

ANTI-CONCURRENT CAUSATION CLAUSES IN INSURANCE CONTRACTS: THE STATE OF THE LAW IN 2017

Joshua T. Carback*

Few aspects of insurance law are more provocative than the anti-concurrent causation clauses (“ACCs”). In circumstances where an insured suffers a loss concurrently caused by both covered and uncovered perils, an ACC bars recovery.¹ If ACCs are unenforceable in the jurisdiction, however, the insured can recover.² Insurers benefit from ACCs to the detriment of insureds because their coverage obligations are significantly reduced in scenarios involving concurrently caused losses. Some support ACCs as an acceptable exercise of the freedom to contract, while others deem them a repulsive manifestation of the power asymmetry between insurers and insureds in drafting policies. This Essay assesses the state of the law with respect to the enforceability of ACCs. Part I provides an overview of insurance causation concepts.³ Part II surveys the state of the law.⁴ Part III explores the normative dimensions of the debate over ACC enforceability.⁵ Part IV concludes.⁶

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¹ Dale Joseph Gilsinger, Annotation, *Validity, Construction, and Application of Anticoncurrent Causation (ACC) Clauses in Insurance Policies*, 37 A.L.R. 6th 657 (2008).

² *Id.*

³ See *infra* Part I.

⁴ See *infra* Part II.

⁵ See *infra* Part III.

⁶ See *infra* Part IV.

I. AN OVERVIEW OF CAUSATION IN INSURANCE LAW

There are three essential questions in any legal inquiry as to whether an insured's loss is covered by their policy.⁷ First, "[h]ow did the loss happen?"⁸ Second, "[i]f multiple forms of insurance are in effect, which if any cover the loss?"⁹ Third, "[i]f there is more than one cause of the loss, is there any coverage?"¹⁰ ACC enforceability is a legal issue often implicated in answering the third question. This Part offers a preliminary overview of causation concepts in insurance law that are critical to unpacking the ACC enforceability issue. Section A of this Part defines important insurance law terminology.¹¹ Section B outlines the form and function of ACCs in insurance contracts.¹²

A. Insurance Contract Terminology

Randall L. Smith and Fred A. Simpson's *Causation in Insurance Law* provides a helpful guide to insurance law terminology.¹³ First, a "peril" is an "active physical force that brings about a loss."¹⁴ "Named-Perils Polic[ies]" are policies that cover listed perils, whereas "All-Risks Insurance Polic[ies]" cover all risks of accidental loss to a property except those that are specifically excluded in the policy.¹⁵ "Causation" consists of the connection between a peril (*e.g.*, a mudslide) and damages that may be covered by an insurance policy.¹⁶

⁷ Randall L. Smith & Fred A. Simpson, *Causation in Insurance Law*, 48 S. TEX. L. REV. 305, 306 (2006).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *infra* Part I.A.

¹² See *infra* Part II.B.

¹³ Smith & Simpson, *supra* note 7, at 312–13.

¹⁴ *Id.* (citing *Fire Ins. Exch. v. Superior Court*, 10 Cal. Rptr. 3d 617, 632 n.13 (Cal. Ct. App. 2004)).

¹⁵ *Id.* at 313; see JEFFREY JACKSON & D. JASON CHILDRESS, *MISS. INS. LAW AND PRAC.* § 15:17 (West 2016).

¹⁶ Smith & Simpson, *supra* note 7, at 313.

Two of the most common insurance policies are first-party property policies and liability insurance policies: the former covers losses produced by perils to an insured's property or person, while the latter "provides protection against a broad range of liability claims."¹⁷ While determining if a loss is covered by a specific peril is a relatively simple inquiry, scenarios where there are multiple causes are more complex. American jurisdictions take different approaches towards causation in insurance law, as will be explored below.

B. *Form and Function of Anti-Concurrent Causation Clauses*

There are three approaches to insurance causation. First, some jurisdictions follow the concurrent causation doctrine.¹⁸ This doctrine is a pro-insured approach because it requires coverage in situations where there are multiple perils concurrently causing a loss and only a minority—even one of those perils—is covered by the policy.¹⁹ Second, some jurisdictions follow the efficient proximate cause ("EPC") doctrine, also known as the dominant cause approach.²⁰ Under this paradigm, courts determine which among concurrent causes of a loss was the most substantial or responsible: if the EPC (*i.e.*, the most substantial) is covered, the insured receives damages.²¹ Finally, some jurisdictions apply the apportionment approach.²² The apportionment approach requires segregation of losses incurred by covered perils from losses caused by uncovered perils, tracking traditional

¹⁷ TOM BAKER & KYLE D. LOGUE, *INSURANCE LAW AND POLICY: CASES, MATERIALS, AND PROBLEMS* 133, 306 (3d ed. 2013); Smith & Simpson, *supra* note 7, at 311.

¹⁸ See *State Farm Mut. Auto. Ins. Co. v. Partridge*, 514 P.2d 123, 132 (Cal. 1973) ("Although there may be some question whether either of the two causes in the instant case can be properly characterized as the "prime," "moving" or "efficient" cause of the accident we believe that coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries.") (footnotes omitted).

¹⁹ Mark M. Bell, *A Concurrent Mess and a Call for Clarity in First-Party Property Insurance Coverage Analysis*, 18 *CONN. INS. L.J.* 73, 76 (2011) (footnote omitted).

²⁰ *Id.* at 79; *e.g.*, *State Farm Fire & Cas. Co. v. Slade*, 747 So.2d 293, 314 (Ala. 1999).

²¹ Bell, *supra* note 19, at 79 (footnote omitted).

²² *Id.* at 80.

tort apportionment doctrine.²³ There are two species of this approach: pure apportionment and modified comparative apportionment.²⁴ If a court follows the pure apportionment model, an insured receives the percentage of damages caused by the covered peril; if the court follows the modified apportionment model, they only receive a percentage of damages correlated to a covered peril if it is the EPC.²⁵

Insurers attempt to contract out of the EPC doctrine using ACCs.²⁶ A model ACC provides as follows: “We do not insure for such loss regardless of: a) the cause of the excluded event; or b) other causes of the loss; or c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss.”²⁷ ACCs work to the advantage of insurers, as is expressed in the following example of a scenario taking place in an EPC jurisdiction.²⁸ An insured contracts into an all-risk homeowner’s policy that covers losses caused by wind, lightning, and hail.²⁹ The policy also contains an ACC and a water damage exclusion.³⁰ Weeks later, hurricane winds cause a levy to breach; flooding subsequently decimates the home. In this situation, the ACC operates in tandem with the water damage exclusion to bar coverage.³¹ There is great division between American jurisdictions over the enforceability of ACCs, as will be explored in Part II below.³²

²³ *Id.* (footnote omitted).

