. Efficient proximate cause

does exactly what it means, it says that there is a grey area.

Results of the roll call vote on a DO NOT PASS were: 5-9-0. The motion failed.

Rep. Ruby moved a DO PASS.

Rep. Tieman seconded the motion.

Results of the roll call vote on a DO PASS were: 9-5-0.

The motion carried.

Rep. Tieman will carry this on the floor.

Date: 3/5/03
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2224

House INDUSTRY BUSINESS & LABOR Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DNP

Motion Made By Ekstrom Seconded By Zaiser

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser		✓	Boe	✓	
Vice-Chair Severson		✓	Ekstrom	✓	
Dosch		✓	Thorpe	✓	
Froseth		✓	Zaiser	✓	
Johnson		✓			
Kasper		✓			
Klein		✓			
Nottestad	✓				
Ruby		✓			
Tieman		✓			

Total (Yes) 5 No 9

Absent Ø

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 3/ 5/03
Roll Call Vote #: 2

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2224

House INDUSTRY BUSINESS & LABOR Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DO Pass

Motion Made By Ruby Seconded By Tieman

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	✓		Boe		✓
Vice-Chair Severson	✓		Ekstrom		✓
Dosch	✓		Thorpe		✓
Froseth	✓		Zaiser		✓
Johnson	✓				
Kasper	✓				
Klein	✓				
Nottestad		✓			
Ruby	✓				
Tieman	✓				

Total (Yes) 9 No 5

Absent Ø

Floor Assignment Tieman.

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 5, 2003 11:54 a.m.

Module No: HR-39-3939
Carrier: Tieman
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2224: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **DO PASS** (9 YEAS, 5 NAYS, ABSENT AND NOT VOTING). SB 2224 was placed on the Fourteenth order on the calendar.

2003 TESTIMONY

SB 2224

Support

Testimony of Patrick Ward in Support of SB 2224 in Senate IBL

My name is Patrick Ward. I am an attorney with the law firm of Zuger Kirmis & Smith of Bismarck. I represent the North Dakota Domestic Insurance Companies and other property and casualty insurers in support of this bill. We asked for this bill to be introduced. We urge a Do Pass recommendation.

SB 2224 amends sections 26.1-32-01 and 26.1-32-03, as they relate to the efficient proximate cause doctrine. This Bill is designed to address problems that have arisen as a result of the Supreme Court's interpretation of these statutes.

The North Dakota Supreme Court recently addressed the efficient proximate cause doctrine in Western National Mutual v. University of North Dakota, a case arising out of the 1997 Grand Forks flood.

The efficient proximate cause doctrine provides when two or more causes contribute to damages and one cause of loss is covered by an insurance contract, while another is not, the judge or jury must decide which is the real cause, otherwise known as the "efficient proximate cause."

Western National Mutual provided boiler and machinery coverage to one of the buildings on the University of North Dakota campus. The Western National policy specifically excluded flood coverage, but theoretically provided

coverage for sewer backup. A major flood occurred in the Red River Valley in 1997 which flooded some of the University buildings after city officials shut down sewer lift stations because of the flooding. The Western National policy contained an exclusion which provided, "coverage is excluded for loss or damage caused directly or indirectly by flood regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

The University of North Dakota argued that the cause of the loss was sewer backup which was covered under the policy and not the direct result of the flood. The North Dakota Supreme Court refused to enforce the flood exclusion and went further in ruling that "a property insurer may not contractually preclude coverage when the efficient proximate cause of the loss is a covered peril."

Section 1

The problem has arisen as a result of the Supreme Court's recent interpretation of the efficient proximate cause doctrine in the case of Western National Mutual Insurance Co. v. University of North Dakota, 2002 ND 63, 653 N.W.2d 4. As applied throughout the country, the efficient proximate cause doctrine requires that two or more separate and distinct actions, events, or forces combine to cause the damage. When the evidence shows the loss was occasioned by a single force, the efficient proximate cause has no application.

Section 1 is intended to clarify the definition of the efficient proximate cause doctrine. This will allow North Dakota courts to properly interpret and apply the doctrine that was adopted by this Legislative Assembly.

Section 2

Section 2 of SB 2224 provides that an insurer may contract out of the efficient proximate cause doctrine. In the Western National case, the Supreme Court concluded that "a property insurer may not contractually preclude coverage when the efficient proximate cause of a loss is a covered peril." In Western National, the parties' insurance contract expressly excluded coverage for loss or damage caused directly or indirectly by flood regardless of any other cause or event which contributes in any sequence to the loss. The Supreme Court determined courts in North Dakota may disregard the language of the policy between two parties and essentially took away the parties' freedom of contract in this state.

The overwhelming majority of states which recognize the efficient proximate cause doctrine and have addressed this issue have held that parties are free to contract out of the efficient proximate cause doctrine. The States which have found parties can contract out of the doctrine include: Alaska, Arizona, Colorado, Georgia, Illinois, Massachusetts, Missouri, Ohio, Utah, and Wyoming.

The North Dakota Supreme Court followed the California rule that insurance policies which exclude certain perils from coverage are inconsistent with the statutory policy surrounding the efficient proximate cause doctrine. The Court's decision is clearly contrary to the majority of states which have addressed the issue.

The problem with the application of the doctrine is that it may mean that exclusions to the coverage in an insurance contract may not be enforceable. Such a result is uncertain and overly broad, and makes it difficult for companies to underwrite insurance in this state. One possible result of such a ruling is that companies would refuse to write homeowners policies or commercial insurance policies in North Dakota because of their inability to enforce standard exclusions. You can fit the situation. A Do Pass vote means Courts have to interpret contract provisions based on what they say, not what they wish they would say.

introduce Bill

TESTIMONY ON SENATE BILL 2224

My name is Rob Hövland. I am currently serving as Chairman of the North Dakota Domestic Insurers, which is comprised of 10 insurance companies that have a home office in North Dakota. The domestic companies affected by this bill are Dakota Fire, Farmers Union, Nodak Mutual, Hartland Mutual, and my employer, Center Mutual. We are here to support this Bill.

The North Dakota property and casualty insurance business has sustained enormous losses over the past ten years. For example, in the homeowners line of insurance, from 1991-1995, the industry as a whole had a 151% loss ratio – meaning for every dollar in premium collected, $1.51 in losses and expenses was incurred. From 1995-2000, the loss ratio was approximately 175%. In 2001, the loss ratio is estimated to be 350%. As a result, several companies have quit writing insurance in our state, some companies have discontinued writing certain lines of insurance, and almost all companies have significantly tightened their underwriting guidelines. A "hard market" has resulted - not from the perspective of insurance companies, but from the consumers standpoint. Rates have increased dramatically, and in some areas, availability has become an issue. The North Dakota market is fragile, and the potential for a major fallout is significant.

To further exacerbate matters, in 2002, the North Dakota Supreme Court issued a ruling (Western National Mutual Insurance Company vs. UND) that will have a tremendous negative impact on North Dakota consumers, unless the legislature takes remedial action.

We are proposing legislation today, in conjunction with Senate Bill 2264, that addresses the problems created by this ruling.

A summary of the background facts of the case is necessary to understand the proposed

legislation. In 1997, a flood of Biblical proportions occurred in Grand Forks. All of Grand Forks east of I29 was ordered evacuated, including the UND campus. As a result of the flood, the lift stations serving UND were shut down, and as a natural consequence of shutting them down, water entered UND buildings through the sewer system and caused significant damage. UND had purchased sewer backup coverage for some buildings, but chose not to purchase it for the buildings that were the subject of the lawsuit.

The Western National Mutual policy provided coverage for "covered losses" but had an exclusion that provided,

> "Coverage is excluded for loss or damage caused directly or indirectly by flood regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

The case was submitted to a Grand Forks jury, which awarded a huge verdict. The North Dakota Supreme Court upheld the verdict, and wrote that a pair of statutes that originated around the year 1917 (N.D.C.C. 26.1-32-01 and 26.1 32-03) render exclusions like Western National's unenforceable. The Court ruled that these two statutes prohibit an insurance company from contracting out of the "Efficient Proximate Cause Doctrine," which effectively prohibits a company from excluding coverage when "concurrent causes" of loss occur.

Several State Supreme Courts have ruled on this issue, and North Dakota is the only one that has specifically prohibited an insurance company from contracting out of the Efficient Proximate Doctrine (arguably, Washington's Supeme Court has implied it would have reached a similar result).

