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WHAT'S TORT GOT TO DO WITH IT: PROXIMATE CAUSE AND THE INTERPRETATION OF INSURANCE CONTRACTS

Gary J. Valeriano

I.
INTRODUCTION

The concept of "proximate" cause has a long and tortured history. Its earliest uses in English case law seem to have been based on the idea that the cause immediately preceding the action under scrutiny is the proximate and/or direct cause. This was likely done in an effort to simplify the assignment of responsibility or blame in both societal actions (*i.e.,* negligence) and contractual obligations (*i.e.,* mostly, but not exclusively, maritime insurance).

Over the years the concept of proximate cause as being the last link before the action under examination has fallen by the wayside. Apparently dissatisfied with the application of the concept of proximate cause as the immediately preceding cause of the damage or loss sustained by the complaining party, courts have over time expanded that concept. It is important, however, to note that the expansion of the concept of proximate cause came mainly in cases dealing with both statutory obligations and the idea of responsibility or liability for the negligent actions of a party. Therefore, proximate cause has been expanded to mean what has come to be understood as the "efficient cause," that is, the cause predominately responsible for the end result. While this concept is in and of itself vague and subject to misapplication, it has over the course of years provided a societal benefit in determining responsibility for damages and/or losses caused by an actor's negligence, malfeasance or recklessness.

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As this paper explores, the concept of proximate cause in insurance law was, for the better part of the recorded cases, confined to the idea of the immediately preceding link in a causal chain. That is, the concept of proximate cause was different in contract than it was when applied in a tort setting. The fact that this distinction blurred over the course of time was probably inevitable. Jurors who are familiar with the term "proximate cause" in the tort setting would, in some cases, quite naturally, assume that it meant the same thing when applied to an insurance contract. The fact that it historically did not was either the result of an oversight in the juror's analysis or was purposefully utilized to reach certain ends.

The purpose of this paper is to examine why the application of proximate cause, as utilized in the tort setting, is inappropriate and unreasonable in interpreting contracts. The whole idea of proximate cause was to make the concept of causation simpler to understand in order to negotiate risks and set fair prices for insurance on those risks. By changing the idea of proximate cause to now include the tort concept of "efficient cause," courts have thrown that bargained-for balance out of kilter. Both for historical and practical reasons, the idea of proximate cause means direct and immediate, not remote. When one starts applying the concept of "efficient proximate cause" to insurance contracts, then the waters are muddied and a more subjective analysis may be utilized which can make almost any link in the causal chain the "efficient" one. It is this change in the meaning of proximate cause, and its application to language which specifically calls for coverage only in circumstances of "direct" or "immediate" loss, that takes the interpretation of the contract out of the standard rules for construction of contracts into the tort realm where defining societal responsibility and obligations are the primary goal. By doing so, the uncertainty that has been created by the use of the term "proximate cause" in the tort setting is now imported into the contractual setting, thereby rendering the intent of the parties to the contract a secondary consideration. This subverts the long standing concept of judicial contractual interpretation which makes the intent of the parties the primary focus. If the long established rule of law is to be served, the courts must reacquaint themselves with the distinction between proximate cause in tort and proximate cause in contract.

II.
CAUSATION IN THE LAW

Any discussion about the cause of things must take into account the fact that the simple concept of "cause" gives rise to a large number of different theories. When generally speaking about causation, we run into problems concerning where to start and how far back to go. There can be no doubt that there are many different kinds of cause in general. "It seems to me that the danger lies in espousing any one particular type of cause to the exclusion of all others, for there can be few, if any, events of which it can truly be said that they had but one single cause."[1] In this context we must be mindful of the fact that a difficulty in describing the "cause" to any observable effect, lies partly in the desire of human beings to attribute responsibility or blame.

The law has over the years come to rely on the term proximate cause in assessing responsibility in both tort and insurance settings. However, an anomaly which has developed over time is the frequent failure of a court to actually read the policy to see if the risk insured against is to be determined by a proximate cause standard or some other relevant wording. One word used widely in connection with causation in insurance policies is the term "direct." One of the focuses of this paper will be the meaning of the word "direct," and the starting point for any interpretation are the basic dictionary sources.

It is interesting to note, preliminarily, that many of the courts construing the insuring phrases which utilize the word "direct," simply do not refer to dictionary definitions which would seem to be the simplest source of understanding.[2] Instead some courts simply assume or impose a proximate cause standard in lieu of whatever word has been chosen by the contracting parties to trigger coverage. For purposes of analysis, we will look at what proximate cause meant and what it has come to mean over time. However we will first look at the definition of "direct" (and "directly") from a variety of different dictionaries generally available in the early part of the 21st century.

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[1] Neil Munro, *Causation In History*, PATHWAYS (ESSAYS), https://philosophypathways.com/essays/munro2.html (last visited June 5, 2018).

[2] *See, e.g.*, Jefferson Bank v. Progressive Cas. Ins. Co., 965 F.2d 1274 (3d Cir. 1992).

A. The Meaning of Direct

The *Oxford English Dictionary* defines "direct" or "directly," as follows:

> 1. Without changing direction or stopping . . . 1.1 At once or immediately . . . .[3]

The Cambridge Dictionary defines "directly" as "without anything else being involved or in between."[4] To cite more recent sources, "directly" is defined as:

> 1a: In a direct manner . . .
> b: In immediate physical contact;
> c: In a manner of direct variation;
> 2a: Without delay; immediately. . . .[5]

Dictionary.com defines "directly" as:

> 1. In a direct line, way, or manner; straight: . . .
> 2. At once; without delay; immediately. . . .[6]

The *Collins English Dictionary* defines "directly" as:

> 1. In a direct manner;
> 2. At once; without delay
> 3. Immediately; just[7]

In determining what the word "directly" means, various thesauruses make clear exactly what is contemplated by use of that word. The *Collins English Thesaurus* lists synonyms as follows:

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[3] *Directly*, OXFORD ENGLISH DICTIONARY, http://en.oxford dictionaries.com (last visited Aug.1, 2018).

[4] *Directly*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org (last visited Aug. 1, 2018).

[5] *Directly*, MERRIAM-WEBSTER.COM, http://www.merriam-webster. com/dictionary/directly (last visited June 5, 2018).

[6] *Directly*, DICTIONARY.COM, http://www.dictionary.com/browse/ directly (last visited June 5, 2018).

[7] *Directly*, COLLINS ENGLISH DICTIONARY (10th ed. 2009).

> 1. Straight, unswervingly, without deviation, by the shortest route, in a bee line. . .
> 2. Immediately, promptly, instantly, right away, straight away, speedily, instantaneously. . . .[8]

Interestingly, the *Merriam Webster Dictionary* defines "immediately" as "in **direct** connection or relation; directly. . . ."[9] This very clearly underscores the fact that "directly" and "immediately" are, or should be, synonyms for one another.

Black's Law Dictionary defines "directly" as "1. In a straight forward manner. 2. In a straight line or course. 3. Immediately"[10] *Black's* further defines "direct" as "free from extraneous influence; immediate. . . ."[11]

Black's Law Dictionary defines "direct loss" to mean: "[a] loss that results immediately and proximately from an event."[12]

Therefore, as can be seen from the various definitions, in the context of a Financial Institution Bond or a Commercial Crime Policy,[13] "direct" is a synonym for "immediate," and this would commonly be understood as meaning that between the covered event and the loss there should be no intervening agency. Note also how *Black's* equates "direct" and "immediate" with "proximate." There are historical reasons for this which we will explore further on.

That the plain meaning of the term "directly" should be applied in the interpretation of the policy provisions is axiomatic given the rules of construction for contracts. Under the standard rules of construction for contracts as established in most jurisdiction and as laid out in the *Restatement of Contracts 2d*, words are to be given their plain and

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[8] *Directly*, COLLINSDICTIONARY.COM, http://www.collinsdictionary.Com/us/english-thesaurus/directly (last visited June 5, 2018).

[9] *Immediately*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/immediately (last visited June 5, 2018) (emphasis added).

[10] *Directly*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[11] *Id.*

[12] *Direct Loss*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[13] Hereinafter CCP.

ordinary meaning.[14] These fundamental rules of contract construction are accepted in all jurisdictions and apply to the interpretation of any contract, whether it be a policy of insurance or otherwise. Therefore, in determining what "resulting directly" means in a CCP policy, the court should look no further than to the standard rules of contractual interpretation.

B. Proximate Cause

1. History

The history of proximate cause goes back to the earliest English reported decisions and involves both proximate cause as an element of negligence and proximate cause as an element of insurance coverage. The English were, of course, forerunners in the issuance of insurance on various matters, and especially in the maritime area where they were preeminent during the last 400 years.

It has been said that the earliest English rulings regarding the meaning of causation were analyzed and formulized by Sir Francis Bacon as far back as his treatise entitled *The Maxims of the Law.*[15] Bacon did a study and offered a synthesis of the underlying rules he determined that courts were applying in various situations regarding causation. His first and foremost rule (*Regula* I) was "*in jure non remota causa sed proxima spectator*," which translates as, "in law, one looks to the near cause, not the remote one."[16]

In essence, whether in order to make things simpler or to provide an adequate tool in risk assessment to society in general, and insurers in particular, Bacon's rule essentially allowed you to go back one link, and one link only, in any causational chain. This meant that proximate, for purposes of early English case law, involves the cause most immediate or closest in time to that which happened. This rule was noted and

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[14] RESTATEMENT (SECOND) OF CONTRACTS, § 202 (AM. LAW INST. 1981).