²⁴ *Id.*

²⁵ *Id.*

²⁶ ANDREW B. DOWNS & LINDA M. BOLDUAN, LAW AND PRAC. OF INS. COVERAGE LITIG. § 52:9 (West 2016).

²⁷ *Id.*

²⁸ See Howard A. Van Dine III & Erik T. Norton, *Anti-Concurrent Causation Clauses and Hurricane Relief: Was it Wind or Water?*, S.C. LAWYER, Jan. 19, 2008, at 19–20.

²⁹ *Id.* at 19.

³⁰ *Id.*

³¹ See *id.* at 19–20.

³² See *id.* at 23.

II. ACC ENFORCEABILITY IN THE UNITED STATES

This Part surveys the state of the law with respect to the enforceability of ACCs in insurance contracts across the United States. For simplicity's sake, this Essay will use a traffic light system to break down the jurisdictional divide. Insurance is chiefly regulated at the state level; therefore, state case law primarily expresses a given jurisdiction's position on ACC enforceability.³³ When ACC enforceability disputes meet diversity and amount-in-controversy requirements, however, parties can remove to federal jurisdiction.³⁴ Part A will review green light jurisdictions—those in which the court of last resort explicitly ruled that ACCs are enforceable.³⁵ Part B discusses red light jurisdictions in which the court of last resort explicitly ruled that ACCs are not enforceable.³⁶ Part C addresses yellow light jurisdictions where the court of last resort has not addressed the issue, but lower state courts and/or federal courts are either discordant or generally favor one position (*i.e.*, enforceability/unenforceability).³⁷

A. Green Light Jurisdictions that Favor ACC Enforceability

The majority of jurisdictions with a clear position, fourteen total, that have determined that ACCs are unequivocally enforceable include Alabama, Alaska, Arizona, Colorado, the District of Columbia, Iowa, Massachusetts, Minnesota, Nevada, New Hampshire, South Carolina, Rhode Island, Texas, Utah, and Wyoming.³⁸ The Alabama Supreme Court's

³³ 15 U.S.C. § 1011 (1945) (“Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.”).

³⁴ 28 U.S.C. § 1332(a) (2012); 28 U.S.C. § 1441(b) (2012).

³⁵ See *infra* Part II.A.

³⁶ See *infra* Part II.B.

³⁷ See *infra* Part II.C.

³⁸ *Stankova v. Metro. Prop. Cas. Ins. Co.*, 788 F.3d 1012 (9th Cir. 2015) (applying Arizona law); *State Bank of Bellingham v. BancInsure, Inc.*, 823 F.3d 456 (8th Cir. 2016) (applying Minnesota law); *Preferred Mut. Inc. Co. v. Travelers Co.*, 127 F.3d 136 (1st Cir. 1997) (applying Massachusetts law); *Katopothis v. Windsor-Mount Joy Mut. Ins. Co.*, No. 14-380, 2016 WL 5374081, at *1 (D.D.C. Sept. 26, 2016) (applying District of Columbia law); *Johnson v. State Farm Fire & Cas. Co.*, No.12-00534-N, 2013 WL 4607548, at *1 (S.D. Ala., August 29, 2013) (applying Alabama law); *Preferred Mut. Ins. Co. v. Meggison*,

decision in *State Farm Fire & Cas. Co. v. Slade* presents an illustrative example.³⁹ In *Slade*, insureds built a home. Insureds' neighbors removed considerable amounts of soil in building a home adjacent to theirs.⁴⁰ The soil removal created a drop off requiring insureds to construct a retaining wall on their property to prevent soil erosion on their land.⁴¹ The retaining wall collapsed when it was struck by lightning during a severe storm, causing the insureds' backyard pool to collapse.⁴² Insureds investigated the damage and learned that visible cracks in the ceilings, interior walls, and exterior walls of their home were caused by soil shifting on their land.⁴³ The destruction of the retaining wall by the lightning strike caused the soil shift, which in turn caused the foundation of insureds' home to move.⁴⁴ Importantly, insureds' policy contained an earth movement exclusion and an ACC providing:

53 F. Supp. 2d 139 (D. Mass. 1999) (applying Massachusetts law); Probuilders Specialty Ins. Co. v. Double M. Constr., 116 F. Supp. 3d 1173 (D. Nev. 2015) (applying Nevada law); Schroeder v. State Farm Fire & Cas. Co., 770 F. Supp. 558, 561 (D. Nev. 1991) (applying Nevada law); Amherst Country Club, Inc. v. Harleysville Worcester Ins. Co., 561 F. Supp. 2d 138 (D. N.H. 2008) (applying New Hampshire law); Ideaitalia Contemporary Furniture Corp. v. Selective Ins. Co. of Am., No. 5:15-CV-00016-RLV, 2016 WL 7238818, at *1 (W.D.N.C. Dec. 14, 2016) (applying North Carolina law); Wandler v. Homesite Indem. Co., No. 13-CV-64-F, 2013 WL 12092300, at *1 (D. Wyo., Nov. 7, 2013) (applying Wyoming law); State Farm Fire & Cas. Co. v. Slade, 747 So.2d 293, 314 (Ala. 1999); State Farm Fire & Cas. Co., v. Bongnen, 925 P.2d 1042 (Alaska 1999); Kane v. Royal Ins. Co. of Am., 768 P.2d 678, 685 (Colo. 1989); Thompson v. State Farm Fire & Cas. Co., 165 P.3d 900 (Colo. App. 2007); Chase v. State Farm Fire & Cas. Co., 780 A.2d 1123 (D.C. 2001); Amish Connection, Inc. v. State Farm Fire & Cas. Co., 861 N.W.2d 230 (Iowa 2015); Boazova v. Safety Ins. Co., 462 Mass. 346 (Mass. 2012); Powell v. Liberty Mut. Fire Ins. Co., 127 Nev. 156, 252 P.3d 668 (Nev. 2011); Bates v. Phenix Mut. Fire Ins. Co., 156 N.H. 719, 943 A.2d 750 (N.H. 2008); Builders Mut. Ins. Co. v. Glascarr Prop., Inc., 202 N.C. Ct. App. 323, 688 S.E.2d 508 (N.C. Ct. App. 2010); South Carolina Farm Bur. Mut. Ins. Co. v. Durham, 380 S.C. 506, 671 S.E.2d 610 (S.C. 2009); JAW The Pointe, L.L.C., v. Lexington Ins. Co., 460 S.W.3d 597, 58 Tex. Sup. Ct. J. 690 (Tex. 2015); Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272 (Utah 1993); State Farm Fire & Cas. Co. v. Paulson, 756 P.2d 764, 769 (Wyo. 1988).

