Which Came First, the Chicken or the Egg? How Courts Apply the Concurrent Causation Doctrine to Resolve Coverage Disputes

By:
John S. Vishneski
Reed Smith

10 Downing Street, home of the British Prime Minister, has been completely destroyed by a missile apparently launched from a Royal Navy ship. The Prime Minister and numerous members of Parliament are dead. Somehow, three people survived the attack and emerged from the rubble: Harriet Jones, a little-known backbencher, Rose Tyler, a minor pop star, and a man identified only as The Doctor. The British government has submitted a claim for the damage to No. 10 Downing Street to its "all risk" property insurer, Lloyds Syndicate No. 3.14159, owned by a consortium known as Torchwood. The case has been assigned to special investigator Pierce Brosnan, who found a job as an insurance adjuster after losing the 007 gig to Daniel Craig.

The British government has claimed in its proof of loss that the missile was somehow fired by accident without authorization. This claim alone was enough to raise Brosnan's suspicions as there are numerous safeguards in place to keep such military missiles from being fired without proper protocols, a fact he learned during filming of Die Another Day. As he began to dig through the police files, additional strange evidence emerged: (i) no complete bodies of the Prime Minister or other MPs were found, but what appeared to be only the outer skins of several MPs were found; (ii) there were several reports of a spaceship landing in the Thames near No. 10 Downing Street although no ship was located, only debris that could be anything, (iii) the Prime Minister apparently requested United Nations approval to launch nuclear weapons less than an hour before the missile strike, and (iv) a police sergeant claims to have encountered a group of large green baby-faced aliens who smelled like bad breath in the Prime Minister's office while evacuating No. 10 Downing Street upon learning of the incoming missile. Brosnan's instincts told him that these scattered bits of evidence were important to Torchwood's coverage investigation. He said to himself, "This case implicates Torchwood's 'caused by alien invasion' exclusion or my name is not James Bond." He decided that an Examination Under Oath was in order, and since the British Government was the claimant he could insist that Harriet Jones sit for the examination.

Harriet Jones appeared for the EUO and brought Rose Tyler and The Doctor with her. As expected, they confirmed Brosnan's suspicions. According to Harriet and her friends, a crime family known as the Slitheen from Raxacoricofallapatorius had infiltrated parliament by killing the Prime Minister and several MPs and fitting their large alien bodies into their victims' skins using a compression collar device, providing perfect disguises, with the only clue that they were not the real Prime Minister and MPs being the gas exchange side effect. Their plan was to convince the United Nations that an alien invasion was imminent so they could get access to the secret codes allowing Britain to launch its nuclear missiles, which they would do by aiming them at other countries so as to cause other governments to retaliate and launch their nuclear missiles, turning the planet Earth into radioactive slag and killing everyone, while the Slitheen watched from the safety of their space ship. The Earth could then be sold off piece-by-piece as fuel for star ships. The Slitheen would make a killing. Fortunately, The Doctor, Rose and Harriet were at No. 10 Downing when the Slitheen's plan was unfolding. They barricaded themselves in the main conference room, which was designed as a safe room and had walls and doors made of 3-inch thick steel. Unable to defeat the Slitheen directly, and with conventional communications blocked by the Slitheen, The Doctor used the special cell phone he made for Rose to access the computer system of his TARDIS (a time machine that looks like a Police Telephone Box *circa* 1963) and tap into the British Defence system. From there, using the super-secret password he just happened to know, he was able to direct a Royal Navy ship to launch a missile at No. 10 Downing Street and blow up the Slitheen, and No. 10 Downing Street, just before the Slitheen used the United Nations nuclear weapons codes to start World War III. Harriet, Rose and The Doctor were not injured because they hid in a small closet with a strong wood frame door just before the missile hit. The space ship must have auto-destructed when the Slitheen did not re-board at the appointed time.

While some may consider this story unusual, over the past several years Torchwood had become increasingly aware of alien activity on Earth, largely centered in London, and due to the massive property damage often caused by such alien invasions, like any prudent insurer, Torchwood had incorporated a

"caused by alien invasion" exclusion into its property insurance policies. Of course, this odd chain of causation created a difficult insurance issue. Yes, an alien invasion set off the chain of events leading to the destruction of No. 10 Downing Street. But, the aliens were not the direct cause of the damage. A domestic missile fired by The Doctor using his TARDIS caused the damage. The Doctor, while admittedly an alien, was not an invading one. In fact, his job seems to be protector and savior of planet Earth. Property damage caused by Royal Navy missiles, friendly aliens and TARDISes is not excluded by Torchwood's "all risk" policy. Consequently, this strange case required Brosnan to apply the elusive concurrent causation doctrine to determine coverage.