[15] Richard J. Scislowski, *The History of Proximate Cause*, July 2011, IRMI, at 2, https://www.irmi.com/articles/expert-commentary/the-history-of-proximate-cause (last visited Aug. 1, 2018).

[16] *Id.*

commented on by the United States Supreme Court in the case of *Patapsco Insurance Company v Coulter* in 1830,[17] and was adhered to and utilized up to and including the 20th century by both English and American courts.

The first appearance this research could find regarding the use of proximate cause in an American case was in the case of *McDonald v. Snelling*,[18] in which negligence was determined in an accident involving a horse-drawn sleigh. In this case, the court pointed out and utilized the Maxim "*causa proxima non remota spectator*," but refused to apply it in the instant situation since they were interpreting liability under *a statute*. While paying homage to the standard rule, the court noted that proximate cause already meant different things in different legal circumstances:

> Perhaps the truth may be that a maxim couched in terms so general as to be necessarily somewhat indefinite has been indiscriminately applied to different classes of cases in different senses, or at least without exactness and precision; and that this is the real explanation of the circumstance that *causa proxima*, in suits for damages of common law, extends to the natural and probable consequences of a breach of contract or tort; while in insurance cases and actions on our highway statute it is limited to the immediately operating cause of the loss or damage. . . .[19]

Eventually, the court held that the definition of proximate cause utilized in the law of insurance was "too narrow and restricted to be applied in the present case." The Massachusetts Supreme Court essentially ruled on an "efficient" proximate cause analysis, that is what we have come to know as the act which sets all others in motion.

In fact, as this case from 1867 demonstrates, there were at this time separate definitions for proximate cause depending on the circumstances:

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[17] 28 U.S. 222 (1830); citing to the English case of Busk v. Royal Ins. Exch., 2 Barn. & Ala. 82 (1818).

[18] 96 Mass. 290 (Mass. 1867).

[19] *Id.* at 294.

1. In negligence cases;

2. In insurance contract cases; and

3. In statutory liability matters.[20]

This begs the question as to why there would have to be different definitions for proximate cause in varying situations. One scholar has speculated:

> The proximate cause test in tort law of "but for" did not translate well to insured's coverage issues because an insured can always trace the necessary causational antecedent of the peril back to the beginning of time, and may also trace causational consequence of peril indefinitely into the future.[21]

It appears that the idea of proximate cause going back only one link in the chain may not have served the interest of justice when it came to tort law (or similar responsibilities imposed by law) and hence the development of a separate and different concept of proximate cause in that arena. Whether from the belief that the simple idea of proximate cause was not sufficient for the more complex issues surrounding negligence and responsibility in the societal setting, that is apart from contracts of insurance, the tort concept of proximate cause began to differ from the contractual concept of proximate cause.

Generally, the distinction between tort and insurance proximate cause was based on the simple understanding of the law of contracts. That is, while the obligation of the court in a tort situation may be to ascribe some sort of blame and to make certain that the societal order is maintained when imposing responsibility for a negligent act, when dealing with insurance contracts we are primarily focused on the intent of the parties who have entered into the contract. Nearly ten years before

[20] Peter C. Haley, *Paradigms of Proximate Cause*, 36 TORT & INS. L.J. 147, 149 (2000).

[21] Randall L. Smith & Fred A. Simpson, *Causation in Insurance Law*, at 53, available at images.iw.com/602.pdf (last visited July 9, 2018).

the famous decision *Palsgraf v. Long Island Railroad Co.*,[22] Justice Cardozo, in a case involving an insurance policy, essentially held as much.

> General definitions of the proximate cause gives little aid. Our guide is the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, the counts. There are times when the law permits us to go far back in tracing events to causes. The inquiry for us is how far the parties to this contract intended us to go.[23]

Putting it a different way, Justice Cardozo stated: "The question is not what men ought to think of as a cause. The question is what they do think of as a cause."[24] Justice Cardozo then stated that the court had to put itself in the place of the average insured to determine whether what happened to the insured's property would be thought of by a reasonable person and a party to the contract is being covered. In reviewing the matter, Cardozo recognized the differences between tort causation and insurance causation:

> This is true even in the law of torts where there is a tendency to go farther back in the search for causes then there is in the law of contracts. . . . Especially in the law of insurance, the rule is that "you are not to trouble yourself with distant causes." . . .[25]

Cardozo then goes on to quote and acknowledge the doctrine of *causa proxima* with respect to causation in insurance contractual determination.

This disparity between the application of causation standards for torts and for insurance contracts was not unusual or limited. In the 1923 case of *Queen Insurance Company v. Globe & Rutgers Fire Insurance*

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[22] 162 N.E. 99 (N.Y. 1928).
[23] Bird v. St. Paul Fire & Marine Ins. Co., 120 N.E. 86, 87 (N.Y. 1918).
[24] *Id.* at 87.
[25] *Id*. at 88.

Company,[26] the United States Supreme Court gave support to the *causa proxima* doctrine in determining coverage for a shipping collision. The court stated that "in construing these policies we are not to take broad views but generally are to stop our inquires with the *cause nearest to the loss*. This is a settled rule of construction, and if it is understood, does not deserve much criticism, since theoretically at least the parties can shape their contract as they like."[27]

Somewhere along the way, this very clear and explicit distinction between proximate cause in tort cases and proximate cause in insurance contract cases got lost. As is abundantly clear, courts and legal scholars knew that the search for proximate cause in tort actions could, and in many cases did, lead to ridiculous conclusions when transposed to a contractual setting. It seems clear that the application of proximate cause to insurance contracts was limited in order to prevent uncertainty existing between parties contracting for specific risks and obligations. The fact is that the definition of proximate cause in the laws of tort has been muddy since the doctrine was first applied. Much criticism has been focused on the uncertain utility of proximate cause in tort litigation. One scholar has stated,

> The deplorable expenditure and stupendous waste of judicial energy which has been employed in converting the simple problem [of causation] into an insoluble riddle beggars description. Only by a patient process of eliminative analysis can the rubbish of literally thousands of cases be cleared away.[28]

And lest you think this is a recent pronouncement, this statement was made by Professor Leon Green in 1927 and little has transpired since then to change its veracity. Much of what we now assume to be legal authority with respect to "proximate cause" and its application to insurance contracts, comes from these "literally thousands of cases" in

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[26] 263 U.S. 487 (1924).

[27] Here the court cited *Morgan v. United States*, 81 U.S. 531 (1871), wherein this rule was applied to a charter party made during the Civil War (emphasis added).

[28] Leon Green, RATIONALE OF PROXIMATE CAUSE 4-5 (Vernon Law Book Co. 1927).

which the concept has been wrestled with in a tort setting. Jurors who are, or were, unaware of the divergent meanings of "proximate cause," when it comes to tort and insurance contracts have readily taken from one area to analyze that in another.

While this faulty thinking has crept into general insurance contract interpretation, not all courts have fallen into this trap. For example, in the case of *Blaine Richards & Co., Inc. v. Marine Indemnity Insurance Co. of America*,[29] the court had to determine the cause of a loss to the insured's cargo. In looking for that cause, the court stated:

> We do not agree that proximate cause in insurance matters is to be determined by resort to "but for" causation. As this Circuit has noted, "the horrendous niceties of the doctrine of so-called 'proximate cause,' employed in negligence suits, apply in a limited manner only to insurance policies." . . . Instead, in such cases we have looked at the reasonable understanding of the parties as to the meaning of their insurance agreements.

This court then went on to cite Justice Cardozo and the *Bird* decision in stating that the question "is not what men ought to think of as a cause. . . . the question is what do they think of as a cause." In acknowledging this disparity between proximate cause in tort law and proximate cause in contractual interpretation, the court further states that:

> This court has lead us, in cases of marine insurance, to apply rather strictly the doctrine of *causa proxima non remota spectator* (the immediate not the remote cause is considered), and hence we have not attempted to trace the origin of losses back to their remote causes.

Nor is this concept of proximate cause being the immediately preceding event causing the loss limited to early 20th century. In the 1950 case of *Bruener v. Twin City Fire Insurance Co.*,[30] the Supreme Court of Washington, dealing with an accident under an automobile insurance policy, the court acknowledged that "[i]n the rare instances where

[29] 635 F.2d 1051 (2d Cir. 1980).
[30] 222 P. 2d 833 (Wash. 1950).

proximate cause has any bearing in contract cases, it has a different meaning than when used in tort." In citing to the case of *Pacific Union Club v. Commercial Union Assurance Co.*,[31] the court quoted that court as follows:

> "The action in the present case is upon contract and does not sound in tort, and the rule of proximate cause in actions for breach of contract and not for torts is to be invoked to determine whether under the contract the excepted peril directly or indirectly induced the happening of the peril insured against."

