Anti-Concurrent Causation Exclusions Receive Spotlight

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After nearly 30 years of infecting court decisions and confounding policyholders’ reasonable expectations, the anti-concurrent causation exclusion is finally beginning to enter the spotlight. While the anti-concurrent clause has been discussed by commentators and lamented over by those who have had claims denied under the clause, major media news outlets are now discussing the clause in the open.

For those unfamiliar with the topic, the anti-concurrent causation exclusion appears in most property insurance and builders' risk policies. The exclusion appears in various forms but typically appears something like this: “The Policy excludes loss or damage caused directly or indirectly by any of the [exclusions]. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.”

As this sample language indicates, the anti-concurrent causation exclusion excludes more than just “concurrent” losses. The clause also excludes “subsequent” losses by including the phrase “in any sequence to the loss” within the clause.

Taking this “in any sequence to the loss” language to its logical end could potentially vitiate coverage for many policyholders. For example, most property insurance policies cover fire damage but also exclude intentional acts.

Assume, for the purposes of this example, that a fire burns 30 percent of a building covered by a property insurance policy containing the anti-concurrent causation exclusion. The building still remains standing, but in order to repair the fire damage, a substantial portion of the building needs to be removed to complete the repair work.

The insured then hires a contractor who removes sections of the property to conduct the repairs. Taken to its conclusion, the insured’s intentional acts of removing damaged property “contribute” to the loss and to the loss in some sequence (after) the loss. Thus, under a plain reading of the policy, coverage could potentially be vitiated.

This example presents an admittedly extreme case, but the same principle applies in many cases. Most recently, policyholders in the wake of Hurricane Sandy have faced the exclusion head on. By way of an overly simplified discussion of the phenomenon, hurricanes occur in two phases: violent winds come from the sea and then storm surges follow, bringing significant water and flooding.
The hurricane phenomenon most acutely demonstrates the anti-concurrent causation problem because damages caused by windstorms are typically covered by policies, while water damage is typically excluded.

Most policyholders' reasonable expectations envision that once their property is damaged by a covered loss, the covered loss cannot be later unwound by a subsequent excluded peril. But this precise problem can often occur during hurricanes. Properties are often damaged by wind, and then flooding follows, which often unwinds coverage for the previously covered wind peril.

In Hurricane Sandy, as was the case with Hurricane Katrina and previous hurricane events, policyholders often suffered wind damage first, but they also suffered water damage after the wind damage. The water damage typically does one of three things: nothing because the wind damage has already destroyed the property; exacerbates the damage caused by the previous wind damage; or creates new damage.

Under many courts' reading of the anti-concurrent causation exclusion, only the first situation would be covered. But, the burden is often placed on the insured to prove that the property was destroyed prior to the water damage. This creates a difficult challenge for policyholders because they typically are not around to witness the destruction of their property — often under mandatory evacuation orders.

Policyholders in New York have recently been facing many of these problems from the anti-concurrent causation exclusions in their policies. These policyholders are not the first to battle this phenomenon, but New York has responded much more aggressively to the anti-concurrent causation clause than previous jurisdictions.

After Hurricane Katrina, for example, a litany of cases developed interpreting the anti-concurrent causation clause and reached different results. Similar litigation is ongoing in New York. New York, however, has tried to take an additional step.

New York is working to pass legislation prohibiting anti-concurrent causation language in property insurance policies. The bill has been passed by the Assembly but, as of the date of this article, still awaits passage in the Senate.

While many can agree that significant problems exist with anti-concurrent causation exclusions, simply prohibiting the exclusion is not a panacea.

Insurers began using anti-concurrent causation exclusions in the mid-1980s in response to various courts employing the opposite of the anti-concurrent causation exclusion. According to these courts, if a covered peril contributed in any way to a loss, then the entire loss was covered.[1]

For example, the Ninth Circuit once addressed the two perils that caused the loss: third-party negligence (a covered peril) in maintaining flood control plans and flood loss (an excluded peril). The court held that because third-party negligence contributed to the loss, the entire loss was covered, even though the loss was unequivocally caused by flooding (an excluded peril).

Reinstituting this type of approach would lead to the same problems for insurers as currently exist for policyholders. It could also eventually lead to significant policy-
premium increases to cover the increasing risks to insurers.

It seems that a happy median can be reached that gives all parties contract certainty and also helps to meet insurers’ and policyholders’ reasonable expectations. To do so, however, courts need to determine how the loss was caused and what peril really caused the loss.

Accordingly, courts will need to address several questions to determine whether coverage should apply. Such questions include the following:

- Did the causes operate in an unbroken chain of events, or did the causes operate independently?
- If the losses operated independently, did they act simultaneously or sequentially?
- If the losses were simultaneous, were the various causes independently sufficient or independently insufficient to cause the loss?
- If the losses were sequential, what cause and resultant loss came first, and did the second cause exacerbate the preceding loss?[2]

Only by addressing these questions can courts, policyholders and insurers determine whether a loss should be covered. Regardless of whether the anti-concurrent causation exclusion is rejected, something needs to be put in its place that ensures contract certainty. Addressing the true cause of loss in a systematic way will help reach that result.

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[2] For further discussion of these types of questions see Mark M. Bell, A Concurrent Mess and a Call for Clarity in First-Party Property Insurance Coverage Analysis, 18 Conn. Ins. L.J. 73 (2012)