A related problem arose when Torchwood, like any responsible insurer, exercised its subrogation rights to sue The Doctor for negligence in causing damage to No. 10 Downing Street, asserting that he could have defeated the Slitheen with a less destructive solution had he exercised ordinary care for one with his training and experience. The Doctor, of course, has comprehensive general liability insurance covering his protecting/saving activities, purchased from a different Lloyds syndicate owned by a consortium of Ferengi citizens, and there is no "caused by alien invasion" exclusion in his policy. However, because it was supposed to dovetail with his vehicle liability policy, his Ferengi policy contained an exclusion for "use, ownership and maintenance of a TARDIS." The Doctor's vehicle liability policy, bought in his home world of Gallifrey, became worthless when Gallifrey was destroyed (or lost) in the time war. Hence, Torchwood's subrogation claim against The Doctor for negligence implicated the concurrent causation doctrine in a liability policy context.

This paper explores the application of different versions of the concurrent causation doctrine to this very common fact situation.

I. What Is Concurrent Causation?

Concurrent causation is a concept seen in both the property and liability insurance arenas. Typically, concurrent causation involves scenarios where multiple perils or acts – at times a mixture of covered and uncovered perils – act together to result in a single instance of damage or injury. While at first blush, this explanation of the doctrine seems simple enough, like most areas of the law, upon closer examination things are not quite so clear. There is no uniform approach across jurisdictions to handling issues of concurrent causation. To the contrary, multiple rules have developed, and even among those rules there are often differences in the results reached by different courts.

Three rules are most widely applied to concurrent causation scenarios. Courts applying the efficient proximate cause rule look to the primary proximate cause of the loss and determine whether that cause is covered by the insurance policy at issue. If so, there is coverage for the resulting loss, regardless of whether the other contributing causes are covered or excluded from coverage under the policy. Where the liberal concurrent cause rule is applied, if both covered and non-covered causes contribute to a loss, there will be coverage so long as the covered cause is separate and distinct from the non-covered cause. Finally, under the 7th Circuit rule, for there to be coverage for a loss, the covered cause must be capable of having caused the loss wholly independently of the excluded cause of loss.

If this sounds a bit confusing, that's because it is. Each of these three rules takes quite a different approach to concurrent causation scenarios than the other two and, as discussed further below, there are even variances within the application of each rule – adding to the murky waters of this issue. And depending on which side you find yourself on in a coverage dispute, a positive outcome to your coverage debate may very well hinge on your ability to convince the court to apply a particular rule in a particular manner, as highlighted further below.

II. Application of the Efficient Proximate Cause Rule

The efficient proximate cause rule has been adopted by the majority of jurisdictions in the United States. Efficient proximate cause means the predominating or most important cause of the loss. Under the efficient proximate cause rule, there is coverage if a covered peril is the efficient proximate cause of the loss, although an excluded peril may have contributed to the loss. Conversely, if the efficient proximate cause of the loss is excluded, there is no coverage.

A. Case Law Applying the Efficient Proximate Causation Rule

It is helpful to review cases across the country to better understand how the efficient proximate rule works in practice. For example, in *Graham v. Public Employees Mutual. Insurance Co.*, 656 P.2d 1077 (Wash. 1983), mudflows following the eruption of Mount St. Helens destroyed a home. Under the terms of the policy, the eruption was a covered loss, but not the mudflows. *Id.* at 1080. The Washington Supreme Court overturned the immediate physical cause doctrine – which would have barred coverage here – in favor of "the efficient or predominant cause" doctrine. *Id.* at 1080-81. The Court held that "it is the efficient or predominant cause . . . which is regarded as the proximate cause, not necessarily the last act in a chain of events." *Id.* at 1081. The Court further held that:

> In the present case, the mudflows which destroyed the appellants' homes would not have occurred without the eruption of Mount St. Helens. The eruption displaced water from Spirit Lake, and set into motion the melting of the snow and ice flanking the mountain. A jury could reasonably determine the water displacement, melting snow and ice and mudflows were mere manifestations of the eruption, finding that the eruption of Mount St. Helens was the proximate cause of the damage to appellants' homes.

Id.