The Washington Supreme Court stated:

> In tort cases, the rules of proximate cause are applied for the single purpose of fixing culpability, with which insurance cases are not concerned. For that purpose, the tort rules of proximate cause reach back of both the injury and the physical cause to fix the blame on those who created the situation in which the physical laws of nature operated. The happening of an accident does not, in itself, establish negligence and tort liability. The question is always, why did the injury occur. Insurance cases are not concerned with why the injury occurred or the question of culpability, but only with the nature of the injury and how it happened.[32]

This recognizes that the concept of proximate cause oftentimes imposes subjective limits on the scope of legal liability for damages based on "our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient."[33]

This is not to say that courts have only looked to the immediate cause of loss in determining all insurance contracts. Again, in an apparent attempt to temper justice with contractual understanding, the

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[31] 12 Cal. App. 503 (D. Ct. App. 1910).

[32] *Id.* at 183-84.

[33] William L. Prosser & William P. Keeton, PROSSER AND KEETON ON THE LAW OF TORTS, §41, at 264 (William P. Keeton et al. eds., 5th ed. 1984).

courts have sometimes expanded the idea of proximate cause to include what tort law considers to be the "efficient cause." So, for example, in the 1948 case of *Link v. General Insurance Co. of America*,[34] the court, while acknowledging that they "'generally are to stop our inquires with the cause nearest to the loss,' . . . proximate cause is not necessarily the nearest point in time; it is the dominate cause."[35] This case, like many others, sought to mitigate what some courts viewed as a limited and sometimes harsh application of the doctrine of *causa proxima non remota spectator*.

The fact that this was a slippery slope was later acknowledge by the United States Supreme Court in a case involving an insurance contract. According to Mr. Justice Frankfurter,

> Unlike obligations flowing from duties imposed on people willy-nilly, an insurance policy is a voluntary undertaking by which obligations are voluntarily assumed. Therefore subtleties and sophistries of tort liability for negligence are not to be applied in construing the covenants of [an insurance] policy. It is one thing for the law to impose liability by its own notions of responsibility [as in a tort context], and quite another to construe the scope of engagements bought and paid for [as in insurance].[36]

Therefore, in summation, proximate cause as a concept has different meanings depending on the context in which it is being used. There are three potential contexts in which proximate causation has been utilized,

1. In tort and negligence law;

2. In statutory construction;[37] and

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[34] 77 F. Supp. 977 (W.D. Wash. 1948), *aff'd.*

[35] *Id.* at 978.

[36] Standard Oil Co. of N.J. vs. United States, 340 U.S. 54 (1950).

[37] It should be noted that statutory construction often includes the interpretation of what are known as statutory policies. Hence, many times

3. In contracts dealing with insurance.

2. Tort Proximate Cause

Under the law of torts, the "proximate cause" is an event that is "legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor."[38] Proximate cause has been defined as follows:

> Proximate cause is the primary cause of an injury. It is not necessarily the closest cause in time or space nor the first event that sets in motion the sequence of events leading to an injury. Proximate cause produces particular, foreseeable consequences without the intervention of any independent or unforeseeable cause. . . .[39]

Proximate cause is defined in its earliest iterations as "the efficient cause but for which the injury to the insured property would not have happened."[40] The doctrine of proximate cause has, as stated, several attendant concepts and constructs designed to best attempt to fill a societal need for ascribing blame. Within the concept of proximate cause we have "intervening and superseding" causes,[41] "foreseeability,"[42]

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proximate cause is interpreted in the broader statutory form , but applied to an insurance contract. This does not mean that all insurance contracts should be interpreted in such a manner. Those non-statutory contracts obviously fall into the last category.

[38] *Proximate Cause*, BLACK'S LAW DICTIONARY (9th ed. 2009). The foregoing is the primary definition given by *Black's,* the secondary definition is as follows: "[a] cause that directly produces an event and without which the event would not have occurred. . . . [a]lso termed (in both senses) direct cause; direct and proximate cause; efficient proximate cause; efficient cause; efficient adequate cause; initial cause; first cause; legal cause; procuring cause; producing cause; primary cause; jural cause. . . ." *Id*.

[39] *Proximate Cause*, WEST'S ENCYCLOPEDIA OF LAW (2d ed. 2008).

[40] Jordan v. Iowa Mut. Tornado Ins. Co. of Des Moines, 130 N.W. 177 (Iowa 1911).

[41] RESTATEMENT (THIRD) OF TORTS § 34, at 569 (2013).

[42] *Id.* § 29 at 505.

"strict liability,"[43] "but for" causation,[44] the "sole proximate cause,"[45] and other created tests such as the "substantial factor"[46] test and the "foreseeability"[47] test. All of these analytical tools are used for the simple purpose of determining who may or may not be at fault in any situation involving a tort.

While the doctrine of proximate cause is phrased in the language of causation, it is actually utilized by judges and juries in a practical, and sometimes arbitrary, fashion to limit the scope of a defendant's liability to a subset of the total class of potential plaintiffs who may have suffered harm from the defendant's actions. In his famous dissent in the *Palsgraf* case, Justice Andrews took on the realistic meaning of what society attempts to do by utilizing the concept of proximate cause:

> What we do mean by the word "proximate" is, that because of convenience, a public policy or the rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. . . . We may regret that the line was drawn just where it was, but drawn somewhere it had to be. . . . The words we used were simply indicative of our notions of public policy. Other courts think differently. But somewhere they reached the point where they cannot say the stream comes from any one source.[48]

Though nearly 90 years has passed since that pronouncement, the term "proximate cause" remain a legal construct designed to fairly and "with a rough sense of justice" place blame. It is utilized in the context of torts and negligence in order to ascribe culpability and to assuage loss. It is a purely legal construct and should have no application in the interpretation of contracts, which utilize words therein, that have plain and distinct meanings.

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[43] *Id.* at 507.
[44] *Id.* § 26 at 347.
[45] *Id.* § 34 at 377.
[46] *Id.* § 27 at 377.
[47] *Id.* § 29 at 505.
[48] Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103-04 (N.Y. 1928).

The concept of proximate cause does not even sit well with all scholars. The *Restatement of the Law (Third) Torts* does not even use the term "proximate cause." The reason for this as stated in the *Restatement* is as follows:

> Although the term "proximate cause" has been in widespread use in judicial opinions, treatises, case books, and scholarship, the term is not generally employed in this Chapter because it is an especially poor one to describe the idea to which it is connected.[49]

The *Restatement* goes on to explain the reasoning for the foregoing statement:

> It is also an unfortunate term to employ for the combination of factual cause and scope of liability. . . . Employing the term "proximate cause" implies that there is but one cause—because nearest in time or geography to the plaintiff's harm—and that factual causation bears on the issue of scope of liability. Neither of those implications is correct. Multiple factual causes always exist . . . and multiple proximate causes are often present. An actor's tortious conduct need not be close in space or time to the plaintiff's harm to be a proximate cause, and proximate cause is only remotely related to factual causation. Thus, the term "causation" should not be employed when explaining this concept to a jury.[50]

As one case has cogently pointed out, proximate cause actually involves two separate elements: (1) Causation in fact (that is whether the defendant's act was a necessary antecedent of the event in question), and (2) policy considerations that limit a defendant's legal responsibility for the consequences of his or her conduct.[51] These two components have been described in another fashion: (1) Causation in fact, which asks whether the defendant's negligent conduct was a substantial factor in

[49] RESTATEMENT (THIRD) OF TORTS at 492 (2013).

[50] *Id.* at 494.

[51] PPG Industries, Inc. v. Transamerica Ins. Co., 20 Cal. 4th 310, 315 (1999).

bringing about the plaintiff's injury; and (2) the "normative or evaluative element" or policy considerations, which asks whether the defendant should be held responsible for the injury such that the law is justified in imposing liability.[52]

III.
CONTRACTUAL INTERPRETATION

Though it is assumed that contractual interpretation has changed little over the course of years, this is not entirely true. Prior to the mid-19th century, writings regarding the interpretation of contracts were generally dependent on the type of contract that was at issue.[53] For example, a contract involving labor may be treated differently than a contract involving property.[54] Eventually, scholars tried to establish a set of rules which would provide a frame work for the interpretation of all contracts, regardless of the parties involved or the subject of the agreement.[55] There ultimately developed what is considered the "classical" view of contractual interpretation, which is best described by Professor Williston as follows:

> In the formation of a bargain, intention of the parties does not mean secret intention, nor generally intention manifested to the third persons, but only the intention manifested to the other party. If the author understood the transaction to be different from that which his words plainly expressed, it is immaterial, as his obligation must be measured by his overt acts.[56]

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[52] William B. Boone & Paul Peyrat, CALIFORNIA TORT GUIDE § 1.15 (3d ed. 1996).

[53] Richard R. Orsinger, *The Law of Interpreting Contracts* (2007), at 2, available at www.orsinger.com/PDFFiles/Advanced_Civil_Appellate_2007_Interpreting_Contracts.pdf (last visited July 9, 2018) hereinafter "Orsinger."

[54] *Id.*

[55] *See* Bruce A. Kimball, *Langdell On Contracts and Legal Reasoning: Correcting the Holmsean Caricature*, 25 L. & HIST. REV. NO. 2, Summer 2007, at 39 (cited by Orsinger at 2).

[56] John R. Fonseca & Patricia Fonseca, WILLISTON ON SALES §5 (5th ed. 1994).

In essence, the classical view ignores the subjective understanding of the parties concerning the words utilized to implement the agreement, and focuses instead on the objective meaning of such language.