The impact of this ruling cannot be overstated. The best policies, and the ones consumers

want most, are comprehensive policies where everything is covered unless it is specifically excluded. If exclusions are not enforceable, more policies will be written on a "named peril" basis, which is much less desireable to consumers. It is very likely that many perils will no longer be covered. For example, most companies offer sewer backup coverage but exclude coverage if a flood occurs. If the exclusion is unenforceable, companies will be forced to discontinue or limit sewer backup coverage.

Senate Bill 2224 contains two changes. The first change adds a sentence to 26.1-32-01 requiring separate, distinct, and totally unrelated causes to be present before the Efficient Proximate Cause Doctrine applies. The second change provided in 26.1-32-03 allows an insurance company to contract out of the Doctrine.

We urge a Do Pass vote on this Bill.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2002 ND 63

Western National Mutual Insurance Company, Plaintiff and Appellant
v.
University of North Dakota, Defendant and Appellee

No. 20010118

Appeal from the District Court of Grand Forks County, Northeast Central Judicial District, the Honorable M. Richard Geiger, Judge.
AFFIRMED.
Opinion of the Court by Sandstrom, Justice.
Ronald H. McLean (argued) and Timothy G. Richard (appeared), Serkland Law Firm, P.O. Box 6017, Fargo, N.D. 58108-6017, and James T. Martin (appeared), Gislason, Martin & Varpness, 7600 Parklawn Avenue South, Suite 444, Edina, MN 55435, for plaintiff and appellant.
Sara Gullickson McGrane, Special Assistant Attorney General, Felhaber Larson Fenlon Vogt, 225 South 6th Street, Suite 4200, Minneapolis, MN 55402-4302, for defendant and appellee.

Western Nat'l Mut. Ins. Co. v. University of North Dakota

No. 20010118

Sandstrom, Justice.

[¶1] Western National Mutual Insurance Company ("Western National") appeals from a declaratory judgment awarding the University of North Dakota ("UND") $3,358,533.18, plus prejudgment interest, and costs and attorney fees for property damage in twenty-two buildings on UND's campus in April 1997. We hold N.D.C.C. §§ 26.1-32-01 and 26.1-32-03 codify the efficient proximate cause doctrine for determining insurance coverage for property damage where an excluded peril and a covered peril contribute to the damage. We also conclude an insurer may not contractually exclude coverage when a covered peril is the efficient proximate cause of damage, even though an excluded peril may have contributed to the damage. We affirm.

I

[¶2] In the spring of 1997, Grand Forks experienced record flooding of the Red River, which resulted in the river breaching protective dikes on April 18 and overflowing into the city. On April 19, the city of Grand Forks east of Interstate 29 and the UND campus were ordered evacuated. The twenty-two buildings in which UND claimed it incurred covered property damage were serviced by two sanitary sewer lift stations, lift station 12 and lift station 6, which were maintained by the city of Grand Forks. On April 20, city officials shut down lift station 12 and lift station 6. After those lift stations were shut down, water entered the UND buildings through the sewer system, causing extensive property damage to boiler and machinery equipment in the buildings.

[¶3] In April 1997, UND had in force a Boiler and Machinery Policy issued by Western National, which provided coverage for "direct damage to Covered Property caused by a Covered Cause of Loss," but excluded coverage for "loss or damage caused directly or indirectly" by flood "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." UND claimed damage to boiler and machinery equipment in its buildings was caused by sewer backup, which was not specifically excluded from coverage under the Boiler and Machinery Policy. Western National denied coverage, claiming UND's property damage was excluded from coverage because it was caused "directly or indirectly" by flood "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

[¶4] Western National brought this declaratory judgment action against UND, seeking resolution of the coverage issue. On cross-motions for summary judgment, the trial court decided Western National's policy excluded coverage for property damage caused by flood, but provided coverage for property damage caused by sewer backup. The court said the parties' claims raised a causation dispute and concluded N.D.C.C. §§ 26.1-32-01 and 26.1-32-03 set out the "efficient proximate cause" doctrine for resolving cases involving concurrent causes of property damage where one cause is a covered peril and the other cause is an excluded peril. The court decided there were disputed issues of material fact about whether sewer backup or the flood was the efficient proximate cause of UND's property damage. In a bifurcated trial, a jury decided the flood was not the efficient proximate cause of UND's property damage. In the second phase of trial, the jury awarded UND over $3.3 million, plus prejudgment interest from July 8, 1998, for the property damage, but found Western National had not acted in bad faith. The trial court subsequently awarded UND costs and attorney fees and denied Western National's post-trial motions for judgment as a matter of law and for a new trial.

[¶5] The trial court had jurisdiction under N.D.Const. art. VI, § 8, and N.D.C.C. §§ 32-23-01 and 27-05-06. Western National's appeal is timely under N.D.R.App.P. 4(a). This Court has jurisdiction under N.D.Const. art. VI, §§ 2 and 6, and N.D.C.C. §§ 32-23-07 and 28-27-01.

II

[¶6] Western National argues its insurance policy with UND clearly and unambiguously excluded coverage for loss or damage caused "directly or indirectly" by flood "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Western National argues, as a matter of law, the April 1997 flood was the sole and direct cause of UND's property damage, because "the flood caused the City to shut down the sanitary sewer lift stations, which caused sewer backup, which caused the damage to UND's property." Western National argues the trial court erred in applying the efficient proximate cause doctrine rather than enforcing the concurrent cause language of the policy.

[¶7] The interpretation of an insurance policy is a question of law, which is fully reviewable on appeal. Center Mut. Ins. Co. v. Thompson, 2000 ND 192, ¶ 14, 618 N.W.2d 505. We review a trial court's interpretation of an insurance policy by independently examining and construing the policy. DeCoteau v. Nodak Mut. Ins. Co., 2000 ND 3, ¶ 19, 603 N.W.2d 906. In Ziegelmann v. TMG Life Ins. Co., 2000 ND 55, ¶ 6, 607 N.W.2d 898 (citations omitted), we outlined rules for construing an insurance policy:

> Our goal when interpreting insurance policies, as when construing other contracts, is to give effect to the mutual intention of the parties as it existed at the time of contracting. We look first to the language of the insurance contract, and if the policy language is clear on its face, there is no room for construction. "If coverage hinges on an undefined term, we apply the plain, ordinary meaning of the term in interpreting the contract." While we regard insurance policies as adhesion contracts and resolve ambiguities in favor of the insured, we will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage. We will not strain the definition of an undefined term to provide coverage for the insured. We construe insurance contracts as a whole to give meaning and effect to each clause, if possible. The whole of a contract is to be taken together to give effect to every part, and each clause is to help interpret the others.

Exclusions from coverage in an insurance policy must be clear and explicit, and are strictly construed against the insurer. Fisher v. American Family Mut. Ins. Co., 1998 ND 109, ¶ 6, 579 N.W.2d 602.

[¶8] Western National's policy with UND required Western National to pay for "direct damage to Covered Property caused by a Covered Cause of Loss," and defined "Covered Cause of Loss" as "an 'accident' to an 'object' shown in the Declarations." The policy defined "object" as boiler and machinery equipment in identified buildings on UND's campus and "accident" as "a sudden and accidental breakdown of the 'object' or part of the 'object' . . . [which] manifest[s] itself by physical damage to the 'object' that necessitates repair or replacement." The policy excluded coverage for "loss or damage caused directly or indirectly by . . . . [flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not] regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

[¶9] Western National's policy did not explicitly define flood and did not explicitly exclude coverage for sewer backup. Although Western National's policy with UND was not an all-risk policy, Western National does not dispute the policy provided coverage for sewer backup. Rather, Western National relies on the language excluding coverage for property damage caused "directly or indirectly" by flood "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

[¶10] The plain, ordinary meaning of "flood" is "an overflowing of water on an area normally dry." Webster's New World Dictionary 535 (2nd Coll. Ed. 1980). See Black's Law Dictionary 1640 (6th ed. 1990) (defining flood as inundation of water over land not usually covered by it); 5 Appleman, Insurance Law and Practice § 3145, at pp. 462-63 (1970) (defining flood waters as waters above the highest line of the ordinary flow of a stream). Other courts have defined flood in accordance with that plain, ordinary meaning, and recognized flood water has a terranean nature for water overflowing its natural banks as opposed to water below the surface. State Farm Lloyds v. Marchetti, 962 S.W.2d 58, 61 (Tex. Civ. 1997). See also Kane v. Royal Ins. Co., 768 P.2d 678, 680-84 (Colo. 1989) (discussing ordinary meaning of flood); State Farm Fire & Cas. Co. v. Paulson, 756 P.2d 764, 769-71 (Wyo. 1998) (discussing insurance cases defining flood). Insurance law generally recognizes sewer backup as a peril that is separate and distinct from flood or surface water. See Front Row Theatre v. American Mfrs. Mut., 18 F.3d 1343, 1346-47 (6th Cir. 1994); Old Dominion Ins. Co. v. Elysee, Inc., 601 So.2d 1243, 1244 (Fla. Dist. Ct. App. 1992); Pakmark Corp. v. Liberty Mut. Ins. Co., 943 S.W.2d 256, 261 (Mo. Ct. App. 1997); Marchetti, at 60-61. Sewage is ordinarily defined as waste matter carried off by sewers or drains, and sewer means a pipe or drain, usually underground, used to carry off water and waste matter. Webster's New World Dictionary 1305 (2nd Coll. Ed. 1980).