In another example, in *John Drennon & Sons Co. v. New Hampshire Insurance Co.*, 637 S.W2d 339, 340 (Mo. Ct. App. 1982), the plaintiff's crane was damaged while it and another crane owned by plaintiff were being used to move a microwave tower. While the tower was suspended in midair, the upper end of it buckled and fell against the crane, damaging it. *Id.* The policy provided coverage for "direct loss or damage by breakage due to hoisting." *Id.* at 341. The evidence showed that all raising of the tower had finished before it fell. *Id.* The insurer contended that "hoisting" was not the direct cause of the damage as no further lifting was to be done, and the damage was directly due to the collapse of a section of the tower. *Id.* The Court held that "a cause is proximate if it is the efficient cause which sets in motion the chain of circumstances leading up to the damage and which in a natural, continuous sequence." *Id.* The Court concluded that "hoisting was the direct cause," because "hoisting the tower apparently put it in a position which caused it to collapse" and that "if it had not been hoisted by the cranes, it could not have caused the damage in the manner that it did." *Id.*

As demonstrated above, under the efficient proximate cause rule, there is coverage if a covered peril is the efficient proximate cause of the loss, although an excluded peril may have contributed to the loss. On the other hand, if the efficient proximate cause of the loss is excluded, there is no coverage. For example, in *Abady v. Hanover Fire Insurance Co.*, 266 F.2d 362 (4th Cir. 1959), pipes in the attic froze and then burst, flooding the building. The insured contended that days prior, there had been a windstorm that uncovered a hatch in the roof, allowing for the cold air to enter and freeze the pipes. *Id.* at 364. The policy explicitly provided coverage for "direct loss by windstorm," but excluded coverage for "loss caused directly or indirectly by [] frost or cold-weather". *Id.* at 363. However, the Court held that even if the windstorm dislodged the hatch cover, allowing for cold air to enter the building, this cause was "too remote" from the resultant damage (the freezing and subsequent bursting of the pipe). *Id.* at 364.

Similarly, in *Lydick v. Insurance Co. of North America*, 187 N.W.2d 602, 604 (Neb. 1971), the policy provided coverage for a windstorm, but specifically excluded coverage for loss "caused directly or indirectly by frost or cold weather or ice". The policy further excluded coverage for "loss to livestock or poultry caused in whole or part by running into streams or ditches . . . or from smothering." *Id.* In that case, the insured's cattle were lost when they sought shelter from the wind and bitter cold in a valley that contained a frozen pond. The ice on the pond gave way and the cattle drowned. *Id.* at 603. The insured argued that the cattle would not have gathered on the frozen pond but for the windstorm. *Id.* at 604. While the Court acknowledged that this was true, it concluded that "there were many other antecedent and contributing factors that produced this loss." *Id.* The Court held that the "direct cause of the loss in this case was the collapse of the ice on which the cattle stood. The cold wind merely created an antecedent and preliminary condition which contributed to their wandering upon the snow-covered ice, and thus can only be considered as an indirect cause." *Id.*

B. Issues Related To The Application Of The Efficient Proximate Cause Rule

Identifying the most important cause of a loss is often difficult. Even the California Supreme Court has conceded there are times where two or more "causes are truly independent of each other and neither one can fairly said to be the 'efficient' or 'predominant' cause of the loss." *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 715 (Cal. 1989). Moreover, the efficient proximate cause is not necessarily the peril which happens first, setting the others in motion. *Id.* at 707-08. Conversely, the "immediate cause" of the loss (the last to occur) is also not necessarily controlling. *Id.* Indeed, "in most instances, the insured can point to some arguably covered contributing factor." *Id.* at 711. As a result, the efficient proximate cause standard often makes it more difficult for insurers to obtain summary judgment on causation questions, and easier for insureds to get their cases to the jury.

C. What the Efficient Proximate Causation Rule Means For Doctor Who

Under the efficient proximate causation rule, the British government is likely covered under the "all risk" property insurance policy for property damage to 10 Downing Street. That is because the direct and most important cause of the damage to 10 Downing Street was the domestic missile that was fired by The Doctor using his TARDIS – a covered cause of loss. While Torchwood would likely argue that the alien invasion (an uncovered cause) triggered the chain of events leading to the destruction of 10 Downing Street, as noted above, the efficient proximate cause is not necessarily the cause that is first in time. Given all of the things that had to happen after the alien invasion for there to be a loss, at best the invasion is an indirect cause, not the efficient proximate cause.