As Judge Learned Hand once wrote:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. The contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.[57]

This was a view adopted by the original *Restatement of Contracts* (1932) wherein it was stated:

> The meaning that shall be given to manifestations of intention is not necessarily that which the parties from whom the manifestation proceeds, expects or understands.[58]

Eventually over time some disfavor arose regarding the strict classical approach to contracts. Some scholars believed that contracts were not only to be interpreted by the words used, but the context in which those words were used.[59]

In a theory of legal interpretation, Justice Oliver Wendell Holmes stated:

> We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. But the normal speaker of English

[57] Hotchkiss v. Nat'l City Bank, 200 F. 287, 293 (S.D.N.Y. 1911).

[58] RESTATEMENT OF CONTRACTS, § 226, cmt b. (1981).

[59] Orsinger at 4 (citing Oliver W. Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV., 417, 417-18 (1899)).

> is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and reference to him as the criteria is simply another instance of the externality of the law.[60]

This so-called enlightened objectivity was eventually adopted by the *Restatement*. This approach, while seeming to reject the pure "classical" interpretation, still espouses a belief in the precision of the English language, tempered with an understanding that every contract is unique. The *Restatement of Contracts 2d* provides the following rules in aid of interpretation:

> (1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable, it is given great weight.
>
> (2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.
>
> (3) Unless a different intention is manifested,
>
> (a) Where language has a generally prevailing meaning it is interpreted in accordance with that meaning;
>
> (b) Technical terms and words are arts are given their technical meaning when used in a transaction within their technical field. . . .[61]

Fundamental to both the classical and enlightened objectivity approach to contractual interpretation is the belief that, absent compelling circumstances, a contract is interpreted within its four corners.[62] It is generally agreed that the use of extrinsic evidence is only available when the plain meaning of the words is not ascertainable in the

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[60] Oliver W. Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).

[61] RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981).

[62] Orsinger at 13 (citing Richard A. Posner, *Law and Literature*, 245-46) (rev. and enlarged ed. 1998).

context of the agreement as a whole.[63] The comment to the *Restatement of Contracts 2d* § 212 states that "after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention."[64] A fully integrated agreement is of course one that is a final and complete expression of the terms agreed to between the parties.[65] A contract is partially integrated "if the written agreement is a final and complete expression of some or all of the terms therein, but not all of the terms agreed upon . . . are contained in the written agreement."[66]

The *Restatement of Contracts 2d* states the following regarding interpretation:

> 1. An integrated agreement is a writing or writings constituting a final expression of one or more terms of the agreement.
>
> 2. Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.
>
> 3. Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.[67]

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[63] *Id.* (citing Margaret Kulfer, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 Oregon L. Rev. 643, 644 (1995)).

[64] RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt b. (1981).

[65] *Id*. at 209 (i).

[66] Orsinger at 15 (citing Keith A. Rawley, *Contract Construction and Interpretation: From the Four Corners to Parol Evidence and Everything in Between*, 69 MISS. L.J. 73, 101-102 (1999)).

[67] RESTATEMENT (SECOND) OF CONTRACTS § 209 (1981).

Under the majority of circumstances, an insurance contract would be considered an integrated agreement.[68] Accepting this as a primary truth, it stands to reason that the insurance contract is to be interpreted by the terms of the insuring form (including endorsements) and those terms alone.

However, simply because an agreement is integrated does not mean that it is without possible ambiguity. The existence and resolution of an ambiguity, the most-often leveled criticism of any insurance contract, is usually determined by three rules:

(1) An ambiguity exists if one or more terms or provisions are susceptible to more than one reasonable meaning.

(2) If a court finds ambiguity, then the court is to generally consider the course of dealing, trade, and performance in considering the meaning of the words.

(3) If step #2 fails to make the meaning clear, then the court may admit extrinsic evidence in order to let a finder of fact determine the meaning.[69]

Other than in a situation involving an ambiguity, the interpretation of the contract is a question of law.[70] The *Restatement of Contracts 2d* provides the following:

> "Question of Law." Analytically, what meaning is attached to a word or other symbol by one or more people is a question of fact. The general usage as to the meaning of words in the English language is commonly a proper subject for judicial notice without the aid of evidence extrinsic to the writing. . . . Such treatment has

[68] Most insuring contracts have a standard interpretation clause. *See, e.g.*, Surety & Fidelity Ass. of Am., Crime Protection Policy, April 1, 2012, Condition 2 ("Changes"): "This Policy contains all of the agreements between you and us concerning the insurance afforded."

[69] *See,* Paragan Res., Inc. v. Nat'l Fuel Gas Distrib. Corp., 695 F.2d 991, 996 (5th Cir. 1983).

[70] Waller v. Truck Exch., Inc., 11 Cal. 4th 1, 18, 44 (Cal. 1995).

> the effect of limiting the power of the trier of fact to exercise or dispense power in the guise of a finding effect, and thus contributes to the stability and predictability of contractual relations. In cases of standardized contracts such as insurance policies , it also provides a method of assuring that like cases will be decided alike.[71]

Therefore, both for practical and philosophical reasons the interpretation of a contract is generally a question of law for a judge (or an appellate court) to decide. In undertaking this act, courts are mindful that words are to be given their plain and ordinary meaning and, if those meanings are ascertainable through common usage, then the analysis is, or should be, over.[72]

Let us now turn to the interpretation of certain words which are typically used in insurance contracts. From what has been stated above, it follows that if "directly" is a synonym for the term "immediately" and is defined to mean without intervening agency, the act covered under an insurance contract utilizing such verbiage should be the immediate and direct cause of the insured's loss. We know that while courts have generally upheld this notion, it is not always the case. The main reason for this interpretive disconnect is the misuse of the concept of "proximate cause," taken from its tort surroundings and grafted onto the interpretation of contracts. As can be seen from the foregoing sources, the importation of the tort concept of proximate cause for the interpretation of words which have plain and ordinary meaning, is not only improper, but logically unsound.

IV.
DEFINING "DIRECT" OR "DIRECTLY" IN POLICIES

There are numerous examples of the correct interpretation of the "direct" language in insurance policies generally and fidelity policies specifically. A number of cases correctly apply the specific language

[71] RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt d. (1981).

[72] *See, e.g.*, Tooling, Mfg. and Techs. Ass'n v. Hartford Fire Ins. Co., 693 F.3d 665, 670 (6th Cir. 2012); Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 691 F.3d 821, 826 (6th Cir. 2012).

utilized in the insuring clauses and, as a result, over time a new majority approach has emerged. As was stated by one court:

> The new causational phrase "directly resulting from" replaced the old phrase "loss resulting through". . . . This change was intended to "emphasize that the Form 24 covered only direct loss" [and] . . . the change has proved pivotal.[73]

However, as another court has noted:

> Two interpretive camps [now] exist: The "proximate cause" camp and the "direct means direct" camp. . . . The primary disputes of the two camps is over whether courts should import tort causation principals when interpreting blanket bonds.[74]

The "direct means direct" phrase has become a trope for those cases utilizing the actual language of the policy for purposes of determining the causal connection between the insured's loss and the covered event. This phrase is attributable to the Ninth Circuit decision in *Vons Cos., Inc. v. Federal Insurance Co.*, which, in determining whether an insured's loss was covered under a standard form fidelity policy, used the tautology "direct means direct."[75] The language utilized by the Ninth Circuit actually came from a prior case, also arising out of the Ninth Circuit, which had been unpublished but which also had been in the context of a fidelity insurance policy. In that case, the court utilized the phraseology in determining whether an insured's loss due to penalties and fees fell within the contours of the fidelity policy.[76] In determining

[73] Mass. Mutual Life Ins. Co. v. Certain Underwriters at Lloyd's, 2010 Del. Ch. LEXIS 156, at *55. (Del. Ch. July 23, 2010).

[74] Universal Mortg. Corp. v. Wurttembergische Versicherung AG., 651 F.3d 759 (7th Cir. 2011).

[75] 212 F.3d 489, 492-493 (9th Cir. 2000).

[76] *See,* United Sec. Bank v. Fid. and Deposit Co. of Md., 125 F.3d 860, 1997 W.L. 632606 (9th Cir. 1997).

that a consequential loss was not covered, the court stated succinctly that "direct means direct."[77]

Most courts have found the "direct means direct" approach to be more persuasive, for the reason that, as one court has stated, "cases advocating that approach are better reasoned and more consistent with the traditional nature of fidelity bonds and the language of the fidelity bond at issue."[78] This same court went on to state: "For example, adopting the proximate cause approach would effectively ignore the term 'direct' in the Fidelity Bond because a direct loss is narrower than a proximately caused loss."[79] Another court has observed that: "The phrase resulting 'directly from' suggests a stricter standard of causation than mere proximate cause, and requires more than a substantial cause, since the words imply that the loss must flow 'immediately', either in time or space from the fraud."[80] Stated another way; "the proximate cause standard is drawn from tort law and the liability insurance context, neither of which is analogous to the typical first party coverage offered by fidelity bonds. . . . Most importantly, the proximate cause standard is inconsistent with the language and nature of the fidelity bond, which excludes coverage for compensatory damages owed due to an indirect loss."[81]

One court has simply adopted the Webster's definition of directly as "without any intervening space of time; next in order."[82] While this approach seems correct from a historical and common sense point of view, it is also consistent with standard rules for the construction of contracts.

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[77] *Id.* at *1-2; the court also stated that "direct loss is much narrower than proximately caused loss."