³⁹ State Farm Fire & Cas. Co. v. Slade, 747 So.2d 293, 293 (Ala. 1999).

⁴⁰ *Id.* at 297.

⁴¹ *Id.*

⁴² *Id.* at 297–98.

⁴³ *Id.* at 298.

⁴⁴ *Id.*

We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as the result of any combination of these. . . .⁴⁵

Insureds argued on appeal that the earth movement exclusion was 1) ambiguous, 2) contrary to reasonable expectations, and 3) *arguendo* that the ACC was unenforceable because it violated the EPC doctrine controlling in Alabama.⁴⁶

The Court found for insurer and held that ACCs are enforceable in Alabama.⁴⁷ The Court first determined that the contract unambiguously excluded earth movement: the plain meaning of the language unequivocally excluded the soil shift.⁴⁸ Second, the Court noted that some jurisdictions do not even consider a reasonable expectations doctrine argument unless a contract is ambiguous to begin with.⁴⁹ The reasonable expectations doctrine provides that when policies “containing provisions reasonably subject to different constructions, one favorable to the insurer and one favorable to the insured,” the construction favoring the insured prevails.⁵⁰ Notwithstanding that observation, the Court held that the insureds could not reasonably expect coverage because the contract unambiguously excluded losses caused by earth movement.⁵¹ Finally, the Court noted its decision in *Western Assurance Co. v. Hann* where it recognized the EPC doctrine.⁵² The Court held that enforcing the ACC did not violate

⁴⁵ *Id.* at 298–99.

⁴⁶ *Id.* at 311–13.

⁴⁷ *See id.* at 314.

⁴⁸ *Id.* at 310.

⁴⁹ *Id.* at 312 (citing *Rodriguez v. Gen. Acc. Ins. Co.*, 808 S.W.2d 379, 381 (Mo. 1991) and *Riffe v. Home Finders Assocs., Inc.*, 517 S.E.2d 313 (W. Va. 1999)).

⁵⁰ *Id.* at 311 (citing *Aetna Cas. & Sur. Co. v. Chapman*, 200 So. 425, 426–27 (1941)).

⁵¹ *Id.* at 312.

⁵² *Id.* at 313 (citing 78 So. 232 (1917)).

public policy.⁵³ The Court's justification for its result was its long established preference to avoid rewriting unambiguous insurance policies.⁵⁴ This case illustrates the rationale typically underlying ACC enforceability: respect for the freedom of contract by enforcing unambiguous policies.⁵⁵

Texas is the most recent jurisdiction to acquire the green light designation, endorsing ACCs as enforceable in *JAW The Pointe, L.L.C. v. Lexington Ins. Co.* in 2015.⁵⁶ In *JAW The Pointe*, insured bought an apartment complex that was later damaged by wind and flooding during a hurricane.⁵⁷ Compliance with city ordinances required repairs, which imposed additional costs.⁵⁸ Insured had purchased several policies offering multiple layers of coverage, the primary layer being provided by the defendant.⁵⁹ The insurer refused coverage on the basis that the policy contained a flooding exclusion, a repair in compliance with ordinance or law exclusion, and an ACC clause.⁶⁰ The Texas Supreme Court noted that ACCs are widely accepted as enforceable in jurisdictions within the United States Court of Appeals for the Fifth Circuit.⁶¹ The Court followed the Fifth Circuit trend in holding that in the case at bar, the ACC and exclusions operated to preclude coverage of the losses sustained by the insured for damages concurrently inflicted on its property by wind and water.⁶²

⁵³ *Id.* at 314.

⁵⁴ *Id.*

⁵⁵ See *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 436 (5th Cir. 2007) (citing *Slade*, 747 So.2d 293).

⁵⁶ 460 S.W.3d 597 (Tex. 2015); JOHN K. DIMUGNO ET AL., *CATASTROPHE CLAIMS: INSURANCE COVERAGE FOR NATURAL AND MAN-MADE DISASTERS* § 4:16 (West 2016).

⁵⁷ *JAW The Pointe, L.L.C.*, 460 S.W.3d at 599–600.

⁵⁸ *Id.* at 600.

⁵⁹ *Id.*

⁶⁰ *Id.* at 602. The policy stated, in pertinent part: “We will not pay for the loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently in any sequent to the loss. a. Ordinance or Law. . . . g. Water 1) Flood. . . .”. *Id.* at 604.

⁶¹ *Id.* at 607–08.

⁶² *Id.* at 610.

B. Red Light Jurisdictions Prohibiting Enforcement of ACCs

The minority of jurisdictions with clear positions, four total, prohibit enforcement of ACCs.⁶³ Subsection 1 addresses two jurisdictions that statutorily prohibit ACC enforceability: California and North Dakota.⁶⁴ Subsection 2 explores two jurisdictions where prohibitions of ACC enforcement are judge made: Washington and West Virginia.⁶⁵

1. Red Light Jurisdictions Statutorily Prohibiting ACC Enforcement

In *Garvey v. State Farm Fire & Cas. Co.*, the California Supreme Court held that enforcement of ACCs was inconsistent with public policy as expressed in the California Insurance Code.⁶⁶ In *Garvey*, insureds bought an all-risk homeowner's policy from State Farm, their insurer.⁶⁷ The policy contained an ACC and an exclusion for earth movement.⁶⁸ The insureds later sued their insurer when the insurer refused coverage for damage to their home concurrently caused by earth movement and contractor negligence.⁶⁹

The Court held in favor of insureds.⁷⁰ Section 530 of the California Insurance Code provides that insurers are liable for proximately caused losses not contemplated by insurance contracts.⁷¹ Section 532 provides that "if a peril is specially excepted in a contract of insurance and there is

⁶³ *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, (Cal. 1989); *Sabella v. Wisler*, 59 Cal. 2d 21 (Cal. 1963); *W. Nat'l Mut. Ins. Co. v. Univ. of North Dakota*, 643 N.W.2d 4, 14 (N.D. 2002); *Safeco Ins. Co. v. Hirschmann*, 773 P.2d 413 (Wash. 1989) (en banc); *Villella v. Pub. Emp. Mut. Ins. Co.*, 725 P.2d 957 (Wash. 1986) (en banc); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 14 (W.Va. 1998); *Howell v. State Farm Fire & Cas. Co.*, 218 Cal. App. 3d 1446 (Cal. Ct. App. 1990).