Interestingly, this same analysis may lead to the opposite result when considering coverage for The Doctor's negligence under his CGL policy. While the CGL policy does not contain an exclusion for loss caused by an alien invasion, it does contain an exclusion for "use, ownership and maintenance of a TARDIS." Because The Doctor's negligent use of his TARDIS to launch a missile at 10 Downing Street was the efficient proximate cause of the loss, and because this cause is specifically excluded by the CGL policy, despite his heroism, The Doctor may be out of luck on his insurance claim.

III. Application of the Liberal Concurrent Causation Rule

The liberal concurrent causation rule was originally adopted by California courts, and is, at times, still referred to as the "California Rule", despite the fact that California has since statutorily adopted the efficient proximate cause rule. As the cases discussed below demonstrate, rather than identify the proximate cause of a loss, the liberal concurrent causation rule looks at each cause of a loss and if one of

those causes is covered, there will be coverage for the loss (despite the existence of contributing non-covered causes).

A. Case Law Applying the Liberal Concurrent Causation Rule

State Farm Mutual Automobile Insurance Co. v. Partridge, 514 P.2d 123 (Cal. 1973), is the seminal case applying the liberal concurrent causation rule. This case involved an insured who was covered by both a homeowner's and an automobile insurance policy with State Farm. *Id.* at 124-25. While hunting with a pistol that had been modified to lighten the trigger pull, the pistol accidentally discharged into the arm of a passenger of the insured's vehicle. *Id.* at 125-26. To make matters more interesting, the insured was driving his vehicle at the time that the pistol discharged. *Id.* The question that arose was whether there was coverage for this incident under either the homeowner's or the automobile insurance policy. *Id.* at 124. State Farm's position was that there was no coverage under the homeowner's policy due to the exclusion from coverage for losses arising out of the ownership, maintenance, or use of a motor vehicle. *Id.* at 126. But the insured argued that that modification of the trigger mechanism on the pistol and the negligent driving of the vehicle were concurrent causes of the loss. *Id.* at 126-27.

Ultimately, the Court held that there was coverage for the loss. In doing so, the Court explained:

> Here the "use" of Partridge's car was not the sole cause of Vanida's injuries but was only one of two joint causes of the accident. Thus, even if we assume that the connection of the car with the accident is the type of non-ambiguous causal relationship which would normally bring the exclusionary clause into play, the crucial question presented is whether a liability insurance policy provides coverage for an accident caused jointly by an insured risk (the negligent firing of the trigger mechanism) and by an excluded risk (the negligent driving). Defendants correctly contend that when two such risks constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy.
>
> In issuing the homeowner's policy to Partridge, State Farm agreed to protect the insured against liability accruing from non-auto-related risks. The insurer does not deny that Partridge's negligence in filing the trigger mechanism of his gun was a risk covered by the homeowner's policy; thus, if the gun had accidentally fired while the insured was walking down the street or running through the woods, the insurer admits that any resultant damage would clearly be covered by the policy. The insurer contends, nonetheless, that coverage is foreclosed here because the present accident arose out of the use of an automobile.
>
> In the instant case, however, although the accident occurred in a vehicle, the insured's negligent modification of the gun suffices, in itself, to render him fully liable for the injuries. Under these facts the damages to Vanida are, under the language of the homeowner's coverage clause, "sums which the Insured . . . [became] legally obligated to pay" because of the negligent filing of the trigger mechanism; inasmuch as the liability of the insured arises from his non-auto-related conduct, and exists independently of any "use" of his car, we believe the homeowner's policy covers that liability.

Id. at 129 (alterations in original). As such, there was coverage for the incident under the homeowner's policy, despite the existence of the motor vehicle exclusion.

A number of courts have followed in the wake of the *Partridge* decision, applying the liberal concurrent causation rule to situations where more than one cause ultimately led to a single loss. The United States District Court for the Western District of Tennessee did so in *Davidson Hotel Co. v. St. Paul Fire &*

Marine Insurance Co., 136 F. Supp. 2d 901 (W.D. Tenn. 2001). That case involved water leaking from a rusted water heater and entering an electrical room through holes left in the floor by workmen. *Id.* at 904. The Court applied the liberal concurrent causation rule to decide that coverage was available for the resulting damage, explaining:

> The concurrent causation doctrine allows for recovery where loss is essentially caused by an insured peril with the contribution of an excluded peril merely as part of the chain of events leading to the loss. Thus, under a policy insuring against property loss "directly" resulting from a particular cause or risk, but excluding coverage against loss by certain enumerated other causes, the insurer's contention that coverage does not exist since an excluded risk combined with an insured risk to bring about the loss is without merit.