[78] Direct Mortg. Corp. v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa., 625 F. Supp. 2d 1171, 1175 (D. Utah 2008).

[79] *Id*.

[80] RBC Mortg. Co. v. Nat'l. Union Fire Ins. Co., 812 N.E. 2d 728, 736 (Ill. App. Ct. 2004).

[81] *Direct Mortgage Corp.*, 625 F. Supp. 2d at 1176 .

[82] Tooling, Mfg. and Techs Ass'n v. Hartford Fire Ins. Co., 693 F.3d 665, 673 (6th Cir. 2012).

In adopting the common sense approach to contract interpretation, the Sixth Circuit has stated:

> Other jurisdictions have considered the meaning of the word in the context of similar insurance policies. The weight of the authorities define "directly" as meaning "immediate"—known by some as the "direct is direct" approach—although other jurisdictions espouse a "proximate cause". . . The debate over the "directly" language first began when the Surety Association revised its standard fidelity-contract form to replace the term "loss resulting through" with "directly resulting from." . . . But regarding of the impetus for the "directly resulting from" language within employee fidelity policies, it remains the case that state courts and federal courts interpreting state law are split on how to interpret the provision. The policies these courts have interpreted—although differing in industry, content, and specific conduct covered—share two fundamental features: (1) There are fidelity contracts to protect against employee theft, fraud, destruction of property or other misfeasance against the insured; and (2) they protect against the loss "directly resulting from," "resulting directly from," "resulting solely and directly from," or "directly caused by" said fraud, theft, or other misfeasance. They are not liability policies, which protect the insured against liability for losses incurred by third parties due to actions by the insured's employees.[83]

In noting that the use of a "proximate cause" analysis is standard in policies involving property damage, "to import a definition for a property damage term to a fidelity policy . . . would be to compare apples and oranges."[84]

In fairness, it is understandable how the utilization of the tort concept of proximate cause came to be associated with the interpretation of the "resulting directly" language of fidelity policies. Courts have, over

[83] *Tooling, Mfg. & Techs Ass'n*, 693 F.3d at 674.
[84] *Id.* at 677.

the course of years, conflated the use of tort and contractual proximate cause especially with coverage issues involving various types of third-party insurance. This is oftentimes the case in disputes over certain property or casualty policies because those coverages usually cover the exact same kind of liability associated with a litigated negligence action. That is, if the start of a fire is the focal point of an action brought by an injured third party for purposes of recompense in tort, the tort analysis of the origin of that fire may appear equally relevant for purposes of determining coverage under a fire policy.[85] Following this logic, the same would be true in many third-party related insurance contracts. However, many policies, such as a fidelity bond or crime policy, are not third-party liability policies, but instead first-party indemnity contracts, and the attribution of "blame" is not relevant since the insureds, while still usually a victim, are opposed not to the "wrongdoer," but to a company with which the insured/victim has a contract.

In this instance, the insureds are victims and the question is not "who" is responsible for their loss, but rather "what" is responsible for the loss. Taken in that setting, the attribution of blame through the construct of tort proximate cause makes no sense. In the first-party context what is important is what the parties have agreed to under the terms of their contract. Therefore, the language of the contract is what is essential in determining the cause of the loss, rather than the irrelevant concept of proximate cause and the attribution of blame. This confusion is further compounded when we import such purely tort proximate cause concepts such as "foreseeability" and "duty."

The next section of this paper will examine the "direct means direct" and the "proximate cause" approach and how it relates to fidelity bonds specifically.

A. The Direct Approach

The foregoing provides ample authority for the correct interpretation of the terms utilized in the standard fidelity coverages. The "direct means direct" approach is the current majority position and is, in light of standard contractual construction, the correct one. It must be

[85] *See*, *e.g.*, *Jeffrey E. Thomas et al.*, APPLEMANS ON INSURANCE, § 188.02 [c] at 42 (5th ed. 2017).

pointed out that the "direct means direct" analysis leads to two inevitable conclusions: (1) That standard fidelity policies are not liability policies and do not, absent exceptional circumstances, cover third-party claims; and (2) there must be an immediate and "direct" link between the act covered and the insured's loss.

While these are separate and distinct concepts, they do overlap to some degree. In reviewing cases dealing with the concept of "direct loss," it must be kept in mind that some of the cases dealing with the direct vs. proximate cause debate focus on the general issue of whether a fidelity bond covers third party losses. These cases may, but not necessarily, focus on the immediacy of the link between that loss and a covered act. It is clear, however, that while we may be dealing with two subsets of the direct loss analysis, they are consistent.

Because these two separate ideas arise from the use of the "direct" language, cases in one context may not be entirely useful in another. In most all cases, any loss suffered by a third party will be indirect (*i.e.*, not "direct"). The reason for this will be that the third party will inevitably seek recompense from the insured either by litigation or through a demand and the fact of that demand or suit is an intervening cause that breaks the link between the covered event and the insured's inevitable loss (*i.e.* payment of damages or settlement). These third-party cases form one of the subsets of the direct loss analysis.

As a second subset of the direct loss analysis, the "direct" language also requires that the action which is complained of in a first-party context, and which is asserted as covered, directly and immediately caused the insured's loss. This is something more akin to the original concept of proximate cause or the last link in the chain.

Courts utilizing a contract-based causation analysis tend to find that a direct loss is the immediate cause of the loss. For example, in *Brightpoint, Inc. v. Zurich American Insurance Co.*,[86] the insured asserted that computer fraud/wire transfer coverage existed because it had sustained a loss of property "resulting directly" from the use of facsimile to transmit post-dated checks. The court rejected the insured's

[86] No. 1:04-CV-2085-SEB-JPG, 2006 U.S. Dist. LEXIS 26018 (S.D. Ind. Mar. 10, 2006).

contention that the insuring agreement only required a theft that is in some way connected to the use of the computer. Such an interpretation "represents a distortion of the policy terms."[87] Accordingly, there was no coverage for the claim because, "[t]he fraud in this instance occurred through the use of the unauthorized checks and guaranties, not the manipulation of numbers or events through the use of a computer, facsimile machine or other similar device. The facsimile transmission caused Brightpoint to purchase the cards from its supplier, not to transfer them to its purchaser, and the use of the fax thus cannot be viewed as having directly (or proximately) caused the theft."[88]

A similar result was reached in *Pestmaster Services, Inc. v. Travelers Casualty & Surety Co.*,[89] which involved the insured's claim under its funds transfer and computer fraud insuring agreements. In *Pestmaster*, the insured claimed a loss after its payroll service failed to apply the funds to the payment of taxes that had been transferred by the insured to the payroll service. The court found there was no coverage for the claim because, among other things, the use of a computer was incidental to the loss and not the direct cause of the loss. The insured's loss did not occur when the funds were transferred to the payroll service, as authorized by the insured, but occurred when the service decided to use those funds to pay its own obligations rather than Pestmaster's federal payroll taxes in breach of their agreement.[90]

In *Flagstar Bank, FSB v. Federal Insurance Co.*,[91] the insured bank entered into a warehouse and credit agreement with a mortgage banker to advance funds pending the close of escrow. The insured bank however discovered that the promissory notes were forged and the mortgage transactions never took place. The insured bank sought recovery under its financial institution bond for more than $19 million in losses, contending that it had sustained "loss resulting directly from:

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[87] *Id*. at *20.

[88] *Id*.

[89] No. CV 13-5039-JFW MRWx, 2014 U.S. Dist. LEXIS 108416 (C.D. Cal. July 17, 2014).

[90] *Id.* at *23.

[91] No. 05-70950, 2006 U.S. Dist. LEXIS 83825 (Nov. 17, 2006) *aff'd* 2008 U.S. App. LEXIS 1114 (6th Cir. 2008).

forgery on . . . any Negotiable Instrument."[92] The Michigan district court concluded that, although the documents contained forgeries, the bank's loss was caused by the fact that the collateral was worthless. Therefore, even if the signatures were genuine, the promise to provide security for the repayment of the obligation (which was the real value of the promissory note), did not exist. Furthermore, the court rejected the insured's proximate cause analysis because "it ignores the plain language of the bonds" which required that the loss result "directly from the forgery."[93] This decision was affirmed by the Sixth Circuit Court of Appeal which recognized that Illinois courts of appeal have held that "resulting directly" establishes a causation standard more stringent than proximate cause.[94]

In the case of *Methodist Health Systems Foundation v. Hartford Fire Insurance Co.*,[95] the court held that a fidelity policy did not cover attenuated losses due to the Ponzi scheme perpetrated by Bernard Madoff. This case did involve a CCP wherein the insured sought recovery for losses it suffered in its investment portfolio as a result of the Madoff scheme. The insured had invested money in Meridian Diversified Fund, Ltd., a mutual fund that invested in hedge funds. Meridian, in turn, invested a portion of the holdings in the Tremont Hedge Fund, which ultimately invested some of those funds with Madoff's company. When Madoff's scheme was uncovered, the insured's investment was virtually wiped out. The insured sought coverage under the Computer Fraud provision which stated, in part, that the insurer would pay "for loss of and loss from damage to 'money', 'securities', and 'other property' following and directly related to the use of any computer to fraudulently cause a transfer of that property from 'the premises'. . . to a person or place outside those premises."[96] In citing to the Louisiana Supreme Court, the district court stated that the word "direct" as used in a contract insuring against direct loss or damages "means immediate or proximate as distinguished from remote."[97] The court also stated that the inclusion