⁶⁴ See *infra* Part II.B.1.

⁶⁵ See *infra* Part II.B.2.

⁶⁶ 48 Cal. 3d 395, 403 (1989).

⁶⁷ *Id.* at 399.

⁶⁸ *Id.* at 399–400.

⁶⁹ *Id.* at 400.

⁷⁰ See *id.* at 412–13.

⁷¹ CAL. INS. CODE § 530 (West 1935).

a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted.”⁷² The Court noted its decision in *Sabella v. Wisler*, where it harmonized its reading of Sections 530 and 532 in determining that insurance companies are liable for losses pursuant to the EPC doctrine.⁷³ In accordance with its decision in *Sabella*, the Court held that if a jury determines on remand that the earth movement was the EPC of insureds’ loss, then insurer would have to provide coverage notwithstanding the ACC and exclusion in the contract.⁷⁴ The North Dakota Supreme Court paralleled the *Garvey* court’s analysis in holding that ACCs are unenforceable pursuant to the statutory embodiment of the EPC doctrine in *W. Nat’l Mut. Ins. Co. v. Univ. of North Dakota*.⁷⁵

2. Red Light Jurisdictions Where Judge-Made Law Bars ACC Enforceability

The high appellate courts of Washington and West Virginia prohibit ACCs notwithstanding the fact that the legislatures of those states are silent on the issue. In *Safeco Ins. Co. v. Hirschmann*, insureds possessed an all-risk homeowner’s policy excluding damage from landslides.⁷⁶ The insurer attempted to contract out of the EPC doctrine by including an ACC with exclusions in the policy that provided: “We do not cover loss caused by any of the following excluded perils, whether occurring alone or in any sequence with a covered peril. . . . 2. Earth Movement, meaning: a. earthquake; landslide; mudflow; earth sinking, rising or shifting.”⁷⁷ The insureds

⁷² CAL. INS. CODE § 532 (West 1935).

⁷³ *Garvey*, 770 P.2d 704, 707 (Cal. 1989) (citing *Sabella*, 59 Cal. 2d at 31–34).

⁷⁴ *Id.* at 412–13.

⁷⁵ *W. Nat’l Mut. Ins. Co.*, 643 N.W.2d at 15–26 (analogizing to *Garvey* in interpreting N.D. CENT. CODE ANN. §§ 26.1-32-01, 26.1-32-03 (West 1985) as voiding the ACC and exclusions in the disputed insurance contract).

⁷⁶ *Safeco*, 773 P.2d at 413.

⁷⁷ *Id.* at 414.

home was destroyed when severe winds, heavy rain, and a hill slide concurrently caused the home to shift from its foundation.⁷⁸

The court held for insureds. The court noted that it adopted the EPC doctrine in *Graham v. Public Emp. Mut. Ins. Co.*⁷⁹ The court relied on its prior decision in *Villella v. Pub. Emp. Mut. Ins. Co.*, where it held that an insurer could not contract out of EPC doctrine.⁸⁰ In noting the nearly identical language of the policy at bar and that in *Villella*, the *Safeco* court concluded “If the initial event, the ‘efficient proximate cause,’ is a covered peril, then there is coverage under the policy regardless whether subsequent events within the chain, which may be causes-in-fact of the loss, are excluded by the policy.”⁸¹

Likewise, the West Virginia Supreme Court prohibited ACCs—despite the lack of a statutory basis for doing so—in *Murray v. State Farm Fire & Cas. Co.*⁸² In *Murray*, insureds home was damaged by boulders and rocks that fell off of a high wall. Insureds sued insurer when they were denied coverage because their loss was partially due to a landslide, a concurrent cause excluded in tandem with an ACC in their policy.⁸³ The court grounded its reasoning in the reasonable expectations doctrine rejected by the Alabama Supreme Court in *Slade*.⁸⁴ The consensus of the minority of red light jurisdictions is the converse of that of the green light jurisdictions: the fairness concern that inheres in the reasonable expectations argument is given more weight than the freedom to contract principle.

⁷⁸ *Id.* (emphasis added).

⁷⁹ 79. 656 P.2d 1077, 1080 (Wash. 1983).

⁸⁰ 725 P.2d 957, 964 (Wash. 1986).

⁸¹ *Safeco*, 773 P.2d at 416.

⁸² 509 S.E.2d 1, 15 (W.Va. 1998).

⁸³ *Id.* at 6.

⁸⁴ *Id.* at 14 (“Insureds with all-risks insurance likely have heightened expectations because of the comprehensive nature of the coverage and the greater premium rates. These expectations would not often be given effect if recovery was denied whenever an exception or exclusion contributed to the loss.” (citing R. Fierce, *Insurance Law-Concurrent Causation: Examination of Alternative Approaches*, 1985 S. ILL. U. L.J. 527, 544 (1986)).