Id. at 905-06.

A few years later this rule was applied by the Court of Appeals for the Eleventh Circuit in *Guideone Elite Insurance Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F. 3d 1317 (11th Cir. 2005). In that case, a woman and her two children were abducted from the parking lot of the insured church, and the woman was robbed and sexually assaulted. *Id.* at 1320-22. She later brought suit against the church, which sought coverage for her claims under its policy of insurance – which specifically excluded from coverage personal injury arising out of sexual misconduct of any kind. *Id.* at 1322-23. The insurer denied coverage under this exclusion. *Id.* at 1323. The Eleventh Circuit disagreed, explaining that:

> Florida's concurrent cause doctrine permits coverage under an insurance policy when the loss can be attributed to multiple causes, as long as one of the causes is an insured risk. . . . This doctrine, however, is only applicable when the multiple causes are not related and dependent, and involve a separate and distinct risk.

Id. at 1330 (internal quotations and citations omitted). Because the perils of robbery and rape were not related and dependent, but involved a separate and distinct risk, there was coverage under the policy. *Id.* at 1330.

In *American Family Mutual Insurance Co. v. Co Fat Le*, 439 F.3d 436 (8th Cir. 2006), the insured caused his own death, and the death of several others, when he left his car running in a garage. *Id.* at 438. The cause of death was found to not just be acute carbon monoxide intoxication, however, but also ecstasy intoxication. *Id.* The families of the deceased brought suit against the owners of the home where the deaths occurred, and they sought coverage under their homeowner's insurance policy. *Id.* at 438. Coverage was denied based on two exclusions - one for bodily injury arising out of the ownership or use of a motor vehicle and the other for the use of controlled substances. *Id.* The Court applied the liberal concurrent causation rule and found that there was no coverage, explaining:

> Missouri law provides that when an insured risk and an excluded risk constitute concurrent proximate causes of an injury, a liability insurer is liable so long as one of the causes is covered by the policy. In determining whether this concurrent proximate cause doctrine applies, we must ascertain whether the alleged covered cause is an act independent and distinct from the excluded cause of the injury. In the present case, we must determine whether the allegations that the Defendants kept an unsafe premises and negligently failed to warn the decedents of the risk of harmful carbon monoxide fumes were independent claims distinct from claims arising out of the ownership or use of an automobile. . . .
>
> In determining whether there are concurrent proximate causes of an injury, Missouri courts examine whether each alleged cause could have independently brought about the

> injury. Under the concurrent proximate cause doctrine, an insured seeking indemnification under a covered policy claim must be able to establish an independent claim under that policy provision, while at the same time not relying on an element of a claim that falls under the policy's exclusion.

Id. at 439 (internal citations omitted). The Court determined that the allegation made in the complaint that the garage of the home was inadequately ventilated was not an inherently dangerous condition without the vehicle that was left running in that garage. *Id.* at 440. Due to this finding, there was no coverage under the homeowner's policy. *Id.* at 441.

B. Issues Related To The Application Of The Liberal Concurrent Causation Rule

Of course, there are several issues presented by the liberal concurrent causation rule as well. First, even if a jurisdiction has adopted the liberal concurrent causation rule, that rule may be negated if the insurance policy at issue contains anti-concurrent causation language. In such a case, taking pains to ensure a dispute is brought before a court that will normally apply this rule would be in vain, as the policy language itself will prevent its application.

Second, the sequence of events does alter the result under this rule. Regardless of whether a covered or a non-covered event sets the chain of events into motion, the inclusion of a single covered, contributing cause in the chain that can be considered as capable of "independently" causing the loss will mean there is coverage for all of the resulting damages. In that vein, although the rule requires that covered and excluded events must be "independent" events, there is no clarity surrounding what "independent" actually means. The answer is largely left to the opinion of the judge or jury deciding the issue.

C. What the Liberal Concurrent Causation Rule Means For Doctor Who

If the British government and The Doctor are lucky enough to find themselves before a court applying the concurrent causation rule, there will likely be coverage for their claims. The damage to No. 10 Downing Street, for which a property claim was made, was caused by both an excluded cause of loss – the alien invasion – and a covered cause of loss – The Doctor's use of his TARDIS. The same result would be reached under this rule for The Doctor's claim for general liability coverage for the British government's suit – because both a covered and an excluded cause of loss resulted in the damages.