[¶11] Here, Western National agrees "it is undisputed that the water

that entered many of the basements of UND's buildings backed up through the sanitary sewer system, [but] it also cannot be disputed that this water entered the sanitary sewage system directly because of the flooding of the Red River and English Coulee." Western National argues whether the water that caused UND's property damage was technically sewer backup rather than flood water was irrelevant, because the flood was the sole and direct cause of the damage. Contrary to Western National's argument, for purposes of determining excluded and covered perils, the manner in which the water entered UND's property is relevant because Western National's policy with UND excluded coverage for flood water but provided coverage for sewer backup. Although the 1997 flood may have been part of the chain of causation that contributed to UND's property damage, there was evidence the water that damaged UND's property backed up through the sewer system and contained sewage particulate. There was evidence no overland flooding entered any of the twenty-two buildings in which UND claimed property damage. UND's expert, Thomas Hanson, indicated UND's property damage was caused by the flow of sewage. There was also evidence sewer backup could have occurred separately and independently of the flood and could have caused damage without the flood. Although the magnitude of water and circumstances of this case suggest the flood may have been part of the chain of causation for UND's property damage, the evidence does not, as a matter of law, require a conclusion the flood was the sole or direct cause of UND's property damage. We agree with the trial court there was a causation dispute about whether the flood, an excluded peril, or sewer backup, a covered peril, caused UND's property damage for purposes of determining coverage.

[¶12] Western National nevertheless argues the "concurrent cause" language of its policy with UND clearly and unambiguously excludes coverage for property damage caused directly or indirectly by flood regardless of any other cause or event that contributes concurrently or in any sequence to the loss. Our analysis of this argument requires an examination of the effect of the efficient proximate cause doctrine and N.D.C.C. §§ 26.1-32-01 and 26.1-32-03 on that policy language.

[¶13] Section 26.1-32-01, N.D.C.C., provides: An insurer is liable for a loss proximately caused by a peril insured against even though a peril not contemplated by the insurance contract may have been a remote cause of the loss. An insurer is not liable for a loss of which the peril insured against was only a remote cause. Section 26.1-32-03, N.D.C.C., provides: When a peril is excepted specially in an insurance contract, a loss which would not have occurred but for that peril is excepted although the immediate cause of the loss was a peril which was not excepted. The source notes for N.D.C.C. §§ 26.1-32-01 and 26.1-32-03 indicate those statutes were derived from N.D.C.C. §§ 26-06-01 and 26-06-03, which in turn indicate a derivation from Cal. Civ. C. §§ 2626 and 2628. Because many of

our statutes share a common derivation from California, we have often said California decisions construing statutes similar to our statutes "'are entitled to respectful consideration, and may be "persuasive and should not be ignored."'" Werlinger v. Mutual Serv. Cas. Ins. Co., 496 N.W.2d 26, 30 (N.D. 1993) (quoting Glatt v. Bank of Kirkwood Plaza, 383 N.W.2d 473, 476-77 n.4 (N.D. 1986)).

[¶14] In Sabella v. Wisler, 377 P.2d 889, 895 (Cal. 1963), the California Supreme Court applied the efficient proximate cause doctrine to determine whether property damage was excluded from coverage where the damage was the result of a concurrence of an excluded peril, earth settling, and a covered peril, a ruptured sewer line. The court said "'the efficient cause--the one that sets others in motion--is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.'" Id. (quoting 6 Couch, Insurance § 1466 (1930)). The court rejected the insurer's arguments the insureds' damages would not have occurred "but for" the excluded peril and the insureds' damages were excluded from coverage under Section 532 of California's Insurance Code, the statutory provision from which N.D.C.C. § 26.1-32-03 is derived. Sabella, at 896-97. The court said:

> But section 532 must be read in conjunction with related section 530 of the Insurance Code and section 530 provides that "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause." It is thus apparent that if section 532 were construed in the manner contended for by defendant insurer, where an excepted peril operated to any extent in the chain of causation so that the resulting harm would not have occurred "but for" the excepted peril's operation, the insurer would be exempt even though an insured peril was the proximate cause of the loss. Such a result would be directly contrary to the provision in section 530, in accordance with the general rule, for liability of the insurer where the peril insured against proximately results in the loss.
>
> It would appear therefore that the specially excepted peril alluded to in section 532 as that "but for" which the loss would not have occurred, is the peril proximately causing the loss, and the peril there referred to as the "immediate cause of the loss" is that which is immediate in time to the occurrence of the damage. The latter conclusion as to the meaning of Section 532 of the Insurance Code suggests disapproval of language to the contrary in [prior caselaw] wherein the "but for" provision of section 532 was

> Interpreted to refer to a cause without which the loss would not in fact have occurred, and without reference to companion section 530 of the Insurance Code.

Sabella, at 896-97 (citations omitted).

[¶15] In Garvey v. State Farm Fire and Cas. Co., 770 P.2d 704, 706-07 (Cal. 1989), the California Supreme Court considered an issue about multiple causation in a case where an excluded peril, earth movement, and a covered peril, negligent construction, contributed to an insured's property damage. The court concluded coverage for a first party claim should be determined under an efficient proximate cause analysis, and under the facts of that case, the determination of efficient proximate cause was a factual issue for the trier of fact:

> If the earth movement was the efficient proximate cause of the loss, then coverage would be denied under Sabella. On the other hand, if negligence was the efficient proximate cause of the loss, then coverage exists under Sabella. These issues were jury questions because sufficient evidence was introduced to support both possibilities.

Garvey, 770 P.2d at 715 (citations omitted).

[¶16] In Howell v. State Farm Fire and Cas. Co., 267 Cal. Rptr. 708, 711 (1990), the California Court of Appeals held a property insurer may not contractually exclude coverage when a covered peril is the efficient proximate cause of a loss even though an excluded peril contributed directly, indirectly, concurrently, or in any sequence to the loss. The court said Sabella and Insurance Code §§ 530 and 532 imposed liability on a property insurer whenever a covered peril was the efficient proximate cause of the loss, regardless of other contributing causes. Howell, at 711. The court said:

> if we were to give full effect to the exclusion clauses contained in [the insurer's] policies "the insurer would be exempt even though an insured peril was the proximate cause of the loss. Such a result would be directly contrary to the provision in section 530, in accordance with the general rule, for liability of the insurer where the peril insured against proximately resulted in the loss. . . ." In short, the exclusion clauses are contrary to section 530, which provides that an insurer "is liable for a loss" proximately caused by a covered peril. Consequently, the exclusion clauses are not enforceable to the extent they purport to limit the insurer's liability beyond what is permitted by California law.

Howell, at 712-13 (citations omitted).

[¶17] The efficient proximate cause doctrine is generally recognized as the universal method for resolving coverage issues involving the concurrence of covered and excluded perils. See Mark D. Wuerfel and Mark Kopp, "Efficient Proximate Causation" in the Context of Property Insurance Claims, 65 Defense Counsel Journal 400 (1998). Although the efficient proximate cause doctrine fairly describes the analysis for property damage involving the concurrence of covered and excluded perils in the majority of American jurisdictions, recent changes in standard policy forms exclude certain perils from coverage if they are a cause of loss, regardless of any other perils acting "concurrently or any sequence with" them. Id. at 407. Under that language, some courts have held the parties are free to contract out of the efficient proximate cause doctrine. See TNT Speed & Sport Ctr. Inc. v. American States Ins. Co., 114 F.3d 731, 733 (8th Cir. 1997); Front Row Theatre, 18 F.3d at 1347; Preferred Mut. Ins. Co. v. Travelers Cos., 955 F. Supp. 9, 11-13 (D. Mass. 1997); State Farm Fire and Cas. Co. v. Bongen, 925 P.2d 1042, 1044-45 (Alaska 1996); Millar v. State Farm Fire and Cas. Co., 804 P.2d 822, 826 (Ariz. App. 1990); Kane, 768 P.2d at 684-86; Ramirez v. American Family Mut. Ins. Co., 652 N.E.2d 511, 515-16 (Ind. App. 1995); Pakmark, 943 S.W.2d at 260-61; Kula v. State Farm Fire and Cas. Co., 628 N.Y.S.2d 988, 991 (N.Y. App. Div. 1995); Alf v. State Farm Fire and Cas. Co., 850 P.2d 1272, 1275-78 (Utah 1993); Paulson, 756 P.2d at 772.