C. Yellow Light Jurisdictions Generally Support Enforcement of ACCs

A sizeable number of jurisdictions, thirty total, do not have a clear rule of law on ACC enforceability. These include Arkansas, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, and Virginia.⁸⁵ Lower state courts in yellow light jurisdictions

⁸⁵ See *TNT Speed & Sport Ctr., Inc. v. Am. States Ins. Co.*, 114 F.3d 731 (8th Cir. 1997) (applying Missouri law); *Front Row Theater, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 18 F.3d 1343, 1347 (6th Cir. 1994) (applying Ohio law); *Iroquois on the Beach, Inc. v. Gen. Star Indem. Co.*, 550 F.3d 585 (6th Cir. 2008) (applying Michigan law); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 223 (5th Cir. 2007) (applying Louisiana law); *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007) (applying Mississippi law); *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007); *Cent. Michigan Cmty. Hosp. v. Fed. Ins. Co.*, No. 06-10220-BC, 2007 WL 473014, at *10 (E.D. Mich. Feb. 6, 2007); *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312 (M.D. Fla. 2002); *Empire Indem. Ins. Co. v. Winsett*, No. 4:06cv439-SPM/WCS, 2008 WL 919824, at *1 (N.D. Fla. Apr. 3, 2008); *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059 (D. Hawaii 2013); *Assurance Co. of Am., Inc. v. Jay-Mar, Inc.*, 38 F. Supp. 2d 349 (D. N.J. 1999); *Nguyen v. Atl. Cas. Ins. Co.*, No. 07-127, 2008 WL 1884050, at *1 (E.D. La. Apr. 24, 2008); *Cameron Par. Sch. Bd. v. RSUI Indem. Co.*, 620 F. Supp. 2d 772 (W.D. La. 2008); *Bao v. Liberty Mut. Fire Ins. Co.*, 535 F. Supp. 2d 532, 535 (D. Md. 2008); *Winters v. Charter Oak Fire Ins. Co.*, 4 F. Supp. 2d 1288 (D. N.M. 1998); *Ideaitalia Contemporary Furniture Corp. v. Selective Ins. Co. of Am.*, No. 5:15-CV-00016-RLV DSC, 2016 WL 7238818, at *12 (W.D.N.C. Dec. 14, 2016); *Kelly v. Farmers Ins. Co.*, 281 F. Supp. 2d 1291, 1293 (W.D. Okla. 2003); *York v. Liberty. Mut. Grp., Inc.*, No. 09-113-HA, 2010 WL 275653, at *9 (D. Or. Jan. 15, 2010); *Swenson v. State Farm Fire & Cas. Co.*, 891 F. Supp. 2d 1101, 1109-10 (D. S.D. 2012); *Hardy & Kelly, LLC v. QBE Ins. Corp.*, No. 3-11-0155, 2012 WL 1744670, at *7 (M.D. Tenn., May 16, 2012); *St. Mary's Area Water Auth. v. St. Paul Fire & Marine Ins. Co.*, 472 F. Supp. 2d 630, 636 (M.D. Pa. 2007); *T.H.E. Ins. Co. v. Charles Boyer Children's Tr.*, 455 F. Supp. 2d 284, 289 (M.D. Pa. 2006); *Lombardi v. Universal N. Am. Ins. Co.*, No. NNHCV136036542S, 2015 WL 600823, at **24-25 (Conn. Super. Ct. Jan. 21, 2015) (unpublished); *Wallach v. Rosenberg*, 527 So. 2d 1386, 1388 (Fla. Dist. Ct. App. 1988); *W. Am. Ins. Co. v. Chateau La Mer II Homeowners Ass'n*, 622 So. 2d 1105, 1108 (Fla. Dist. Ct. App. 1993); *Bozek v. Erie Ins. Grp.*, 46 N.E.3d 362, ¶ 36 (Ill. App. Ct. 2015); *Ramirez v. Am. Family Mut. Ins. Co.*, 652 N.E.2d 511 (Ind. App. Ct. 1995); *Robichaux v. Nationwide Mut. Fire Ins. Co.*, 81 So. 3d 1030, ¶ 15 (Miss. 2012); *Kula v. State Farm Fire & Cas. Co.*, 212 A.2d 16, 19-20 (N.Y. App. Div. 1995); *Builders Mut. Ins. Co. v. Glascarr Prop's., Inc.* 688 S.E.2d 508, 511 (N.C. Ct. App. 2010); *Shirey v. Tri-State Ins. Co.*, 274 P.2d 386, ¶ 8 (Okla. 1954); *Duensing v. State Farm Fire & Cas. Co.*, 131 P.3d 127, ¶ 18 (Okla. Civ. App. 2005); *Mailhot v. Nationwide Mut. Fire Ins. Co.*, 740 A.2d 360, 361 (Vt. 1999); *Am. Family Mut. Ins. Co. v. Schmitz*, 793 N.W.2d 111, ¶ 24 (Wis. Ct. App. 2010). *But see* *Estate of Konell v. Allied Prop. & Cas. Ins. Co.*, No. 3:10-cv-955-ST, 2013 WL 3791141, at *6 (D. Or. July 19, 2013) (unreported) (following the reasoning of Washington courts in holding an ACC unenforceable). Case law addressing the

generally favor enforcement. The recent decision by the Illinois Appellate Court for the Second District in *Bozek v. Erie Ins. Grp.* serves as a prime example.⁸⁶ In *Bozek*, insureds incurred damage to their swimming pool following a storm: the failed pressure valve to the pool and hydrostatic pressure concurrently caused the loss.⁸⁷ The insurer denied coverage under insureds' homeowner's policy because it contained a water damage exclusion and an ACC.⁸⁸ The court held for the insurer and, in doing so, rejected insureds' public policy argument on the basis that it was insufficiently briefed.⁸⁹ The court underscored the narrowness of its decision because it is not resolved as a matter of law whether Illinois applies the EPC doctrine when adjudicating insurance causation disputes.⁹⁰

Federal courts making "Erie Guesses"⁹¹ in jurisdictions without controlling state precedents generally favor ACC enforceability. The jurisprudence of the United States Court of Appeals for the Fifth Circuit uniquely illustrates percolation of case law addressing ACC enforceability due to the frequency of insurance claims disputes arising from hurricane inflicted property damage in that jurisdiction.⁹² In *Leonard v. Nationwide Mut. Ins. Co.*, insureds purchased a homeowner's policy.⁹³ Hurricane Katrina battered the coast of Mississippi where insureds lived; the storm caused a tidal surge

enforceability of ACCs in insurance contracts has not percolated significantly in Arkansas, Delaware, Hawaii, Georgia, Idaho, Kansas, Kentucky, Maine, Montana, Nebraska, New Mexico, Rhode Island, and Virginia.

⁸⁶ *Bozek*, 46 N.E.3d 362 at 1.

⁸⁷ *Id.* at 6, 26.

⁸⁸ *Id.* at 8.

