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Beware of Anticoncurrent Causation Clauses—

They Can Erase Your Property Insurance Coverage

By Finley Harckham


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Before there were viruses that spread over the Internet to corrupt computers and other data, there were provisions in property insurance policies that have a similar impact. Known as anti-concurrent causation clauses, they appear in a preamble to the exclusion section of policies and are intended to bar coverage beyond instances where there is an excluded *cause* of loss, to every situation in which an excluded peril is only one cause, or is even the *result* of a covered cause of loss. Those provisions lie at the heart of the wind and rain versus flood debate raging in the Gulf Coast in the wake of Hurricane Katrina, but their reach goes much further. In fact, if applied as written, some of those clauses can render most property and business interruption coverage practically illusory. Policyholders must be alert to the presence of those clauses when buying property coverage, and aware of how the courts are interpreting them when claims are made.

Anticoncurrent Causation Clauses—The Most Common to the More Onerous

A number of different anticoncurrent causation clauses are in use today, and some are more onerous than others. One of the more commonly used clauses is found in the Insurance Services Office Causes of Loss-Special Form (CP 10 30 04 02). It states:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Following that provision is a list of exclusions. This provision bars coverage whenever an excluded peril directly or indirectly causes damage. Although this is a very unfavorable clause for policyholders, unlike other forms at least it is limited in scope to excluded causes of loss, which in many instances will leave room for argument over whether an event was a cause or an effect.

> ***"Anticoncurrent causation clauses ... appear in a preamble to the exclusion section of policies and are intended to bar coverage ..."***

A more problematic clause is found in State Farm property policies. It provides:

> We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such losses regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or

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(d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these.

That clause is followed by a number of exclusions. Unlike most policies, the exclusions are not limited to "perils," but include "events" that occur along with causes of loss.

The 'Purported' Intentions of Anticoncurrent Causation Clauses

Anticoncurrent causation clauses are so named because they are intended, among other things, to be a response to the rule in most jurisdictions that in instances of concurrent causation—where multiple forces independently cause a loss, one of which is a covered peril and the other is not—the insurance policy must respond. For example, in one case a policyholder modified a gun to have a hair trigger, and then put the gun in a car which he drove recklessly. The gun discharged, injuring a passenger. The insured's homeowner's policy did not cover liability resulting from the use of automobiles. In awarding coverage under that policy the court reasoned that although "multiple causes may have effectuated the loss [that] does not negate any single cause"—in that case, the covered negligence in modifying the gun. *See State Farm Mut. v. Partridge*, 514 P.2d at 130-131 (1973). An anticoncurrent causation clause would reverse the ruling in that case and bar coverage because an excluded peril, the use of an automobile, was a cause of the loss.

However, at least some anticoncurrent causation clauses are intended to go beyond reversing the concurrent causation rule, to bar coverage when an excluded event is merely a consequence of a covered cause of loss, or follows damage caused by an insured peril. As one court explained in the context of a Hurricane Katrina claim of a family that had coverage for wind and rain, but not flood, if the anticoncurrent causation clause in the family's policy was enforced, it "would mean that an insured whose dwelling lost its roof in high winds and at the same time suffered an incursion of even an inch of water could recover nothing..." *Leonard v. Nationwide Mutual Ins. Co.*, 438 F.Supp.2d 684 (S. D. Miss. 2006).

There are many other scenarios in which coverage could be forfeited under an anticoncurrent causation clause. For example, when a covered wind and rain event causes the interior of a building to become damp, and mold develops, if dampness or mold are excluded, there would be no coverage even though mold was the effect, not the cause, of loss. Likewise, when a broken water pipe under a home, which is a covered cause of loss, washes away soil beneath the foundation, the resulting damage would be barred from coverage if the policy contains an anticoncurrent causation clause and an earth movement exclusion. *See Kula v. State Farm*, 628, N.Y.S.2d 988 (4th Dep't 1995).

The Three Rationales Applied by the Courts

Anticoncurrent causation clauses have been the subject of numerous lawsuits in which policyholders argue that it would be unfair or unlawful to allow such provisions to eviscerate their coverage. Some of the clauses have been upheld under the laws of a number of states, including Alaska, Arizona, New York, Nevada and Utah, and invalidated under the laws of other states, including California, Mississippi, West Virginia and Washington. However, most of the cases involve the *State Farm* provision quoted above. That provision is broader than the ISO form and some other clauses, so cases interpreting it may not have wider application. Adding to the uncertainty, in a number of states there are no cases interpreting any of the clauses.