[¶18] In Bongen, 925 P.2d at 1044 n.3, however, the Alaska Supreme Court recognized insurers of property in California are statutorily required to provide coverage if the efficient proximate cause of a loss is an insured risk, but Alaska had no equivalent statutes that required application of the doctrine. See also Kula, 628 N.Y.S.2d at 991 (California has statutorily adopted the efficient proximate cause doctrine, but New York has not); Alf, 850 P.2d at 1277 (some states have judicially or statutorily adopted efficient proximate cause doctrine); Safeco Ins. Co. v. Hirschmann, 773 P.2d 413, 419-20 (Wash. 1989) (Callow, C.J., dissenting) (California law based on specific regulatory statutes).

[¶19] Under California law, a property insurer may not contract out of the efficient proximate cause doctrine, and we reject Western National's assertion California's interpretation of its statutes was based on the reasonable expectation doctrine, an interpretative tool in the construction of insurance contracts that this Court has not adopted. See Thompson, 2000 ND 192, ¶¶ 11-12, 618 N.W.2d 505. Although Garvey, 770 P.2d at 708, 711, mentioned the reasonable expectation doctrine, we are not persuaded the reasonable expectation doctrine provided the legal basis for the Sabella court's interpretation of the California statutes, or for the Howell court's conclusion that concurrent cause provisions were not enforceable to the extent those exclusionary provisions purported to limit an

insurer's liability in a manner contrary to California law.

[¶20] In construing insurance policies, we have interpreted policies in light of relevant statutory provisions. See Nodak Mut. Ins. Co. v. Heim, 1997 ND 36, ¶ 21, 559 N.W.2d 846; Milbank Mut. Ins. Co. v. Dairyland Ins. Co., 373 N.W.2d 888, 891 (N.D. 1985); Richard v. Fliflet, 370 N.W.2d 528, 533 (N.D. 1985); Hughes v. State Farm Mut. Auto. Ins. Co., 236 N.W.2d 870, 883 (N.D. 1975); Bach v. North Dakota Mut. Fire Ins. Co., 56 N.D. 319, 326-27, 217 N.W. 273, 275-76 (1928). We also construe exclusions from coverage strictly against the insurer. Fisher, 1998 ND 109, ¶ 6, 579 N.W.2d 602. California's interpretation of statutory provisions similar to N.D.C.C. §§ 26.1-32-01 and 26.1-32-03 provides persuasive authority for construing and harmonizing our statutes. We conclude North Dakota has statutorily adopted the efficient proximate cause doctrine, and a property insurer may not contractually preclude coverage when the efficient proximate cause of a loss is a covered peril.

[¶21] Western National's reliance on Northstar Steel, Inc. v. Aetna Ins. Co., 224 N.W.2d 805 (N.D. 1974), Strausbaugh v. Heritage Mut. Ins. Co., 1999 WL 33283346 (D. N.D. 1999), and Executive Corners Office Bldg. v. Maryland Ins. Co., 1999 WL 33283330 (D. N.D. 1999), aff'd without pub. opin., 221 F.3d 1342 (8th Cir. 2000), is misplaced. Those cases all involved different exclusions, and no issues were raised in those cases about the efficient proximate cause doctrine or the application of N.D.C.C. §§ 26.1-32-01 and 26.1-32-03.

[¶22] In Northstar, 224 N.W.2d at 806-07, a policy excluded coverage for damage caused by rain, and the insured incurred property damage when rain accumulated within the walls of an uncovered concrete foundation at a construction site, pushing the foundation walls out and raising a cistern tank. This Court relied in part on the ordinary meaning of "rain" as water that has fallen as rain and affirmed the trial court's denial of coverage. Id. at 807-08. Northstar and cases cited therein affirmed trial court findings of fact, or a jury verdict, about causation, and no issue was raised about the "efficient proximate cause" doctrine, or the application of N.D.C.C. §§ 26.1-32-01 and 26.1-32-03.

[¶23] In Executive Corners, the insureds, Grand Forks business owners during the 1997 flood, suffered property damage from overland water that entered their premises and from sewer backup that accompanied the flood. The insureds claimed their policies afforded coverage for damage caused by the sewer backup that occurred prior to the damage caused by the overland water. The federal district court for North Dakota granted the insurer summary judgment, concluding concurrent cause language similar to this case unambiguously excluded coverage where damage was caused

directly or indirectly by an excluded peril, flood water, even though the damage was also partially caused by a covered peril, sewer backup.

[¶24] In Strausbaugh, the insureds, Grand Forks residents, claimed property damage to their house during the 1997 flood. The insurer denied coverage under similar concurrent cause language that also excluded coverage for damages caused by sewer or drain backup and by seepage. The insureds argued the flood exclusion was not applicable because no overland flood water reached their house. The insureds claimed water damage in their basement was a result of seepage that their sump pump could not remove because the electricity had been turned off, and they sought coverage under language providing coverage for any damage caused by an accidental discharge or overflow in the plumbing system. The court decided coverage was unambiguously excluded under concurrent cause language, concluding a reasonable jury would be forced to conclude the insureds' damages were directly or indirectly caused by the flood. The court also said, assuming the insureds' sump pump was part of their plumbing system, the insureds admitted the water in their basement was the result of seepage, which was specifically excluded from coverage.

[¶25] Both Executive Corners and Strausbaugh are distinguishable because they involve different factual circumstances and different exclusions from coverage. More important, however, neither case addressed the efficient proximate cause doctrine and the application of N.D.C.C. §§ 26.1-32-01 and 26.1-32-03.

[¶26] We conclude the trial court did not err in construing Western National's insurance policy with UND to incorporate N.D.C.C. §§ 26.1-32-01 and 26.1-32-03 and the efficient proximate cause doctrine and in concluding the concurrent cause language was not enforceable to the extent it purported to exclude coverage in a manner contrary to those statutes.

[¶27] Western National argues, assuming the efficient proximate cause doctrine applies to this case, the evidence establishes the flood was the efficient proximate cause of UND's property damage.

[¶28] During the first phase of trial, the jury found the 1997 flood was not the efficient proximate cause of UND's property damage. The court instructed the jury:

> The efficient proximate cause is a peril or risk that sets other causes in motion. It is not necessarily the last act in a chain of events, nor necessarily is it the triggering cause. To determine the efficient proximate cause you must look to the quality of the links and the chain of causation.
>
> The efficient proximate cause is considered the

> **predominating cause of the loss. By definition there can only be one efficient proximate cause; i.e., predominant cause of the loss.**
>
> **It is for you the jury to find whether by a greater weight of the evidence flooding of the Red River and its tributaries constituted the efficient proximate cause of the loss claimed by the University under its insurance policy with Western National.**

[¶29] Under that instruction, Western National argues it was unreasonable to conclude anything other than the 1997 flood was the efficient proximate cause of UND's property damage. Western National argues it was beyond argument the flood was the triggering event of UND's damages and set all subsequent events in motion. Western National argues it was entitled to judgment as a matter of law under N.D.R.Civ.P. 50, or to a new trial under N.D.R.Civ.P. 59.

[¶30] A trial court's decision on a motion for judgment as a matter of law under N.D.R.Civ.P. 50 is based upon whether the evidence, when viewed in the light most favorable to the party against whom the motion is made, leads to but one conclusion as to the verdict about which there can be no reasonable difference of opinion. Symington v. Mayo, 1999 ND 48, ¶ 4, 590 N.W.2d 450. In considering a motion for judgment as a matter of law, a trial court must apply a rigorous standard with a view toward preserving a jury verdict. Id. In determining whether the evidence is sufficient to create an issue of fact, the court must view the evidence in the light most favorable to the non-moving party, and must accept the truth of the evidence presented by the non-moving party and the truth of all reasonable inferences from that evidence which supports the verdict. Victory Park Apartment, Inc. v. Axelson, 367 N.W.2d 155, 166 (N.D. 1985). The trial court's decision on a motion for judgment as a matter of law is fully reviewable on appeal. Knoff v. American Crystal Sugar Co., 380 N.W.2d 313, 318 (N.D. 1986).

[¶31] We review a trial court's denial of a N.D.R.Civ.P. 59 motion for new trial under the abuse-of-discretion standard. Ali by Ali v. Dakota Clinic, Ltd., 1998 ND 145, ¶ 5, 582 N.W.2d 653. A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law. Schneider v. Schaaf, 1999 ND 235, ¶ 12, 603 N.W.2d 869.