IV. Application of the 7th Circuit Rule

A. Case Law Applying the Seventh Circuit Rule

Purporting to apply Illinois law, the Seventh Circuit Court of Appeals has effectively created a third variation of the concurrent causation doctrine that appears to be unique to the Seventh Circuit. In *Transamerica Insurance Co. v. South*, 975 F.2d 321, 323 (7th Cir. 1992), an insured investment advisor allegedly recommended certain annuities to clients representing that they were guaranteed by the state guarantee fund when in fact they were not guaranteed because the insurer selling the annuities was not authorized to do business in Illinois, a requirement for the guarantee fund to apply. The insurer became insolvent, and the clients sued. *Id.* The investment advisor's errors and omissions liability insurer, Transamerica, denied coverage under its policy's insolvency exclusion.[1] *Id.* at 322. The investment advisor argued that it was nevertheless covered because the clients had alleged that he was negligent in

[1] The exclusion stated: "XII. Any claim arising out of insolvency, receivership or bankruptcy of any organization (directly or indirectly) in which the INSURED has placed or obtained coverage or in which an INSURED has placed the funds of a client or account." *South* at 328.

failing to investigate the insurer and learn that it was not authorized to do business in Illinois and in poor financial health. *Id.* at 329. Citing to prior Illinois state court cases applying the liberal rule similar to the cases described in Section III above, the Seventh Circuit held there was no coverage. *Id.* at 332.

Its decision appears to be a straightforward application of the principle that the covered cause must be *capable* of causing the loss at issue by itself, even if an excluded cause also, in fact, contributed to causing the loss. Had it simply applied that principle, it would have reached the result of no coverage because the investment advisor's negligent failure to investigate the insurer and learn that its annuities were not guaranteed and that it was in poor financial health were not, in fact, *capable* of causing the loss absent the insolvency of the insurer selling the annuities.

However, the Seventh Circuit characterized the rule as requiring that the covered and excluded caused must be "wholly independent" of each other. *South* 975 F.2d at 330. This is confusing language when applied to circumstances where an excluded and a covered cause act together to cause the particular loss. In the *State Farm v. Partridge* case discussed above in connection with the liberal rule, the jostling of the vehicle (excluded) and the hair trigger of the gun (covered) combined to cause the injury. 514 P.2d at 125-26. The only independence required of the two causes was that each hypothetically could cause the same type of injury in the absence of the other cause (e.g. the hair trigger of the gun could cause it to go off unexpectedly and injure someone while the owner was walking down the street). But, "wholly independent" carries the connotation that the covered cause was sufficient to cause, and did cause, the damage or injury at issue notwithstanding the presence of the excluded cause.

This latter interpretation of "wholly independent" was adopted in a subsequent Seventh Circuit case, *Nautilus Insurance Co. v. 1452-4 Milwaukee Avenue, LLC*, 562 F.3d 818 (7th Cir. 2009). In *Nautilus*, the insured owner of property hired contractors and subcontractors to excavate its property and such activity allegedly caused damage to a neighboring property. *Id.* at 819. The neighbor sued alleging the owner was liable for the negligence of its contractors and subcontractors and also that the owner was liable directly because it failed to give the neighbor a statutorily required notice of the planned excavation. *Id.* at 820. The owner's liability insurance contained an exclusion for liability arising out of the operations performed by contractors and subcontractors. *Id.* Of course, at the duty to defend stage, the damage to the neighbor's property potentially could have arisen from the contractor and subcontractor operations or possibly from a different cause (e.g. trespassers injuring the excavation supports). In the latter case, the owner would still be liable to the neighbor for the damage to its property for failing to give the statutory notice. Hence, *hypothetically*, the owner's failure to give notice could have caused the same damage without any negligence on the part of the contractors or subcontractors. Under the liberal rule, the result would be coverage for the neighbor's suit.

However, the Seventh Circuit applied the "wholly independent" standard and ruled that because in the circumstances alleged, the failure to give notice and the negligence of the contractors and subcontractors *resulted in the same injury*, they could not, therefore, be said to be wholly independent causes. *Nautilus* at 823. The Court stated:

> While it is true that the statutory duty of the property owner is independent of the duties of contractors and subcontractors, there is no separate or independent compensable injury; a failure to comply gives rise to liability for any property damage "arising from" the excavation. Thus, the statutory claims in the underlying complaints seek recovery for the same loss as all the other claims – the property damage arising out of the faulty excavation performed by 1452 LLC's contractors and subcontractor – and coverage for that property damage is excluded by the contractor-subcontractor exclusion.