[92] *Id.* at *7.
[93] *Id.* at *44.
[94] 260 F. App'x 820, 825 (6th Cir. 2008).
[95] 834 F. Supp. 2d 493 (E.D. La. 2011).
[96] *Id.* at *496.
[97] *Id.* (citing Cent. La. Elec. Co. v. Westinghouse Elec. Corp., 579 So. 2d 981, 985 (La. 1991)).

of the words "resulting directly from" indicates "an intent to limit the coverage available and is especially significant because the language appears in a section of the policy that specifically addresses the scope of coverage."[98] In ruling in favor of the insurer, the court stated that "while the Madoff Ponzi scheme was a contributing factor in plaintiff's sustained losses, this court finds that the Madoff Ponzi scheme was not a direct cause of plaintiff's losses."[99] Only the immediate investor with Madoff (Tremont) had suffered losses "resulting directly from" the Madoff Ponzi scheme and the insured was too far removed in order to recover under that "direct loss" provision.[100]

Another case demonstrating the need for an actual link between the supposedly covered event and the loss is *Valley Community Bank v. Progressive Casualty Insurance Co.*[101] In this case, the insured bank suffered a loss at the hands of a customer who had provided the bank with false statements concerning his net worth in the underwriting of a loan. While this case dealt with other issues unique to a Financial Institution Bond, one of the claims made by the insured was it had suffered its loss due to forgery of certain documentation. While there was no doubt that forgery had taken place, the court in this matter found that the forgery was not the direct cause of the insured's loss.

The court pointed out that the policy covered "loss resulting directly" from the extension of credit on the faith of certain documents covered under the policy.[102] In making its determination as to whether the loss suffered by the insured was "directly caused" by the forged documents, the court noted that the insurer does not guaranty the truth of the documents, merely that the signatures are genuine and authentic.[103] After discussing the difference between fidelity policies and credit insurance, the court stated that the insured's loss "was not caused by the allegedly forged signature" on the document in question, but because of

[98] *Id.* (citing Lynch Props, Inc. v. Potomac Ins. Co., 962 F. Supp. 956, 961 (N.D. Tex. 1996)), *aff'd.*, 140 F.3d 622 (5th Cir. 1998).

[99] *Id.* at 496.

[100] *Id.*

[101] 854 F. Supp. 2d 697 (N.D. Cal. 2012).

[102] *Id.* at 708.

[103] *Id.* at 707.

the fact that the customer did not have the securities as represented.[104] The court stated that even if the signature on the document had been genuine, the insured "would have suffered the same loss because it made the loan based on nonexistent collateral."[105] On this basis, the court stated that even a validly signed document "would not have prevented the loss."[106] On this basis, the court ruled that the insured's loss was caused by the customer's "misrepresentation about his assets, not the forgery. . . ."[107] In finding that cases have "rejected arguments that 'loss resulting directly from' should be construed to mean 'loss proximately caused by', the court pointed out that 'direct means direct' and that this was narrower than proximate cause."[108]

No discussion of the interplay between the insured's liability to third parties and the requirement of direct loss would be complete without the previously mentioned *Vons Cos. v. Federal Insurance Co.*,[109] in which Vons' alleged employee engaged in a fraudulent scheme that eventually resulted in loss to third-party victims of that scheme. These alleged victims sued Vons and others. Vons eventually settled the litigation for $10 million, the limit of its fidelity insurance policy. The so-called employee brokered transactions for various grocery stores (including Vons), in order to cover shortages in some stores and dispose of surpluses in others.

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[104] *Id.* at 709.

[105] *Id.*

[106] *Id.*

[107] *Id.* It is interesting to note that this court does discuss a proximate cause analysis as well since the insured argued that the "direct loss" language was overwritten by California Insurance Code § 530 which states: "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." (quoting United Sec. Bank v. Fid. & Deposit Co., No. 96-16331, 1997 U.S. App. LEXIS 27965, at *2-3 (9th Cir. Oct. 9, 1997)) and *Vons*, 212 F.3d at 492. The court found that an insurer had the right to limit coverage and that this right was not countermanded by California Insurance Code § 530 since the limit was clearly stated in the policy.

[108] *Valley Cmty. Bank*, 854 S. Supp. 2d 697 at 709.

[109] 212 F.3d 489 (9th Cir. 2000).

In upholding summary judgment in favor of the insurer, the Ninth Circuit held that California law recognized that fidelity policies cover direct losses of specified covered property and are "not third-party liability policies."[110] In so holding, the court followed the Fifth Circuit in *Lynch Properties.* In affirming the district court's decision, the Ninth Circuit, held: "Federal provided Vons with coverage for 'direct losses' that were 'caused by' employee theft or forgery. Vons's policy did not provide coverage for third party claims. … We hold that 'direct' means 'direct' and that in the absence of a third party claims clause, Vons's policy did not provide indemnity for vicarious liability for tortious acts of its employee."[111]

The Seventh Circuit followed the direct-means-direct line of cases in *Universal Mortgage Corp. v. Wurttembergische Versicherung AG*.[112] In that case, the insured's employee conspired with an outside mortgage broker to have the insured fund mortgages that did not comply with its underwriting requirements. The insured ultimately packaged the loans and sold them to investors with the insured warranting that they were compliant, but unaware that they were not. When the investors holding the failed loans learned they had purchased non-compliant loans, they demanded that the insured repurchase the loans pursuant to its contractual obligations. The insured repurchased the loans and then sought coverage for its losses under the employee dishonesty insuring agreement of a Financial Institution Bond.

The Seventh Circuit noted the division between the "direct means direct" and the "proximate cause" lines of cases and strongly sided with the "direct means direct" camp.[113] In so doing, the court rejected the insured's contention that the loss was not caused by its contractual repurchase obligations but rather by its initial funding of the noncompliant loans. Though the court acknowledged that the insured may have suffered an actual direct loss when it funded the noncompliant loans, that loss was recouped in full upon the resale of the noncompliant loans to investors. The court reasoned that although the cause of the loss was the employee's dishonesty, the loss resulted directly from its

[110] *Id*. at 491.
[111] *Vons, supra*, 212 F.3d at 492-93.
[112] 651 F.3d 759 (7th Cir. 2011).
[113] *Id*. at 762.

contractual obligation to repurchase the non-confirming loans. The loss for which the insured sought coverage arose later when the investors exercised their contractual resale rights and thus, the loss was not "direct."[114]

Another case upholding this proposition is *Pinnacle Processing Group, Inc. v. Hartford Casualty Insurance Co*.[115] In this case, the insured's business was the processing of credit card transactions for merchants. One of its merchants processed credit card transactions which ultimately proved to be fraudulent. The insured made good these purchases to its own processing bank. The insured then attempted to freeze the refund requests made by the cardholders but was too late in doing so. The insured in turn tried to get these payments from its merchants' bank accounts, but the requests were dishonored.

The insured claimed coverage under the Computer Fraud Insuring Agreement which provided coverage "resulting directly from computer fraud" and the insurer denied the claim.[116] In ruling on the issue of causation, the court stated that "direct means without any intervening agency or steps; without any intruding or diverting factor."[117] In ruling in favor of the insurer, the court held that the insured's loss "was not direct."[118] In coming to its decision, the court noted that three steps were necessary for the insured to actually suffer its loss in this instance: (1) the insured's processing bank was unable to recover the chargeback funds from the merchants bank; (2) the insured's bank deducted funds from the insured's account and finally; (3) the insured fulfilled its contractual obligation to replace those deducted funds. The court stated that to interpret "the term 'directly' as potentially applying to such an attenuated chain of events would be to 'create ambiguity where none exists.'"[119] The court went on to state that "such an interpretation

[114] *Id.* at 763.

[115] 2011 U.S. Dist. LEXIS 128203 (W.D. Wash. Nov 4, 2011).

[116] *Id.* at *9.

[117] *Id.* at *12 (citing Moeller v. Farmers Ins. Co. of Wash., 229 P.3d 857, 862 (Wash. Ct. App. 2010) which in turn was citing *Direct*, WEBSTER'S THIRD NEW INT'L DICTIONARY (3d ed. 1976)).

[118] *Id.* at *13.

[119] *Id.* (citing Pub. Util. Dist. No. 1 v. Int'l Ins. Co, 881 P.2d 1020, 1020 (Wash. 1994)).

would render the use of the word 'directly' in the insurance policy superfluous: There would be no difference between the phrase 'resulting from computer fraud,' and 'resulting directly from computer fraud.'"[120] Based on this, the court gave "the term 'direct' is [sic] plain meaning"[121] and in doing so, determined that the loss was not covered under the policy.[122]

In summary, and for the most part then, courts have correctly embraced the position that that a direct loss is not merely loss that results as a consequence of a named peril. Instead, direct loss is so linked in space, time, and relationship that the covered peril must immediately proceed to loss.[123] This is a correct interpretation of the term "direct" and is consistent with the historical application of the term "proximate cause" in the insurance/contractual setting.