[¶32] The determination of efficient proximate cause is generally a factual question for the trier of fact. Garvey, 770 P.2d at 14-15. See 65 Defense Counsel Journal, at 402. The trial court instructed the jury the efficient proximate cause "is not necessarily the last act in the chain of events, nor necessarily is it the triggering cause," and

the efficient proximate cause "look[s] to the quality of the links and the chain of causation" and "is considered the predominating cause of the loss."

[¶33] Here, there was evidence indicating the water that entered the twenty-two buildings at issue in this case contained sewage particulate and came through the sanitary sewer system. There was evidence the twenty-two buildings that received property damage in this case incurred no overland flooding. There was evidence sewer backup could have occurred separately and independently of the flood and could have caused damage without the flood. The evidence reflects the flood and sewer backup were both part of the chain of causation for UND's property damage. The magnitude of water involved in the backup indicates the flood may have been part of the chain of causation in this case, but does not, as a matter of law, require a conclusion the flood was the efficient proximate cause of UND's damage. There was evidence supporting the jury's determination the flood was not the efficient proximate cause of UND's property damage. Under the circumstances of this case, we conclude Western National was not entitled to judgment as a matter of law on UND's claim for coverage, and the trial court did not abuse its discretion in denying Western National's motion for a new trial on this issue.

III

[¶34] Western National argues the trial court erred in denying its motion for new trial based on UND's counsel's reference to reinsurance, the trial court's refusal to exclude UND's expert opinion testimony that Western claims was not disclosed during discovery, and the trial court's refusal to instruct the jury on proximate cause.

A

[¶35] Western National argues UND's counsel's reference to reinsurance requires a new trial. During the second phase of the jury trial, UND's counsel asked a Western National representative, Aaron Toltzman, a question about reinsurance. The trial court sustained Western National's objection to the question and admonished the jury not to consider any references to reinsurance.

[¶36] In denying Western National's motion for a new trial based on UND's counsel's reference to reinsurance, the trial court stated:

> The first ground claims that there was misconduct by the prevailing party by injecting the matter of reinsurance. In turn, Western National claims this created prejudice towards it, warranting a new trial. In support of this claim Western National cites Ceartin v. Ochs, 516 N.W.2d 651 (N.D. 1994). This cited action involves a personal injury

> claim. In the Ochs trial, references to liability insurance coverage came into evidence in violation of N.D.R.Ev. 411. The circumstances of this case are quite different. In this case the entire jury panel as well as the impaneled jury was completely aware that this action involved an insurance company and dealt with the issue of insurance coverage. The description of the case contained in the opening instructions also explained that this entire case dealt with whether there was insurance coverage for the damages claimed by the defendant. By necessity and circumstances, references to insurance were made out in the open and before the jury from the beginning of the case. The brief reference made by University's counsel to reinsurance was contained in a question. This question was objected to and the objection was sustained. A cautionary instruction was provided to the jury by the court.
>
> Considering the open role that insurance coverage had in this trial, the limited reference to reinsurance and the cautionary instruction given by this court to the jury, I conclude that the brief reference to reinsurance in front of the jury did not constitute misconduct and did not cause prejudice or harm to Western National that would warrant the granting of a new trial.

[¶37] Not all references to insurance require a new trial. See Smith v. Anderson, 451 N.W.2d 108 (N.D. 1990). Here, the trial court carefully explained the reference to reinsurance did not warrant a new trial, because of the role of insurance in the trial and the court's cautionary instruction. The court's decision reflects a rational mental process leading to a reasoned decision, and under the circumstances of this case, we conclude the court did not abuse its discretion in denying Western National's motion for a new trial on this issue.

B

[¶38] Western National argues, during discovery, UND failed to disclose Thomas Hanson's expert opinion that if the lift stations had not been shut down, there would have been no sewer backup. Western National now argues the trial court erred in allowing Hanson to testify at trial regarding that opinion and abused its discretion in not granting a new trial on this issue.

[¶39] In denying Western National's motion for a new trial on this issue, the trial court concluded:

> Western National claims that this court improperly allowed opinion testimony by witness Thomas Hanson relating to the effect of the shutdown of the sewer stations and water infiltration. On direct examination, this question

> was posed by the University. Essentially the question was (and the court is paraphrasing) "If the lift stations had not been shut down, would there have been sewer backup?" Western National objected. The grounds for the objection was simply "lack of foundation". No specification for Western National's objection beyond that was made. There certainly was no reference that the objection was grounded in failure to disclose this opinion at a prior time. Having considered the earlier testimony of this witness, including his expertise and his experience in the Grand Forks city sanitary sewer system and his involvement in the operations of that system during the flooding of the city of Grand Forks, I was satisfied that a sufficient evidentiary foundation existed to allow him to answer the question. The objection on the grounds of insufficient foundation is a general objection, and not a specific one. Gateway Bank v. Department of Banking, 219 N.W.2d 211 (Neb. 1974). An objection to the admission of evidence must be specific enough to alert the trial court to legal questions or problems raised and enable the opposing counsel to take any possible corrective action to remedy the defect. In the Interest of S.J.M., 539 N.W.2d 496 (Iowa App. 1995). A general objection as to foundation to a question requesting an opinion of a witness is not adequately specific to alert the trial court to rule on whether a prior opinion has been disclosed. See Bernadt v. Suburban Air, Inc., 378 N.W.2d 852 (Neb. 1985); See also Daniels v. Bloomquist, 138 N.W.2d 868 (Iowa 1965); Thompson v. Bohlken, 312 N.W.2d 501 (Iowa 1981). If it was Western National's intention in its objection to alert this court to the failure of the University to provide a prior disclosure of an opinion, it did not adequately do so by the general objection of "lack of foundation". Consequently, the University was entitled to receive an answer to this question.
>
> Under these circumstances this court is not satisfied that these grounds as represented by Western National are sufficient to constitute a basis for granting a new trial.

[¶40] Under N.D.R.Ev. 103(a), an objection to the introduction of evidence must state the specific ground of objection, if the specific ground is not apparent from the context. See State v. Helgeson, 303 N.W.2d 342, 346 (N.D. 1981). We agree with the trial court that Western National's general objection to a lack of foundation did not specifically raise the issue about the disclosure of Hanson's opinion. Moreover, UND disclosed Hanson as an expert who would "testify as to the sewer system and sewer backup." In his deposition, Hanson testified that once the lift stations were shut down, backup of sanitary sewage was certain to occur. We conclude Western National had adequate notice of Hanson's opinion, and the trial court did not abuse its discretion in denying Western National's

motion for a new trial on this issue.

C

[¶41] Western National argues the trial court erred in refusing to instruct the jury on proximate cause.

[¶42] Jury instructions must fairly and adequately inform the jury of the law. Huber v. Oliver Cty., 1999 ND 220, ¶ 10, 602 N.W.2d 710. A trial court is not required to instruct the jury in the exact language sought by a party if the court's instructions adequately and correctly inform the jury of the applicable law. Id.

[¶43] The trial court instructed the jury on efficient proximate cause, and Western National has not cited any authority requiring an additional instruction on proximate cause. The court's instruction on efficient proximate cause fairly and adequately informed the jury of the law, and we believe any further instructions on proximate cause in the first phase of the trial would have been surplusage. We conclude the trial court did not abuse its discretion in refusing to grant a new trial on this issue.

IV

[¶44] Western National argues, as a matter of law, UND was not entitled to recover prejudgment interest under N.D.C.C. § 32-02-04. The jury awarded UND pre-judgment interest from July 8, 1998. Western National argues UND was not entitled to prejudgment interest, because UND had not determined the amount of its loss at that time and did not do so until trial.

[¶45] Under N.D.C C. § 32-03-04, a party is entitled to interest on damages for a breach of contract if the damages are certain, or capable of being made certain, by calculation on a specific day. In Metcalf v. Security Int'l Ins. Co., 261 N.W.2d 795, 802-03 (N.D. 1977), this Court said if a claim for breach of contract is uncertain, unliquidated, and disputed, prejudgment interest should not be awarded; however, the fact the sum owed is disputed does not, by itself, render the claim uncertain or unliquidated so as to preclude interest under N.D.C.C. § 32-03-04. In Metcalf, at 803, this Court awarded interest to the claimant, concluding an amount owed was "certain" under N.D.C.C. § 32-03-04, because it was ascertainable by calculation under the proper construction of the contract.