⁸⁹ *Id.* at 35.

⁹⁰ *Id.*

⁹¹ The term "Erie guess" refers to when a federal court applies state law pursuant to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). In circumstances where a state's highest court has not ruled on the issue at bar, federal courts "guess" at what the state's highest court would decide if it had considered the very issue at bar, and may look to the decisions of lower state courts in performing that analysis. *E.g.*, *Howe ex rel. Howe v. Scottsdale Ins. Co.*, 204 F.3d 624, 627 (5th Cir. 2000) (citing *Krieser v. Hobbs*, 16 F.3d 736, 738 (5th Cir. 1999) and *Matheny v. Glen Falls Ins. Co.*, 152 F.3d 348, 354 (5th Cir. 1998)).

⁹² See Craig A. Cohen & Mark H. Rosenberg, *After the Storm: Courts Grapple with the Insurance Coverage Issue Resulting from Hurricane Katrina*, 43 TORT TRIAL & INS. PRAC. L.J. 139 (2008).

⁹³ *Leonard*, 499 F.3d at 424 (5th Cir. 2007).

that flooded insureds' home.⁹⁴ The policy was an all-risk policy containing a water damage exclusion and an ACC that read, "We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss. . . ." ⁹⁵ Insurer denied coverage; insureds sued for damages.

In writing for the majority, former Chief Judge Edith H. Jones first observed that Mississippi follows the EPC doctrine.⁹⁶ While the Mississippi high appellate court had not addressed the ACC enforceability issue, federal district courts and lower state courts in Mississippi historically upheld the enforceability of ACCs on the basis that unambiguous contracts should be "enforced as written."⁹⁷ The court also noted that no Mississippi statute prohibits insurers from contracting out of the EPC doctrine, like statutes in California and North Dakota have done.⁹⁸ The court determined that 1) Mississippi caselaw has not prohibited ACC enforceability, 2) Mississippi statutes do not prohibit the same, and 3) public policy supports enforcing unambiguous contracts freely entered into.⁹⁹ Consequently, the court found for the insurer and denied coverage.¹⁰⁰

III. ANALYSIS OF ACC ENFORCEABILITY IN AMERICAN INSURANCE LAW

The jurisdictional divide over the enforceability of ACC provisions in insurance contracts has important ramifications for the insurance industry and the legal system. Section A assesses the normative debate over

⁹⁴ *Id.*

⁹⁵ *Id.* at 425 (emphasis omitted).

⁹⁶ *Id.* at 431 (citing *Evana Plantation, Inc. v. Yorkshire Ins. Co.*, 58 So. 2d 797, 798 (Miss. 1952)).

⁹⁷ *Id.* at 433 & n. 8 (citing *Am. Bankers' Ins. Co. v. White*, 158 So. 346, 349 (Miss. 1935)).

⁹⁸ *Id.* at 435; *see supra* Part II.B.1.

⁹⁹ *Leonard*, 499 F.3d at 436.

¹⁰⁰ *Id.*

whether ACCs should be enforced.¹⁰¹ Section B provides recommendations to insurance professionals, legislators, and judges predicated upon the normative conclusions asserted in the previous Section.¹⁰²

A. ACCs Should Be Enforced

Pursuant to Article I of the United States Constitution, the freedom of contract is an essential pillar undergirding American contract law.¹⁰³ Most state constitutions explicitly safeguard this freedom.¹⁰⁴ The aim of contract law, after all, is to fulfill—not desert—the expectations of parties.¹⁰⁵ The policy debate implicated in the issue of whether the judiciary should intervene to bar enforcement of ACCs is similar to that discussed in *Lochner v. New York*.¹⁰⁶ That is, to what extent should the judiciary alter the common law distribution of entitlements and wealth?¹⁰⁷ In other words, how should the interest in preserving individual liberty by honoring contracts freely entered into to be balanced against fairness and equity concerns stemming from the fact insureds often do not read the fine print of their policies?

While insurance contracts are technical and rarely accepted with a lawyer “at the insured’s elbow,”¹⁰⁸ insurers should nevertheless be allowed

¹⁰¹ See *infra* Part III.A.

¹⁰² See *infra* Part III.B.

¹⁰³ See U.S. CONST. art. I, § 10, cl. 1.

¹⁰⁴ GEORGE BLUM ET AL., 16B AM. JUR. 2D CONSTITUTIONAL LAW § 641 (West 2d ed. 2017) (citing cases).

¹⁰⁵ STEVEN W. FELDMAN, 21 TENN. PRAC. CONTRACT LAW AND PRACTICE § 8:4 (2016) (citing *Miller v. Tawil*, 165 F. Supp. 2d 487 (S.D. N.Y. 2001)).

¹⁰⁶ 198 U.S. 45 (1905).

¹⁰⁷ Cf. Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 917 (1987) (“The *Lochner* Court required government neutrality and was skeptical of government “intervention”; it defined both notions in terms of whether the state had threatened to alter the common law distribution of entitlements and wealth, which was taken to be a part of nature rather than a legal construct. . . . Cases distinguishing between “positive” and “negative” rights are built on *Lochner*-like premises that take the common law as the baseline for decision.”).

¹⁰⁸ See *Chase*, 780 A.2d at 1123 (“The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policyholder

to contract out of the EPC doctrine. ACCs should generally be enforceable. The fundamental protection of insureds against abuses by the insurer in the drafting of the contract is the doctrine of *contra proferentem*: in the event that there are ambiguities in a policy, those ambiguities are construed in favor of the reasonable expectations of the insured against the insurer.¹⁰⁹ The doctrine of *contra proferentem* is a sufficient safeguard for ensuring that Aristotelian notions of equity are observed in insurance contract disputes.¹¹⁰ Neither legislative prohibitions of ACCs nor judicial activism generating such prohibitions are justified because they run afoul of the freedom of contract insurers and insureds enjoy. Unambiguous language in policies containing ACCs presents sufficient warning to both parties as to what policies do and do not cover.¹¹¹ As former Chief Justice Keith Callow's dissenting opinion in *Safeco Ins. Co. v. Hirschmann* demonstrated, barring enforcement of ACCs actually upsets a proper balance of policy interests by effectively "depriv[ing] insurers of the right to contract for coverage excluding specific risks."¹¹² Perhaps jurisdictions uniquely susceptible to frequent natural catastrophes should promulgate ACC prohibitions predicated on dire public policy interests. Generally, however, respecting the freedom to contract should be the teleological focal point in any causation inquiry before a court; enforcing ACCs should be the rule, not the exception.¹¹³

who is often without technical training, and who rarely accepts it with a lawyer at his elbow." (citing *Pa. Indem. Fire Corp. v. Aldridge*, 117 F.2d 774, 775 (D.C. Cir. 1941) and *Aschenbrenner v. United States Fid. & Guar. Co.*, 292 U.S. 80, 84, (1934)).