B. The Proximate Cause Approach

As one would expect, application of the proximate cause standard to contractual terms is no less confusing than when it is applied to torts. Many cases have declined to follow the *Vons* "direct means direct" approach and an oft-cited example of a court's conflation of tort and contract causation is *Jefferson Bank v. Progressive Casualty Insurance Co.*[124]

In the *Jefferson Bank* case, the court was called on to determine whether the insured bank could recover under Insuring Agreement E of a

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[120] *Id.* The court also analyzed this as a third party loss, *i.e.*, that the insured had to replace the money taken out of the insured's reserve account by its bank. On that basis, the direct loss was actually to the bank and the "indirect result" was the insured's "replacement of those loss funds. . . ." *Id.*

[121] *Id.* at 13.

[122] *Id.* at 13.

[123] *See also,* Tooling, Mfg. & Techs Ass'n. v. Hartford Fire Ins. Co., 693 F.3d 665, 674 (6th Cir. 2012); United Gen. Title Ins. Co. v. Am. Int'l Group., Inc., 51 F. App'x 224, 226 (9th Cir. 2002); Phillip R. Seaver Title Co. v. Great Am. Ins. Co., No. 08-CV-11004, 2008 U.S. Dist. LEXIS 78568 (E.D. Mich. Sept. 30, 2008) *amended, in part,* Phillip R. Seaver Title Co. v. Great Am. Ins. Co., No. 08-CV-11004, 2008 U.S. Dist. LEXIS 95267 (E.D. Mich. Nov. 17, 2008).

[124] 965 F.2d 1274 (3d Cir. 1992).

Financial Institution Bond for a loss resulting from its extension of credit in good faith reliance on a mortgage that bore the forged signature of a notary. In particular, the bank needed to demonstrate that it had incurred a loss "resulting directly from" a covered cause of loss.[125]

Although the court acknowledged that the phrase "resulting directly from" in the policy suggested a stricter standard of causation than mere proximate cause, it nonetheless held that Pennsylvania law required a proximate cause standard of analysis.[126] The court based its conclusion that "resulting directly from" required only a proximate cause analysis on two things.

First, the court examined insurance cases where the policy contained the language "direct cause of a loss" for storm damage and found that those cases had equated "direct" with "proximate."[127] Considering those cases to be sufficiently analogous, the court opined that "resulting directly from" was equivalent to "proximately caused by" under Insuring Agreement E.[128] Apparently unaware of the irony, the court's second reason to eschew a literal interpretation of the contract was that the court believed that "direct cause" or "immediate cause" was a very nebulous concept that did not enjoy "favor under Pennsylvania law."[129] It further explained that Pennsylvania had adopted a "substantiality" standard, rather than an "immediacy" standard, for proximate causation.[130] After setting up what can only be viewed as a straw man, the court concluded:

> Given the difficulty and confusion that results from applying a "nearest cause" or "immediate cause"

[125] *Id.* at 1280.

[126] *Id.* at 1281.

[127] *Id.* (citing Marks v. Lumbermen's Ins. Co., 49 A.2d 855 (Pa. Super. Ct. 1996) (interpreting "Direct Loss and Damage by Windstorm, Cyclone and Tornado"); Lorio v. Aetna Ins. Co., 232 So. 2d 490 (La. 1970) (interpreting "Death or destruction, directly resulting from or made necessary by: . . . (b) Windstorm"); Lipshultz v. Gen. Ins. Co. of Am., 96 N.W.2d 880, 881 (Minn. 1959) (interpreting "direct loss by windstorm to the contents of the premises").

[128] *Jefferson Bank*, 965 F.2d 1274 at 1281.

[129] *Id.*

[130] *Id.*

> standard, we do not believe that the parties intended to contract for it. Instead, we believe that in this contract "resulting directly from" means "proximately caused by."[131]

Even if one were to accept that "direct cause" is nebulous, that is no reason to adopt an even more nebulous or less precise standard. Moreover, the court's analysis rewrites the very contract terms that the court itself acknowledged imposed a stricter standard than proximate cause. Not surprisingly, subsequent courts have distinguished their cases from *Jefferson Bank*.[132] The criticism was aptly summarized by the Seventh Circuit in *First State Bank of Monticello v. Ohio Casualty Insurance Co*:[133]

> This approach is misdirected; tort-causation concepts like proximate cause, "substantial factor" causation, and intervening cause are inappropriate here. In particular, the concept of proximate cause is problematic in this context; proximate cause is a shifting standard that draws the line of causation "because of convenience, of public policy, of a rough sense of justice. . . . It is practical politics." . . . . Insurance-coverage cases are not concerned with the philosophical social-duty underpinnings of tort law. The action sounds in contract, and our task is to interpret the parties' agreement.
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> . . . .

[131] *Id.* at 1282.

[132] *See, e.g.,* RBC Mtg. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, N.E.2d 728, 737 (2004); Direct Mtg. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 625 F. Supp. 2d 1171, 1175 (D. Utah 2008).

[133] 555 F.3d 564, 570 (7th Cir. 2009).

> Accordingly, contract—not tort—principles apply to the determination of loss causation; Illinois follows this rule.[134]

A case following the *Jefferson Bank* analysis is *Scirex Corp. v. Federal Insurance Co*.[135] In this case, the insured was covered under a "blanket employee dishonesty" policy which provided coverage, in part, for "direct loss caused by any fraudulent or dishonest acts committed by its employees."[136]

The insured's employees were supposed to conduct clinical trials observing patients for eight hours and to record the observations every 30 minutes. This report was to be provided to the Food and Drug Administration ("FDA") for its review and pursuant to a contract between the insured and the FDA which provided payment to the insured for the report. The insured became aware, however, prior to providing the report that its employees were not conducting eight-hour clinical trials, nor were they recording observations every 30 minutes. Instead, some of the patients were reviewed for as little as an hour at a time. Because the eventual report was not conducted pursuant to the established protocols, the report was worthless and the insured undertook the time and effort to replicate the report utilizing the correct protocols. To do so required the insured to absorb a loss due to the time and efforts of its employees. Because of the faulty first report, the insured could not collect those fees and costs from the FDA.

The insured made claim under its fidelity policy arguing that the value of the second report was the loss it incurred as a result of the dishonest and fraudulent acts of its employees. One of the defenses to this claim was that the loss had not been "direct" as the loss was only incurred after the insured voluntarily undertook to replicate the original clinical trials with the correct protocols.[137] The insurer stated that these losses were more akin to "ordinary expenses from a failed business

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[134] *Id.* at 570 (citing Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928); Bird v. St. Paul Fire & Marine Ins. Co., 120 N.E. 86, 87 (N.Y. 1918).

[135] 313 F.3d 841 (3d Cir. 2002).

[136] *Id.* at 845.

[137] *Id.* at 843.

venture" than from losses caused by employee dishonesty.[138] In finding that the losses caused to the insured were the "proximate cause" of the employee's dishonest and fraudulent acts, the court adopted *Jefferson Bank's* view that direct loss equates with proximate cause. The court stated that "it is uncontested that their [the employees] failure to follow protocol and their deceptive recordkeeping singlehandedly rendered the studies worthless."[139] The court went on to say that the insured's "losses were directly tied to these studies, and by rendering those studies worthless, . . . [the employee's] behavior proximately, and therefore directly," caused the insured's losses.[140]

Another problem that arises in the utilization of a proximate cause analysis to direct loss is demonstrated by the case of *FDIC v. Fidelity & Deposit Co. of Maryland*.[141] In this case, the FDIC attempted to prove that most of the bad loans made by a then defunct bank were the result of the dishonest activities of its chief lending officer. While there was no doubt that there had been bad loans and in some cases dishonest loans made during the course of the employee lending officer's reign, not all of the loans for which coverage was sought had the earmarks of actual dishonesty. In applying what can only be described as a loose causation analysis, the Fifth Circuit Court of Appeals held that "a general pattern of dishonesty, rather than a dishonest act for each loan, is sufficient in this circuit."[142] In finding that a "general pattern" of dishonesty suffices for purposes of determining whether the employee's acts caused the loss, the court again jumped from a determination of actual cause to one of ultimate effect. This essentially writes the "direct" language out of the policy.[143]

In *FrontLine Processing Corp. v. American Economy Insurance Co.*,[144] the Montana Supreme Court answered the certified question of

[138] *Id.* at 845.
[139] *Id.* at 850.
[140] *Id.*
[141] 45 F.3d 969 (5th Cir. 1995).
[142] *Id.* at 976.
[143] *See also,* Hanson Plc v. Nat'l Union Fire Co., 794 P.2d 66, 69 (Wash. Ct. App. 1990); *but see* Cambridge Trust v. Commercial Union Ins. Co., 591 N.E. 2d 1117 (Mass. App. Ct. 1992).
[144] 149 P.3d 906 (Mont. 2006).

whether the term "direct loss" when used in the context of employee dishonesty coverage afforded the insured consequential damages "that were proximately caused by the alleged dishonesty."[145] In this case, the insured, due to the acts of one of its employees, failed to pay its business taxes. The insured sought coverage under its fidelity policy for costs attendant to the failure to pay taxes such as the fees of a forensic accountant, a forensic handwriting analyst, a forensic computer review and "costs, interests, penalties and fees assessed by the Internal Revenue Service."[146] The coverage provided that the insurer "will pay for direct loss" which results "from dishonest acts committed by any of your employees."[147] The Montana Supreme Court looked at case law interpreting "direct loss" to mean "all losses proximately caused by an employee's dishonest activity," and specifically *Jefferson Bank*.[148] The court also looked at cases limiting loss under the "direct means direct" analysis. The court stated that: "We are persuaded that a proximate cause analysis is appropriate in determining whether a loss is 'direct' under a fidelity insuring policy. Such a position comports, as well, with our tradition of applying a causation standard to various types of losses claimed under insurance policies."[149] The court then analyzed three Montana cases dealing with other types of policies.[150] The court also distinguished the cases cited by the insurer on the "direct means direct" analysis. In looking at those cases, the Montana Supreme Court stated that, unlike the cases cited by the insurer, the insured's "disputed claims are not the result of lawsuits by or settlements made to third parties."[151] Rather, the court noted that the insured's damages were incurred in the investigation of the extent of the employee's "alleged dishonest conduct and to mitigate and remedy the discovered damage."[152] Therefore, by distinguishing only the direct loss cases dealing with third-party claims, the court chose to follow the proximate cause cases. As a consequence,