[¶46] In Dolajak v. State Auto. & Cas. Underwriters, 276 N.W.2d 373, 383 (N.D. 1979), an insurer gave several reasons for denying a claim, including that the insured did not have an insurable interest in the property. Later, the insurer asserted it did not know the amount of the claim or its validity because the insured had demanded the full amount of coverage. Id. This Court affirmed an

award of prejudgment interest, concluding "[g]iven those reasons for [the insurer's] denial of the claim, it is apparent that [the insurer] would have denied the claim even if [the insured] had submitted written proof of loss indicating his interest in the [property] that was insured under the policy." Id.

[¶47] Here, Western National denied coverage on the ground UND's property damage was excluded from coverage under the flood exclusion. Because Western National claimed coverage was excluded under the flood exclusion, it is apparent Western National would have denied UND's claim regardless of when UND determined the exact amount of its loss. We conclude UND's claim was certain under Metcalf and N.D.C.C. § 32-03-04 because it was ascertainable by calculation under the proper construction of the policy, and UND was entitled to prejudgment interest under the rationale of Dolajak.

V

[¶48] Western National argues the trial court erred in awarding UND attorney fees. Western National argues its policy requires it to pay attorney fees only for suits it is called to defend, i.e., third-party actions. Western National argues it was not called upon to defend a "suit," rather it began a declaratory judgment action to determine the rights and liabilities of the parties.

[¶49] Absent statutory or contractual authority, the American Rule generally assumes each party to a lawsuit bears its own attorney fees. Ehrman v. Feist, 1997 ND 180, ¶ 18, 568 N.W.2d 747. This Court has allowed an insured to recover attorney fees in litigation to resolve insurance coverage disputes. See Johnson v. Center Mut. Ins. Co., 529 N.W.2d 568, 571-72 (N.D. 1995); State Farm Fire and Cas. Co. v. Sigman, 508 N.W.2d 323, 325-27 (N.D. 1993).

[¶50] In Sigman, 508 N.W.2d at 324, an insurer brought a declaratory judgment action against its insured for a determination of coverage. A majority of this Court construed language in the insurance policy requiring the insurer to pay reasonable expenses the insured incurred at the insurer's request as obligating the insurer to pay the insured's attorney fees incurred in the insured's declaratory judgment action. Id. at 325. This Court also said the award of attorney fees was proper under N.D.C.C. § 32-23-08, which provides "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." Sigman, at 327. This Court said:

> "Litigation between an insurance company and its insured to determine coverage presents a unique situation. The insured pays premiums to receive protection, not a lawsuit from its insurer. When the insured gets that policy protection only by court order after litigating coverage, it

> is both 'necessary' and 'proper' to award attorney fees and costs to give the insured the full benefit of his insurance contract. . . . If an insured is not awarded attorney fees as supplemental relief, he is effectively denied the benefit he bargained for in the insurance policy."

Sigman, at 326-27.

[¶51] We have declined to apply Sigman when there is no coverage under an insurance policy. See Hanneman v. Continental West. Ins. Co., 1998 ND 46, ¶ 47, 575 N.W.2d 445; State Farm Mut. Auto. Ins. Co. v. Estate of Gabel, 539 N.W.2d 290, 294 (N.D. 1995). The Legislature has not amended N.D.C.C. § 32-23-08 since this Court's 1993 decision in Sigman, and the Legislature's acquiescence and failure to amend the statute is evidence the Sigman interpretation of that statute is in accordance with legislative intent. See Clarys v. Ford Motor Co., 1999 ND 72, ¶ 16, 592 N.W.2d 573; Krehlik v. Moore, 542 N.W.2d 443, 446 (N.D. 1996).

[¶52] Here, the proceedings in the trial court established Western National's policy provided coverage for UND's property damage. We conclude the court's award of attorney fees was appropriate under N.D.C.C. § 32-23-08 and Sigman. Western National has not challenged the amount of attorney fees awarded to UND, and we therefore affirm the award of attorney fees.

VI

[¶53] We affirm the judgment.

[¶54]

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March 4, 2003

Hon. George Keiser
Chairman
House Industry, Business and Labor Committee
State Capitol Building
Bismarck, North Dakota 58506

Re: SB 2224

Dear Chairman Keiser and Committee Members:

Thank you for the opportunity to testify before your committee on SB 2224. I deeply appreciate the opportunity to do so.

We recommend a "Do Not Pass" on SB 2224. The doctrine of "efficient proximate cause" was codified by the North Dakota legislature. This doctrine is applied by the courts when the trier of fact has to decide what the predominate proximate cause of the loss was. While not all states put efficient proximate cause into their statutes, efficient proximate cause is the universal method for resolving coverage issues which involve a covered peril and a noncovered peril. Virtually every state applies the efficient proximate cause doctrine to coverage disputes. North Dakota's law tracks closely with California's efficient proximate cause statute. States which have not codified the efficient proximate cause doctrine have prohibited "contracting out" of efficient proximate cause.

This bill, if it became law, would allow insurers to deny coverage in almost any situation since they could point to an exclusion and argue that the exclusion was the efficient proximate cause of the loss. As a result, policyholders who thought they had coverage for certain losses really don't, since one of the other exclusions could always be used as a basis for denying coverage. Consumers are left holding the bag and paying for a policy that really doesn't do what it's supposed to do - protect them in the event of a loss.

SB2224 allows an insurance company to "contract out" of the efficient cause doctrine. I suspect that most of us would have no idea what we're signing away if we bought a policy with that exclusion. We'd find out only after a loss whose origin was not easily definable, and our discovery would be that we're not covered for the loss.

Sincerely,

David R. Bliss

Email: dbliss@olsoncichy.com
cc: Committee members
DRB
C:\My Documents\Agnew 777-02\BlissLetterHead.wpd

SB 2224
Testimony of Paula J. Grosinger
Lobbyist 193 for the North Dakota Trial Lawyers Association
Presented to House IBL Committee, the Honorable George Keiser Chairman
March 4, 2003

I. SB 2224 arose because Western National Insurance refused to pay claims for damage resulting from sewer backup at the University of North Dakota in 1997.
   A. The case went to Court and was decided in favor of UND by a jury.
   B. Western National appealed, but did not like the decision rendered by the North Dakota Supreme Court

II. SB 2224 completely reverses current North Dakota law and allows further limits to insurance coverage.
   A. In rendering its decision, the North Dakota Supreme Court extensively researched the principle of efficient proximate cause. North Dakota codifies this in N.D.C.C. 26.1-32-01 and 26.1-32-03 which determine coverage where an excluded peril and a covered peril contribute to damage.
   B. The Court noted that Courts in states with statutory provisions similar to North Dakota's universally apply the efficient proximate cause analysis to determine coverage.
   C. Even States without similar statutory language have prohibited "Contracting Out" of efficient proximate cause.

III. SB 2224 is unnecessary because Insurance Companies can specify what they will exclude from coverage in the contract/policy.
   A. It is recognized that broad general exclusions and vague language should not be construed in favor of the Insurer because this would render most coverage illusory. Insureds would rarely, if ever, be able to collect.
   B. Courts around the country have recognized that it is the insurer's obligation to specify exclusions to coverage. They have also found that terms like "flood" and "surface water" are vague.
   C. Insurance policies are adhesion contracts. Any ambiguity or reasonable doubt as to the coverage or exclusions in the policy is to be strictly construed against the insurer and in favor of the insured.
   D. SB 2224 would allow insurance companies to exclude coverage for even remotely connected events.
   E. The Supreme Court has stated that "Coverage cannot be defeated simply because a separate excluded risk constitutes an additional cause of injury.

TESTIMONY SB 2224

A survey of the United States indicates approximately thirty states have judicially adopted the efficient proximate cause doctrine. See 65 Defense Counsel Journal 400, "Efficient Proximate Causation" in the Context of Property Insurance Claims (1998). Only California and North Dakota have adopted the efficient proximate cause doctrine in statute. See CA.Ins. § 530; N.D.C.C. §26.1-32-01; see also Western National Mut. Ins. Co. v. University of North Dakota, 2002 ND 63, ¶ 18, 643 N.W.2d 4 (noting California has statutorily adopted the doctrine, but most states have not). Attached with this testimony is an excerpt of the 1998 article indicating the various states which have adopted the efficient proximate cause doctrine. The article explains that the overwhelming majority of states, which have addressed the issue of whether parties can contract out of the efficient proximate cause, have held that the language of the policy controls and parties are free to contract out of the doctrine.

and effect by turns. [FN20]

REVIEW OF THE STATES

A review of the principle of efficient proximate causation of property loss in the law of the United States confirms that it fairly describes the mode of analysis of loss in about three-fifths of American jurisdictions.