¹⁰⁹ *Id.* (citing *Smalls v. State Farm Mut. Auto. Ins. Co.*, 678 A.2d 32, 35 (D.C. 1996)).

¹¹⁰ See ARISTOTLE, *NICOMACHEAN ETHICS* 1137(b)20–1137(b)24 (Lesley Brown ed., David Ross trans. 2006) (c. 384–322 B.C.) (defining equity as the willingness to accommodate exigencies not contemplated in general rules).

¹¹¹ See *Chase*, 780 A.2d at 1132 ("Nor can we say that [Insurer] owed [Insured] a greater duty of disclosure or warning than the duty it fulfilled by using clear and unambiguous language in drafting the exclusionary provision in the policy.").

¹¹² See *Safeco*, 773 P.2d at 413 (Callow J., dissenting).

¹¹³ Cf. MEIXIAN SONG, *CAUSATION IN INSURANCE CONTRACT LAW* 68 (2014) ("The freedom of contract is the root of the policy. Ambiguity may exist where the wording or the definition of the excluded perils is unclear. However, whether the underwriter is liable in the event of concurrent cause with one excluded is not ambiguous. When the parties' intention is clear and explicit, the courts should respect and comply with it.").

B. *Recommendations for Practitioners, Legislatures, and the Judiciary*

Predicated upon the status of ACC enforceability in American insurance law as of 2017, this Section sets forth recommendations to actors in the insurance law system. This Section addresses insurance professionals and litigators.¹¹⁴ It also discusses potential responses to the issue of ACC enforceability by legislatures and the judiciary.¹¹⁵

Insurance professionals and insurance law practitioners should stay abreast of the state of the law. Public adjustors and lawyers representing an insured should be mindful of whether the law in the controlling jurisdiction allows or bars ACC enforceability outright in reviewing insured's coverage and developing litigation strategy. The same applies to staff adjusters, independent adjusters, and lawyers representing insurers. The enforceability of ACCs can be successfully contested by insureds as a matter of law in red light jurisdictions. In green light jurisdictions, insureds should not litigate the enforceability of ACCs unless the ACC and/or exclusionary language is *likely* to be found ambiguous, thereby triggering the doctrine of *contra proferentem*. Frivolous ACC enforceability claims in green light jurisdictions will only draw judicial ire and waste client funds. With respect to legal teams representing insurers, policies should not be drafted to include ACCs in red light jurisdictions. In green light jurisdictions, policy drafters should make special effort to ensure that ACCs and exclusionary terms are *unambiguous*. The model in Part I provides an example of an ACC that will likely survive judicial scrutiny.¹¹⁶ Attorneys should calibrate terms to the expectations of clarity possessed by judges in the forum where insurance litigation would likely occur.

Yellow light jurisdictions where ACC enforceability is unsettled provide a more complex problem with regard to litigation strategy. Caselaw in lower state courts and in federal courts in such jurisdictions generally favors enforceability. In lieu of a controlling high court opinion, insurers should seek federal jurisdiction where ACC enforceability is highly favored. Under federal law, parties contracting into a policy are citizens in

¹¹⁴ See *infra* Part III.B.1.

¹¹⁵ See *infra* Part III.B.2.

¹¹⁶ See *supra* note 26 and accompanying text.

1) every state where the insured is a citizen, 2) every state where the insurer is incorporated, and 3) every state where the insurer has a principal place of business.¹¹⁷ To that end, insurers should include ACCs in policies where parties to the contract will be considered diverse in citizenship the amount of coverage potentially denied is expected to exceed \$75,000.¹¹⁸ Insurers should advise courts of state and federal precedent that favors ACC enforceability, as well as the fact that the majority of states with clear rules of law favor ACC enforceability.

The converse recommendation applies to insureds: insureds should avoid removal and fight to the court of last resort in the jurisdiction in arguing that ACCs should not be enforced.¹¹⁹ Insureds should analogize insurance laws in the jurisdiction to those in California and North Dakota's insurance codes in arguing that enforcement is statutorily barred.¹²⁰ If there are no analogous statutes, or in the alternative, insureds should highlight Washington and West Virginia case law finding ACCs problematic.¹²¹ They should note fairness concerns inhering in the epistemic asymmetry during the policy drafting phase between insurers and insureds. If possible, insureds should stipulate that there be no ACC in the drafting stage to avoid the expense of litigating ACC enforceability to begin with.

Yellow light jurisdictions should favor ACC enforceability for the reasons stated in Part III.A. Courts should not bar ACC enforceability where there is no statutory basis to do so; it is the prerogative of the legislature to enact such a policy.¹²² Insurers should emphasize separation of powers concerns in arguing for enforceability in yellow light jurisdictions without laws prohibiting ACCs.

¹¹⁷ 28 U.S.C. § 1332(c) (2012).

¹¹⁸ 28 U.S.C. § 1332 (2012).

¹¹⁹ Because federal precedent in Oregon is split, removal there may be warranted. *See supra* note 86.

¹²⁰ *See* CAL. INS. CODE §§ 530, 532; N.D. CENT. CODE ANN. §§ 26.1-32-01, 26.1-32-03 .

¹²¹ *See Safeco*, 773 P.2d at 413 ; *Murray*, 509 S.E.2d at 14.

¹²² *See e.g.*, THE FEDERALIST NOS. 47–51 (James Madison) (asserting the separation of powers principle).