[145] *Id.* at 31.
[146] *Id.* at 13.
[147] *Id.* at 14.
[148] *Id.* at 19.
[149] *Id.* at 30.
[150] Green v. Milwaukee Mechanic's Ins. Co., 252 P.310 (Mont. 1926); Newman v. Kamp, 374 P.2d 100, 104 (Mont. 1962); Life Ins. Co. of N. Am. v. Evans, 637 P.2d 806, 808 (Mont. 1981).
[151] *Frontline Processing Corp.*, 149 P.3d 906 at 26.
[152] *Id.*

the court concluded that "the term 'direct loss' when used in the context of employee dishonesty coverage. . . applies to consequential damages incurred by the insured that were proximately caused by the alleged dishonesty."[153]

The New Jersey Supreme Court in the case of *Auto Lenders Acceptance Corporation v. Gentilini Ford, Inc.*[154] held in the same manner as the Montana Supreme Court. In this case, the insured was forced to buy back from its lending bank several auto leases which had been the product of misrepresentations in the application by one of the insured's employees. When the bank discovered that the applications had misrepresentations, the bank required that the insured make good on its recourse requirement and the insured ultimately paid its bank to settle the matter.

The fidelity policy at issue applied to "direct loss . . . resulting from dishonest acts committed by any of your employees acting alone or in collusion although the persons . . . ."[155] At the trial court level, the insured was granted summary judgment but this was reversed and judgment in favor of the insurer was ordered by the appellate division. In the appellate decision, the court believed that the insured had not suffered a direct loss as required by the policy and "the majority held that no such loss had occurred because 'the facts involved fraudulent conduct by the employee directed against a third-party.'"[156] In applying the "plain and ordinary meaning" of the term direct loss, the appellate court majority concluded that coverage was appropriate only if "the employee's action [is] directed against the employer. . . ."[157] The New Jersey Supreme Court, however, disagreed with the appellate division and ruled that the division had employed the wrong standard in determining what constituted a "direct loss." The court cited to the "Appleman's rule," and stated:

> Where a peril specifically insured against such other causes in motion which, in an unbroken sequence and

[153] *Id.* at 31.
[154] 854 A.2d 378 (N.J. 2004).
[155] *Id.* at 252.
[156] *Id.* at 254.
[157] *Id.*

> connection between the act and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. . . . In other words, it has been held that recovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk.[158]

Though the insurer pointed out that the citation to Appleman deals with cases wherein an insured risk is at odds with an excluded risk, the court stated that "the prevailing approach taken by courts in New Jersey and elsewhere to defining direct loss, in whatever type of policy that term arose, . . . adopt the conventional proximate cause test as the correct standard to apply when determining whether a loss resulted from the dishonest acts of an employee."[159] In deciding that it would follow the "proximate cause" analysis, the New Jersey Supreme Court ultimately found that the insured had sustained a direct loss because "it was induced by his [the employee's] fraudulent acts to hand over automobiles in exchange for installment sales contracts signed by non-creditworthy customers."[160] Because the employee exposed the insured to "a risk of default that it would not have been willing to accept in the absence of fraud" (*i.e.*, a "but for" standard), any loss to the insured "resulting from the default of the purchasers on the sale of the automobiles was proximately, and therefore directly," the result of the employee's actions.[161]

C. The Correct Interpretation Of "Direct" Under The Policies

Since hundreds of years of jurisprudence have established that the true purpose behind contractual interpretation is discerning the intention of the parties who made that contract, it would make sense that the discerning of this intent would be a primary consideration in any

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[158] *Id.* (citing to 5 John A. Appleman, INSURANCE LAW AND PRACTICE, § 3083, at 309-11 (1st ed. 1970).

[159] *Id.* at 259.

[160] *Id.*

[161] *Id.* at 260.

construction of insurance contracts. As history has demonstrated, the utilization of the tort concept of proximate cause in interpreting an insurance contract is not only incorrect and imprecise, but it is detrimental to the intentions of the parties as well.

An insurance contract is obviously based on an offer of protection in exchange for a fee. The parties to that contract are the ones in the best position to determine what kind of protection, or coverage, will be provided and how much would fairly be charged. The main problem in grafting the tort concept of proximate cause onto a contractual relationship is that it subverts the intentions of the parties. The tort definition of proximate cause is designed to affix blame/responsibility and to ameliorate potential societal concerns. That is not the intent of an insurance contract. The intent of an insurance contract is the same as any other contract: one party offers something in exchange for something else. In this case, the insurer is offering protection in exchange for a set price, otherwise known as a premium. If, because of the interpretation given to that contract, one party receives more than it is entitled to under the contract, it is unfair to the other party who has already set a price on what it will deliver and it undermines our certainty in the supposed sanctity of contractual relationships. As one court has stated: "If the policy terms are clear, courts should interpret the policy as written and avoid writing a better insurance policy than the one purchased."[162]

Insurance premiums are not randomly selected but are instead determine by a series of formulas and historical antecedents.[163] If a court, by changing the intent and scope of the protection, disrupts those formulas and historical antecedents by extending the language of the policy to provide more than the parties either intended, or for which historically coverage has been granted, this destabilizes the relationship.

While this may seem a minor consideration on a case-by-case basis, in the long run, it will have significant consequences. If one of the parties to an insurance contract believes that it is being unfairly treated, that party will either cease to further engage in such contracts or will

[162] Carteret Ventures LLC v. Liberty Mutual Ins. Co., No. 09-2831 (JLL), 2009 WL 3230844 (D.N.J. Oct. 2, 2009).

[163] *See e.g.*, 1 CALIFORNIA INSURANCE LAW & PRACTICE, § 6A.02.

change the nature of the relationship. The unintended consequences of an interpretation of an insuring contract which utilizes a tort proximate cause standard for which it was not designed may be the withdrawal of such protections based upon an insurer's inability to adequately secure profit for that which it is giving or a concomitant raise in premiums or a restriction in terms which may, effectively, lead to the same conclusion. This is especially true when the insured is a financial institution or a sophisticated business that may have picked certain coverages or even negotiated changes.[164]

This is not an apologia for insurance companies; it is merely a statement of fact. In any business climate, if one of the parties to the contract feels that they are not being given a fair reading of that contract, that party will likely refuse to continue in that vein. It is possible that the earlier distinctions drawn between "proximate cause" in its tort setting and "proximate cause" in other areas of use were based on this understanding. Whereas society needs to be able to allocate responsibility for certain actions people may take in their interactions with other human beings, the same considerations are not attendant to a parties' relationship with another party via contract. It is assumed that those parties are entirely capable of determining what it is they will provide, and what it is they will take in any contractual setting. By utilizing what is a tort understanding of proximate cause in the contractual area, courts subvert the meaning of that contract and allow for instability in the insurance market.

It appears that nothing need be done to rectify this situation but for a return to the understanding that proximate cause, in relation to insurance policies, is a substantially different and more restricted concept than the idea of proximate cause in the tort setting. Therefore, when an insurer uses a term such "direct" or "directly," nothing more is necessary to preserve the contractual balance than to give that term its ordinary dictionary definition and understanding rather than the baggage of

[164] *See, e.g.*, Great Western Cas. Co., v. General Cas. Co. of Wisconsin, 734 F. Supp. 2d 718 (D. Minn. 2010); First State Bank of Montecello v. Ohio Cas. Ins. Co., 555 F.3d 564 (7th Cir. 2009); Fountain Powerboat Indus. Inc., v. Reliance Ins. Co., 119 F. Supp. 2d 552 (E.D.N.C. 2000); Benjamin Moore & Co., v. Aetna Cas. & Sur. Co., 843 A.2d 1094 (N.J. 2004); State Bank of Viroqua v. Capitol Indemnity Corp., 214 N.W.2d 42, 43 at n. 1 (Wis. 1974).

hundreds of years of tort analysis. Whereas the confusion generated by trying to apply the tort concept of proximate cause may be a worthy risk in assigning social responsibility and blame, it is a detriment when dealing with contracts between private parties.

V.
CONCLUSION

In closing, the principles of contract interpretation, not the constructs of tort law, should apply to the analysis of causation issues in any insurance setting. If the parties to a contract have chosen a particular word or series of words to define when coverage for the risk will be triggered, it should not fall on the courts to change this trigger by giving it a meaning different from the one chosen by the parties. This is especially true when the courts utilize a standard of proximate cause based on the evolved tort concept and not its original meaning of the last link in the chain. The latter is more akin to the "direct" or "immediate" standard than the tort concept of proximate cause and is the correct application.