A. Following Efficient Proximate Causation Rule
Arizona: Koory v. Western Casualty and Surety Co., 737 P.2d 388 (Ariz. 1987).
Arkansas: Southall v. Farm Bureau Mutual Insurance Co., 632 S.W.2d 420 (Ark. 1982); Farmers Union Mutual Insurance Co., 328 S.W.2d 360 (Ark. 1959).
Colorado: Koncilja v. Trinity Universal Insurance. Co., 528 P.2d 939 (Colo.App. 1974).
Connecticut: Frontis v. Milwaukee Insurance. Co., 242 A.2d 749 (Conn. 1968).
Delaware: Cavalier Group v. Strescon Industries, 782 F.Supp. 946 (D. Del. 1992).
District of Columbia: Quadrangle Development Corp. v. Hartford Insurance Co., 645 A.2d 1074 (D.C.App. 1994); Unkelsbee v. Homestead Fire Insurance Co., 41 A.2d 168 (D.C.App. 1945).
Georgia: Stephens v. Cotton States Mutual Insurance Co., 121 S.E.2d 838 (Ga.App. 1961); Travelers Indemnity Co. v. Wilkes County, 116 S.E.2d 314 (Ga.App. 1960)
*406 Idaho: Burgess Farms v. New Hampshire Insurance Group, 702 P.2d 869 (Idaho App. 1985).
Illinois: Mammina v. Homeland Insurance Co., 21 N.E.2d 726 (Ill. 1939); Denham v. LaSalle-Madison Hotel Co., 168 F.2d 576 (7th Cir. 1948).
Iowa: Bettis v. Wayne County Mutual Insurance Ass'n, 447 N.W.2d 569 (Iowa 1989); Qualls v. Farm Bureau Mutual Insurance Co., 184 N.W.2d 710 (Iowa 1971).
Kentucky: Wright v. Louisville Store of Russellville, 417 S.W.2d 242 (Ky. 1967).
Louisiana: McManus v. Travelers Insurance Co., 360 So.2d 207 (La.App. 1978); Milton v. Main Mutual Insurance Co., 261 So.2d 723 (La.App. 1972).
Massachusetts: Jussim v. Massachusetts Bay Insurance Co., 610 N.E.2d 954 (Mass. 1993); Jiannetti v. National Fire Insurance Co., 178 N.E. 640 (Mass. 1931).
Michigan: Kansas v. New York Life Insurance Co., 193 N.W. 867 (Mich. 1923); Michigan Sugar Co. v. Employers Mutual Liability Insurance Co., 308 N.W.2dd 684 (Mich. 1981).
Mississippi: Grain Dealers Mutual Insurance Co. v. Belk, 269 So.2d 637 (Miss. 1972); Grace v. Lititz Mutual Insurance Co., 257 So.2d 217 (Miss. 1972).
Missouri: Hahn v. M.F.A. Insurance Co., 616 S.W.2d 574 (Mo.App. 1981); Boecker v. Aetna Casualty and Surety Co., 281 S.W.2d 561 (Mo.App. 1955).
Nebraska: Curtis O. Griess & Sons Inc. v. Farm Bureau Insurance Co., 528 N.W.2d 329 (Neb. 1995); Brown v. Farmers Mutual Insurance Co., 468 N.W.2d 105 (Neb. 1991).
Nevada: Pioneer Chlor Alkali Co. v. National Union Fire Insurance Co., 863 F.Supp. 1226 (D. Nev. 1994).
New Hampshire: Terrien v. Pawtucket Mutual Fire Insurance Co., 71 A.2d 742 (N.H. 1950).
New Jersey: James v. Federal Insurance Co., 73 A.2d 720 (N.J. 1950); Stone v. Royal Insurance Co., 511 A.2d 717 (N.J.Super. 1986).
New York: Kosich v. Metropolitan Property and Casualty Insurance Co., 626 N.Y.S.2d 618 (App.Div. 4th Dep't 1995).
Ohio: Holmes v. Employers' Liability Assurance Corp., 43 N.E.2d 746 (Ohio App. 1941); Princess Garment Co. v. Fireman's Fund Insurance Co., 115 F.2d 380 (6th Cir. 1940).
Oklahoma: Shirey v. Tri-State Insurance Co., 274 P.2d 386 (Okla. 1954); Pennsylvania Fire Insurance Co. v. Sikes, 168 P.2d 1016 (Okla. 1946).
Oregon: Gowans v. Northwestern Pacific Indemnity Co., 489 P.2d 947 (Or. 1971); Naumes Inc. v. Landmark Insurance Co., 849 P.2d 554 (Or.App. 1993).
Pennsylvania: Marks v. Lumbermen's Insurance Co., 49 A.2d 855 (Pa.Super. 1946); Tannenbaum v. Connecticut Fire Insurance Co., 193 A. 305 (Pa.Super. 1937).

South Carolina: King v. North River Insurance Co., 297 S.E.2d 637 (S.C. 1982).
Tennessee: Lunn v. Indiana Lumbermens Mutual Insurance Co., 201 S.W.2d 978 (Tenn. 1947).
Washington: Villella v. Public Employees Mutual Insurance Co., 725 P.2d 957 (Wash. 1986).
West Virginia: La Bris v. Western National Insurance Co., 59 S.E.2d 236 (W. Va. 1950).

B. Rejecting Efficient Proximate Causation Rule
It appears that only three states have explicitly rejected the efficient proximate cause analysis of property insurance loss, holding instead that where a policy expressly insures against loss caused by one risk but excludes loss caused by another risk, coverage is extended to a loss caused by the insured risk, even though the excluded risk is a contributory cause.
Florida: Transamerica Insurance Co. v. Snell, 627 So.2d 1275 (Fla.App. 1993); Wallach v. Rosenberg, 527 So.2d 1386 (Fla.App. 1988).
Minnesota: **407* Henning Nelson Construction Co. v. Fireman's Fund American Life Insurance Co., 383 N.W.2d 645 (Minn. 1986).
Wisconsin: Kraemer Bros. Inc. v. United States Fire Insurance Co., 278 N.W.2d 857 (Wis. 1979); Smith v. State Farm Fire & Casualty Co., 531 N.W.2d 376 (Wis.App. 1995).

C. Distinctive Rules
One state appears to follow a distinctive rule, under which the proximate cause is regarded as the final event in time. If the proximate cause, so defined, is a covered peril, the loss is covered, and if the proximate cause, so defined, is excluded, the loss is excluded.
Alabama: Chemstrand Corp. v. Maryland Casualty Co., 98 So.2d 1 (Ala. 1957).
Another follows another distinctive rule, under which the insured carries the burden of proving either that its loss was caused solely by a covered peril or that its loss can be segregated into damage caused by a covered peril and damage caused by the excluded perils or perils.
Texas: Travelers Indemnity Co. v. McKillip, 469 S.W.2d 160 (Tex. 1971).

D. Effect of Policy language
Policy language may significantly limit from the outset the attempt of either party to the insurance contract to attempt to persuade the trier of fact that its interpretation of the causal chain is reasonable. Recent changes to standard ISO policy forms have attempted to exclude certain perils from coverage if they are a cause of loss, regardless of any other perils acting "concurrently or in any sequence with" them.
The Washington Supreme Court invalidated this language because it is obviously inconsistent with the "efficient proximate cause" rule. However, the court did not otherwise explain why it concluded that it was not within the power of the parties entering into the insurance contract so to remove the policy from the application of the rule. [FN21]
California also invalidated this language, but the California Court of Appeal concluded that the exclusion was inconsistent with the statutory requirements, particularly Section 530 of the California Insurance Code, which provides: "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause." [FN22]
In all other states that appear to have considered this new exclusionary language, it has been consistently held that the parties are free to contract out of the efficient proximate cause rule.
Alaska: State Farm Fire and Casualty Co. v. Bongen, 925 P.2d 1042 (Alaska 1996).
Arizona: Millar v. State Farm Fire and Casualty Co., 804 P.2d 822 (Ariz.App. 1990).
Colorado: Kane v. Royal Insurance Co., 768 P.2d 678 (Colo. 1989).
Georgia: Underwood v. United States Fidelity & Guaranty Co., 165 S.E.2d 874 (Ga.App. 1968).
Illinois: Ramirez v. American Family Mutual Insurance Co., 652 N.E.2d 511 (Ill.App. 1995).
Massachusetts: Preferred Mutual Insurance Co. v. Travelers Cos., 955 F.Supp. 9 (D. Mass. 1997).