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As a general rule, the courts have applied three rationales when deciding this issue, which may give some indication of how courts will act in other jurisdictions. First, some states, including

California and Washington, have adopted a statutory or common law rule that insurance policies must provide coverage if the efficient proximate cause of loss is a covered peril. Courts in those jurisdictions have held that anticoncurrent causation clauses violate that rule, and therefore are unenforceable.

Second, under the law of many states, an insurance policy must be interpreted in a manner that is consistent with the reasonable expectations of the policyholder. This doctrine is intended to compensate for the fact that most insurance policies are contracts of adhesion, drafted by the insurer and sold on a take it or leave it basis. Some courts, such as those in Mississippi, have concluded that anticoncurrent causation clauses are unenforceable because they defeat the policyholder's reasonable expectations of coverage when a covered peril is the proximate cause of loss. However, other courts, including those in Alaska, have found the clauses to be enforceable under the reasonable expectations doctrine. Those courts have concluded that the clauses are clear and unambiguous, and therefore policyholders could not reasonably expect coverage for risks excluded by them.

Third, other courts which enforce these clauses do so under the laws of states which lack a proximate causation rule and which reject the reasonable expectations doctrine in favor of a rule that insurance policies are to be interpreted under the same rules as all other contracts. To these courts, anticoncurrent causation clauses are enforceable because they are clear and unambiguous, and entered into by parties who are free to contract as they wish.

Not all property policies contain anticoncurrent causation clauses. Avoiding those provisions should be a high priority when selecting coverage.

Conclusion

When a loss occurs, policyholders should keep two things in mind when evaluating coverage in light of an anticoncurrent causation clause. First, the different clauses in use may lead to different results depending upon the facts of a claim. So, do not assume that just because a court has enforced one clause it would hold that another clause bars coverage. Second, not all courts will enforce these clauses. Moreover, in many instances more than one state's law is potentially applicable to a loss. So, the policyholder should examine the laws of all states which might be applied to determine whether a viable claim exists. For example, a policyholder headquartered in California might get the benefit of that state's law rejecting the enforceability of anticoncurrent causation clauses for a loss suffered at a facility in Arizona. Policyholders must be as resourceful in securing coverage as insurance companies are in denying it.

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What Side is Your Insurance Broker On?

By John G. Nevius, Esq., P.E.

Whose side will the insurance broker be on when you have to make a claim? Like so many things, it depends on where your relationship is at: figuratively and literally. A recent New York Court of Appeals case highlights the differences in broker obligations between New York and states like New Jersey and provides insight into ensuring that you and the broker have the necessary "special relationship."

In *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152 (2006), New York's highest court held against a policyholder's malpractice claims involving the broker. The decision turned on whether the broker had assumed a duty to obtain appropriate insurance coverage. The lower appeals court held that no such duty existed, in part, because the policyholder admitted to reading the insurance policy and had not subsequently demanded any changes.

New York's Court of Appeals, however, explained that to create the special relationship necessary to give rise to an obligation come claim time, a policyholder generally would

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have to do one of three things. First, a special relationship could arise out of payment for services beyond the typical broker commission taken out of the premium. Second, a specific coverage issue would have to be identified prior to insurance policy procurement regarding which the policyholder seeks out and relies upon the broker's advice. This standard seems intuitive because policyholders inevitably rely on broker's expertise just as business people rely on other professionals such as architects, engineers or accountants. Many courts, however, are reluctant to bestow traditional professional status upon insurance professionals and thereby require them to meet a legal standard such as the standards architects, engineers and accountants must meet routinely. These courts argue that buying insurance is a simple arms-length commercial transaction. Third, the "course of dealing" between the broker and its policyholder client can serve to put the broker on notice that the policyholder was relying on its expertise. Again, this seems intuitively inherent to almost any insurance policy acquisition. If it were not, what purpose would the broker serve? Of course, a lot depends on the nature of the coverage and the business imperatives involved.

New York's law contrasts with that of other states. Some states have statutes clarifying the roles and obligations of insurance brokers and agents. Other states rely on case law to address these issues. Companies in New Jersey, for example, will ordinarily have a special relationship as broker clients. *See Aden v. Fortsh*, 776 A.2d 792 (N.J. 2001). Given this split of authority, the question may be: which side of the river will you and the insurance broker be on at claim time?

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