Id. at 822. The Seventh Circuit's application of the concurrent causation doctrine in *Nautilus* requires that the covered and excluded causes must be "wholly independent" in the sense that they, in fact, cause distinct injuries. This would seem to narrow the concurrent causation doctrine considerably, requiring a much broader type of independence of the covered and excluded causes than cases like *State Farm v. Partridge* applying the liberal concurrent causation rule.

The Seventh Circuit once again applied its unique rule in *Netherlands Insurance Co. v. Phusion Projects, Inc.*, 737 F.3d 1174 (7th Cir. 2013). In *Netherlands*, Phusion, the insured manufacturer of a beverage called Four Loko, was sued in several personal injury cases by individuals who drank Four Loko and injured themselves or others. *Id.* at 1175. Four Loko alleged contained high amounts of both alcohol and stimulants, including caffeine, guarana and taurine. *Id.* Plaintiffs alleged that the combination of alcohol and stimulants in Four Loko caused those who drank Four Loko to act aggressively and recklessly and that the stimulants masked the depressant effects of alcohol, resulting in dangerous behaviors that caused the injuries in question. *Id.* at 1175-76. Netherlands sought a declaration of no coverage arguing application of its liquor liability exclusion which removed coverage for liability by reason of causing or contributing to intoxication. *Id.* at 1175.

Under the liberal concurrent causation rule, coverage would be found. High amounts of alcohol and high amounts of stimulants are each *capable* of affecting behavior and causing recklessness independently. However, the Seventh Circuit applied its unique variation and ruled that since both causes were alleged to combine to cause the injuries at issue, there was no coverage. *Id.* at 1180. The Court applied its "wholly independent" standard, stating:

> [B]ecause of the very nature of the Four Loko product, the stimulants and alcohol cannot be separated. The presence of energy stimulants in an alcoholic drink has no legal effect on the applicability of a liquor liability exclusion. The supply of alcohol, regardless of what it is mixed with, is the relevant factor to determine whether an insured caused or contributed to the intoxication of any person. While Phusion's choice of premixing energy stimulants and alcohol to make its Four Loko product might not have been a very good one, it does not amount to tortious conduct that is divorced from the serving of alcohol.

Id.

Under the Seventh Circuit's unique variation, the Court does not ask the hypothetical question as to whether the covered cause is *capable* of causing the injury at issue independently of the excluded cause; rather, the Court asks whether the covered cause, in fact, caused the injury at issue independently of the excluded cause. The Seventh Circuit rule appears to narrow the concurrent causation doctrine considerably from the liberal concurrent causation rule discussed above.

The Seventh Circuit's unique "wholly independent" rule was recognized as inconsistent with application of the liberal concurrent causation rule by the Illinois Appellate Court. In *Cincinnati Insurance Co. v. William F. Braun Milk Hauling*, 988 F.Supp.2d 895 (S.D. Ill. 2013), a Federal District Court was faced with a question of coverage for an accident at a construction site where both use of a vehicle (excluded) and failure to provide the statutorily required number and placement of flagmen were alleged to result in the accident. The Court noted that in virtually identical circumstances, the Illinois Appellate Court in *Louis Marsh Inc. v. Pekin Insurance Co.*, 491 N.E.2d 432 (Ill. App. Ct. 1985) had applied the liberal concurrent causation rule and had found coverage because both the use of the vehicle and the improper placement and supply of flagmen were hypothetically *capable* of causing injury independently of each other. Citing the Seventh Circuit opinion in *Nautilus*, however, the Court held that the Seventh Circuit's

interpretation of Illinois law was different and the Court felt bound to follow its reviewing court. *William F. Braun Milk Hauling*, 988 F.2d at 900.

B. Issues Related To The Application of the Seventh Circuit Rule

Under the Seventh Circuit Rule, an excluded cause of loss must be completely incidental to the loss. The covered cause of loss must not only be capable of causing the loss independently, but it must have in fact caused the loss.

Covered and excluded causes acting together to produce a loss can result in no coverage for the loss entirely.

