

Clause reflects Katrina

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Robert M. Horkovich is a shareholder and insurance recovery attorney at Anderson Kill & Olick P.C. in New York. He spoke recently with Business Insurance Senior Editor Roberto Cenicerros about anti-concurrent causation clauses in property policies and their relationship to claims alleging damage due to climate change.

Q: I understand anti-concurrent causation clauses might have relevance for climate change and environmental pollution cases. What is an anti-concurrent causation clause?

They are clauses the insurance industry is putting into first-party property policies that may make property coverage and business interruption coverage illusory. It is a clause put in the preamble of a group of exclusions. It basically says, "I am listing a whole bunch of exclusions, and if there is a covered loss, a loss that you would imagine would be covered by this policy, but any of these other exclusions apply, you don't have coverage." So, it's the sale of a policy in the Gulf Coast for hurricanes, for example, telling people, "We're going to insure you for hurricanes," but then there is a clause for excluding flood damage. It says, "If there is any part of this loss that may be caused by flood, even though your house got blown down by wind before the floods arrived, we're not going to give you coverage."

Q: How widely are these clauses used?

Very widely used. (Insurers) are attempting to put the clauses into all first-party property policies.

Q: Are these in commercial or other types of policies other than property?

They are in commercial policies. Generally, I would imagine they could try to put them into liability policies, but right now they are predominantly used in the first-party property policies and business interruption policies.

Q: Is this relatively new?

Yes. Since Hurricane Katrina, this has been a big deal. Hurricane Katrina had a devastating impact on the Gulf Coast. Hundreds of thousands of homes were knocked down by wind. Later, floods devastated almost any structure present. Many of the policies had flood damage exclusions. Anti-concurrent causation clauses were introduced because some courts were saying, "We've got to separate how much of the damage was caused by wind, which is a covered loss, and flood, which is not a covered loss."

Q: So there have been some recent court decisions about these clauses?

Yes, some courts have refused to enforce them. A federal court in Mississippi in the wake of Katrina said, "These clauses are hidden in the policies; they make the coverage illusory because hurricanes, by their nature, would have wind and flood." If some carrier is out there selling hurricane insurance, people expect to be insured for hurricanes. They don't expect the insurance company to come in at the end of the day and say, "Oh by the way, there was flood and rain and we don't cover water damage, and therefore we're not going to pay you anything." So some courts have stricken the clause, saying they're ambiguous and inherently anti-consumer and anti-public policy.

Q: Is there still a need for policyholders to be concerned then?

Sure, because lots of other courts may not do that. Other courts may say, "Well, this clause is plain on its face."...Then you don't have any coverage. It can go well beyond the circumstance of a hurricane.

Q: Is there a concern that climate change could cause situations where these clauses are triggered?

Sure, there are lawsuits that have been filed against companies for advancing climate change. Those companies may be involved in the extraordinary production of greenhouse gases. The lawsuits against them say, "You are emitting greenhouse gases that are causing the environment to warm up and, because of that, there is extra flooding."

So policyholders may say, "I'm going to make claims to my carriers for those lawsuits against me." The insurance companies, because of anti-concurrent causations, whether flood or some other exclusion, can try to eliminate the coverage they've sold.

This is a burning issue and policyholders—corporate or individuals—should look at their policies to see if they have a preamble to their exclusion section that tries to set out anti-concurrent causation clauses, and if they have any clout whatsoever in managing the language of their policy, try to get that language taken out.

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