Missouri: Pakmark Corp. v. Liberty Mutual Insurance Co., 943 S.W.2d 256 (Mo.App. 1997); TNT Speed & Sport Center Inc. v. American States Insurance Co., 114 F.3d 731 (9th Cir. 1997).
Ohio: Front Row Theatre Inc. v. American Manufacturer's Mutual Insurance Cos., 18 F.3d 1343 (6th Cir. 1994).
Utah: Alf v. State Farm Fire and Casualty Co., 850 P.2d 1272 (Utah 1993).
Wyoming: State Farm Fire and Casualty Co. v. Paulson, 756 P.2d 764 (Wyo. 1988).

[FNa1]. Note 1. IADC member Mark D. Wuerfel is a founding partner of Kinder, Wuerfel & Cholakian in San Francisco. He was graduated from the University of California Hastings College of the Law in 1976. He concentrates in litigation involving insureds in selected areas of insurance defense.

[FNa2]. Note 2. Mark Koop is special counsel at the same firm. He received his B.A. in classics from Reed College, his M.A. from the University of Washington, and his J.D. in 1985 from the University of California at Los Angeles

[FN1]. 770 F.Supp. 558 (D. Nev. 1991).

[FN2]. Id. at 561.

[FN3]. 770 P.2d 704, 706-07 (Cal. 1989).

[FN4]. 377 P.2d 889 (Cal. 1953).

[FN5]. Id. at 895 (court's emphasis).

[FN6]. 514 P.2d 123 (Cal. 1973).

[FN7]. 770 P.2d at 708 (citations omitted).

[FN8]. 111 P. 4 (Cal. 1910).

[FN9]. Id. at 5-6.

[FN10]. 74 U.S. (7 Wall.) 44 (1868).

[FN11]. 95 U.S. 117 (1877).

[FN12]. Id. at 130-31.

[FN13]. 302 U.S. 556 (1938).

[FN14]. A.C. 350 (1918).

[FN15]. 302 U.S. at 562-63.

[FN16]. 340 U.S. 54 (1950), rev'g, 178 F.2d 488 (2U Cir. 1949). See also 81 F.Supp. 183 (S.D. N.Y. 1948).

[FN17]. Id. at 57, 61 (citations omitted).

West's Ann.Cal.Ins.Code § 530

WEST'S ANNOTATED CALIFORNIA CODES
INSURANCE CODE
DIVISION 1. GENERAL RULES GOVERNING INSURANCE
PART 1. THE CONTRACT
CHAPTER 6. LOSS
ARTICLE 2. CAUSES OF LOSS

Current through start of 2003-04 Reg. Sess. and includes Ch. 1 of 2nd Ex.Sess.

§ 530. Proximate and remote causes

An insurer is liable for a loss of which a peril **insured** against was the **proximate cause,** although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

CREDIT(S)

2003 Electronic Pocket Part Update

(Stats.1935, c. 145, p. 510, § 530.)

HISTORICAL AND STATUTORY NOTES

1993 Main Volume

Derivation: Civ.C. § 2626.

West's Ann. Cal. Ins. Code § 530
CA INS § 530
END OF DOCUMENT

TESTIMONY ON SENATE BILL 2224

My name is Rob Hovland. I am currently serving as chairman of the North Dakota Domestic Insurers Association, which is comprised of 10 insurance companies that have a home office in North Dakota, including my employer, Center Mutual Insurance Company.

It is no secret that North Dakota's property and casualty insurers have sustained enormous losses over the past ten years. As a result, several companies have quit writing insurance in our state, some companies have discontinued writing property insurance in North Dakota, others are considering leaving the state or discontinuing writing certain lines of insurance, and almost all companies have significantly tightened their underwriting guidelines. A good example of the condition of the property and casualty market is shown in some of this Session's bills. At the urging of the Insurance Commissioner's office, the House of Representatives passed a bill, heard by this committee, that in the future, insurance companies that leave the state or quit writing a line of insurance need to notify the Insurance Commissioner's office prior to doing so. In Senate Bill 2251, which passed the Senate, the Commissioner's office asking for the power to force companies to involuntarily write insurance if the property and casualty market deteriorates further, and insurance is no longer reasonably available.

To further exacerbate matters, in 2002, the North Dakota Supreme Court issued a ruling (Western National Mutual Insurance Company vs. UND) that will have a tremendous negative impact on North Dakota consumers, unless the legislature takes

remedial action. Senate Bill 2224 addresses the problems created by this ruling.

A summary of the background facts of the case is necessary to understand the proposed legislation. In 1997, a flood of Biblical proportions occurred in Grand Forks. All of Grand Forks east of I29 was ordered evacuated, including the UND campus. As a result of the flood, the lift stations serving UND were shut down, and as a natural consequence of shutting them down, water entered UND buildings through the sewer system causing significant damage. UND had purchased sewer backup coverage for some buildings, but chose not to purchase it for the buildings that were the subject of the lawsuit. It should be noted that no insurance company offers flood coverage -- it can only be purchased through the federal government.

The Western National Mutual policy included coverage for "covered losses," but had an exclusion that provided,

> "Coverage is excluded for loss or damage caused directly or indirectly by flood regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

The case was submitted to a Grand Forks jury, which awarded UND a huge verdict. The North Dakota Supreme Court upheld the verdict, and wrote that a pair of statutes that originated around 1917 (N.D.C.C. 26.1-31-01 and 26.1 32-03) render exclusions like Western National's unenforceable. The Court ruled that these two statutes prohibit an insurance company from contracting out of the "Efficient Proximate Cause Doctrine," which effectively prohibits a company from excluding coverage when "concurrent causes" of loss occur.

Several State Supreme Courts have ruled on this issue, and North Dakota is the only one that does not allow an insurance company to contract out of the Efficient

Proximate Cause Doctrine (arguably, the Washington Supreme Court has implied it would agree with North Dakota's Court).

This North Dakota Supreme Court ruling has created problems in insurance contract interpretation because the language of the policy no longer controls whether or not coverage applies. Many exclusions may not be enforceable. At first glance, this may appear favorable to consumers, but in reality, the ruling has a negative impact on consumers. Insurance companies have discontinued offering some types of policies or reduced coverage significantly because some coverages cannot be provided without some limitations.

The impact of this ruling cannot be overstated. The best policies, and the consumers want most, are comprehensive policies where everything is covered unless it is excluded. If exclusions are not enforceable, more policies will be written on a "named peril" basis, which is less desirable to consumers, particularly on liability coverage. It is very likely that many perils will no longer be covered. For example, most companies offer sewer backup coverage but exclude the coverage if a flood occurs. If the exclusion is unenforceable, companies will be forced to discontinue or limit sewer backup coverage.

Senate Bill 2224 contains two changes. The first change adds a sentence to 26.1-32-01 requiring separate, distinct, and totally unrelated causes to be present before the Efficient Proximate Cause Doctrine applies. The second change provided in 26.1-31-03 allows an insurance company to contract out of the Efficient Proximate Cause Doctrine.

We urge a Do Pass vote on this Bill.

Supplemental Information regarding SB 2224
Submitted by Paula Grosinger, Lobbyist 193
To ND House Industry, Business & Labor Committee
The Honorable George Keiser Chair
On behalf of the North Dakota Trial Lawyers Association

The efficient proximate cause doctrine is only statutorily defined in two states - **California** and **North Dakota.**

However, the principle is almost universally applied whenever courts examine a chain of causation. In other words, anytime a court looks at a chain of causation they are doing an efficient proximate cause analysis. There is extensive case law which adopts the efficient proximate cause doctrine in federal and state jurisdictions both inside and outside North Dakota (the following is not all-inclusive but is taken from the Appellee's brief in Western National Mutual Insurance Company vs. UND - Supreme Court No: 20010118):

Federal Courts:
First Circuit
Sixth Circuit
Eighth Circuit
Ninth Circuit

State Courts:
Alaska
Arizona
California
Iowa
Massachusetts
Minnesota
Missouri
North Carolina
Oregon
North Dakota
South Dakota
Texas
Utah
Washington
West Virginia
Wisconsin
Wyoming

Even states without like statutory language have prohibited "contracting out" of efficient proximate cause. Safeco Ins. v. Hirshmann, 773 P.2d 413, 416 (Wash. 1989).

Tho only states that have permitted contracting out of efficient proximate cause have no similar statutory provisions. See, e.g., State Fire v. Bongen, 925 P.2d 1042, 1044 (Alaska 1996); Preferred Mut. Ins. v. Travelers Co., 955 F. Supp. 9 (D. Mass), aff'd, 127 F.3d 136 (1st Cir. 1997); TNT Speed & Sport Ctr. v. American States Ins., 114 F.3d 731, 733 (8th Cir. 1997) (Missouri law).