C. What the Seventh Circuit Rule Means For Doctor Who

Unfortunately for the British government and for The Doctor, coverage would be denied for their claims under the Seventh Circuit Rule. With respect to the property insurance claim for No. 10 Downing Street, the Seventh Circuit would say that the alien invasion (excluded) was inextricably linked with The Doctor's use of his TARDIS (covered) to thwart the alien invasion because both causes in fact combined to produce the resulting damage to No. 10 Downing Street.

Similarly, The Doctor's claim for coverage under his general liability policy for the British government's suit for damages to No. 10 Downing Street would also be denied. Although here the coverage for each cause is reversed – alien invasion (covered) and use of TARDIS (excluded) – the Seventh Circuit would point to fact that both causes in fact combined to cause the damage to No. 10 Downing Street and were therefore not "wholly independent" of one another.

V. Policy Language Can Impact Which Rule A Court Will Apply

Finally, the language of the policy can impact whether and how a court applies the rules described above. For example, in *Julian v. Hartford Underwriters Insurance Co.*, 110 P.3d 903, 904 (Cal. 2005), the plaintiff suffered damage to his home following a rain-induced mudslide. The homeowners' insurance policy at issue contained an exclusion purporting to bar coverage for loss caused by weather conditions that contributed "in any way with" a landslide. *Id.* at 905. The insureds argued that the "contribute[s] in any way" language violated California's statutory efficient proximate cause doctrine, because it allowed the insurer to defeat coverage for a loss proximately caused by otherwise covered weather conditions by also finding the existence of a landslide in the causal background – no matter whether the landslide was independent from the weather conditions or an indirect cause of the loss. *Id.* at 910. Nonetheless, the Court held that there was no coverage for the landslide as a matter of law, despite the argument that the efficient proximate cause of the damage was torrential rain (a covered cause of loss). *Id.* at 912.

In *Crete-Monee School District v. Indian Insurance Co.*, No. 96 C 0275, 2000 WL 1222155, *2-10 (N.D. Ill. Aug. 22, 2000), the plaintiff suffered damage to several schools when deteriorated PVC roofs froze and shattered during a particularly cold winter day (20 degrees below Fahrenheit). It was undisputed that had the roofs been in better condition, the roofs would not have shattered even at that cold temperature. It was likewise undisputed that the worn roofs would have continued to function properly absent the unusually chilly conditions. *Id.* at *11-12. While the policy excluded coverage for deterioration, as well as weather conditions that "contribute in any way with . . . earth movement," it did not contain similar language excluding coverage for losses caused concurrently by weather conditions and deterioration. *Id.* at *13-14. Based on this discrepancy, the court applied a liberal concurrent causation rule to find coverage, concluding that "the presence of a covered cause (weather) creates coverage as a matter of law even in the presence of an excluded cause (deterioration)." *Id.* at *25.

Some courts, however, have ignored express policy language in favor of statutorily-adopted concurrent causation rules. For example, Washington has a statutory efficient proximate cause rule. In *Safeco Insurance Co. v. Hirschmann*, 760 P.2d 969, 969 (Wash. Ct. App. 1988), the insured's home was destroyed in a landslide after an unusually severe wind and rain storm. An expert testified that the primary cause of the landslide was the record rainfall that saturated the ground. *Id.* at 969-70. However, the policy explicitly excluded coverage for landslides, and stated "we do not cover loss caused by [landslides], ***whether occurring alone or in any sequence with a covered peril***". *Id.* at 970 (emphasis in original). Nonetheless, the Court held that "the language of the particular exclusion at issue does not nullify the conclusion that the proximate cause of Hirschmann's loss was a combination of wind and rain, which are insured perils under his all-risk policy." *Id.*

Similarly, North Dakota has a statutory efficient proximate cause rule. In *Western National Mutual Insurance Co. v. University of North Dakota*, 2002 ND 63, 643 N.W.2d 59 (N.D. 2002), a river flooded, causing water to enter University buildings through the sewer system. The policy 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***," but provided coverage for sewer backup. *Id.* at P3, 643 N.W.2d at 8. The Court held that given North Dakota's statutorily-adopted "efficient proximate cause doctrine," the insurer could not contractually preclude coverage when the efficient proximate cause of a loss was a covered peril. *Id.* at P20, 643 N.W.2d at 13. The Court concluded that while the flood may have been part of the chain of causation, there was evidence supporting the jury's determination that it was the sewer backup (and not the flood) that was the efficient proximate cause of the property damage. *Id.* at P33, 643 N.W.2d at 15-16.