As stated in Part III.A., in my view, a legislated public policy against ACC enforcement is only justifiable in jurisdictions with unusual susceptibility to natural catastrophes demanding unique social security measures. I believe the Gulf States, specifically Louisiana, Texas, and Florida, are circumstantially best disposed to consider such action because they are uniquely susceptible to hurricane damage. According to the most comprehensive assessment of hurricane activity impacting the United States, on average, seven hurricanes strike the United States every four years and two major hurricanes hit the United States every three years.¹²³ Forty percent of hurricanes that hit the United States hit Florida; sixty percent of the category four and five hurricanes that hit the United States hit Florida or Texas.¹²⁴ These statistics demonstrate the Gulf States' susceptibility to hurricanes due to their extensive coastlines: from 1851 to 2010, nineteen struck Texas, twenty struck Louisiana, and thirty-seven struck Florida.¹²⁵ This susceptibility can be used to justify an ACC ban.

Legislatures should consider two realities related to patterns of hurricane activity. First, the number and intensity of landfalling hurricanes hitting the United States *decreased* significantly during the twentieth century.¹²⁶ Second, despite the immense destruction of Hurricane Katrina, the 2005 season was somewhat of an outlier. The majority of the most expensive hurricanes to hit the United States since 1851—normalized to reflect inflation in 2010 dollars as well as changes to personal wealth and coastal count population—occurred in the early- to mid-twentieth century.¹²⁷

¹²³ ERIC S. BLAKE, CHRISTOPHER W. LANDSEA & ETHAN J. GIBNEY, *The Deadliest, Costliest, and Most Intense United States Tropical Cyclones from 1851 to 2010 (And Other Frequently Requested Hurricane Facts)*, NAT'L WEATHER SERVICE, NAT'L HURRICANE CTR., 20 (2011), <http://www.nhc.noaa.gov/pdf/nws-nhc-6.pdf>.

¹²⁴ *Id.*

¹²⁵ *Id.* at 20, 22.

¹²⁶ *Id.* at 15.

¹²⁷ *Id.* at 28.

Overall hurricane activity since the two thousands increased, but exceptionally strong landfalls *did not*.¹²⁸ The devastation of the 2017 Atlantic season in the form of Hurricanes Harvey, Irma, and Maria, estimated to have inflicted more than \$290 billion in damage, was also unusual.¹²⁹ While these storms are not necessarily traceable to climate change, the prospective impact of climate change on future seasons threatening Gulf State homeowners should be taken into consideration as well.¹³⁰

Gulf State legislatures should also take into consideration milder interventions as alternatives. One example is public awareness campaigns preceding and during hurricane season (June 1 to November 30) targeting vulnerable areas that recommend homeowners evaluate their homeowner insurance policies closely in light of the ACC issue. Other more robust population level interventions include preventative measures, such as rolling back *laissez-faire* residential zoning on flood plains.¹³¹

The best argument for banning ACCs, would, I think, conceptualize such a measure as a “buckle-your seatbelt” regulation in light of the common scenario where flooding, wind damage, and mudflows concurrently cause residential property damage in hurricane prone areas.¹³² The need is illustrated by the fact that private homeowners insurance policies commonly do not guarantee against flood damage.¹³³ Moreover, disagreements

¹²⁸ *Id.* at 15.

¹²⁹ Maggie Astor, *The 2017 Hurricane Season Really Is More Intense Than Normal*, N.Y. TIMES (Sept. 19, 2017), <http://www.nytimes.com/2017/09/19/us/hurricanes-irma-harvey-maria.html>.

¹³⁰ See Peter Singer, *Hurricanes' Unnatural Toll*, PROJECT SYNDICATE (Oct. 13, 2017), <https://www.project-syndicate.org/commentary/hurricanes-inadequate-preventive-measures-by-peter-singer-2017-10>.

¹³¹ See *id.* (“But the number of lives lost and the amount of damage caused reflect human decisions. Houston’s notorious *laissez-faire* approach to zoning allowed houses to be built on flood plains.”).

¹³² See *id.*

¹³³ See *Does Homeowners Insurance Cover Hurricane Damage?*, ALLSTATE (May, 2016), <http://www.allstate.com/tools-and-resources/home-insurance/insurance-for-hurricane-damage.aspx>.

over the combination of flood and wind damage after hurricanes is a common source of dispute between insurers and insureds.¹³⁴ These factors, compounded by the impact of climate change on future seasons, make a compelling case for ACC bans. Legislatures should consider, however, alternative interventions outlined previously and inquire into the economic toll of banning ACCs. If possible, the amount of damage sustained by insureds unremediated because of ACCs should be empirically measured in order to inform the relative merits of a ban from an economic point of view. In the scenario where legislatures do enact such legislation, they should seek clarity and avoid the tension evidenced in Sections 530 and 532 of the California Insurance Code noted in *Garvey*.¹³⁵ To that end, insurance legislation intending to uphold the enforceability of exclusions in likeness of Section 532 should also explicitly disclaim that insurers cannot include ACCs in policies.

IV. CONCLUSION

The majority of jurisdictions with clear rules of law favor ACC enforcement, with Texas being the most recent addition to that number.¹³⁶ The law remains unsettled in a number of jurisdictions.¹³⁷ Courts in unsettled jurisdictions should uphold enforceability of ACCs out of respect for the freedom of contract principle.¹³⁸ Insurers and insureds should be

¹³⁴ See Darla Mercado, *Hurricane Matthew: Watch Out for These Insurance Surprises*, CNBC (last updated Oct. 6, 2016, 5:40 PM), <http://www.cnbc.com/2016/10/06/do-you-know-if-insurance-policy-covers-hurricane-damage.html>.

¹³⁵ See *Garvey*, 770 P.2d at 707 (“Our courts have long struggled to enunciate principles that determine whether coverage exists when excluded and covered perils interact to cause a loss. Initially, the courts attempted to reconcile section 530 (which provides for coverage when a peril insured against was the “proximate cause” of loss) with section 532 (which provides, that “If a peril is specifically excepted in a contract of insurance, and there is a loss which would not have occurred but for such peril, such loss is thereby excepted [from coverage] even though the immediate cause of the loss was a peril which was not excepted”).”).

¹³⁶ See *supra* Part II.A.

¹³⁷ See *supra* Part II.C.

¹³⁸ See *supra* Part III.A.

mindful of this jurisdictional divide in drafting policies and litigating disputes.¹³⁹ Legislatures that do favor the minority position should explicitly articulate the unenforceability of ACCs in their insurance codes to improve judicial economy by eliminating litigation over ambiguous statutory language.¹⁴⁰

¹³⁹ *See supra* Part III.B.

¹⁴⁰ *See supra* Part III.B.