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Anti-Concurrent Causation Clauses Can Erase Your Property Coverage

Most property insurance policyholders do not realize the extent to which their coverage has been undermined by a pernicious form of mega exclusion called anti-concurrent causation clauses, which appear in a preamble to a policy's exclusion section. Whereas an ordinary exclusion bars coverage for one specific kind of loss, the anti-concurrent causation clause seeks to bar coverage in every situation where an excluded peril is one of two or more clauses—or even the result of a covered cause of loss. These provisions lie at the heart of the wind and rain v. flood debate raging in the Gulf Coast in the wake of Hurricane Katrina, but their reach goes much further. 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.

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Anti-concurrent Causation Clauses—The Most Common to the More Onerous

Some anti-concurrent causation clauses are more onerous than others. The least restrictive type, found in the ISO Clauses of Loss-Special Form, simply bars coverage whenever an excluded peril directly or "indirectly" causes damage. This is at least limited in scope to excluded causes of loss, often leaving room for argument over whether an event was a cause or an effect. A more problematic clause, found in State Farm policies, extends the exclusive effects beyond causes of loss to certain "events" that may be the *result* of a covered cause.

Anti-concurrent causation clauses are the insurance industry's answer to most jurisdictions' rule that in instances of concurrent causation, the insurance policy must respond if the covered peril is the "efficient proximate cause" of loss. For example, in one case a policyholder modified a gun to have a hair trigger, then put the gun in a car which he drove recklessly. The gun discharged, injuring a passenger. While the insured's homeowner's policy did not cover liability resulting from the use of automobiles, 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. An anti-concurrent causation clause would reverse the ruling and bar coverage because an excluded peril was a cause of the loss.

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At least some anti-concurrent causation clauses aim 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 anti-concurrent 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…"

There are many scenarios in which coverage could be forfeited under an anti-concurrent causation clause. For example, 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 anti-concurrent causation clause and an earth movement exclusion.

Three Rationales Applied by the Courts

Anti-concurrent causation clauses have been the subject of numerous lawsuits. Some ACC clauses have been upheld in states including Alaska, Arizona, Mississippi, New York, Nevada and Utah; others have been invalidated in states including California, West Virginia and Washington. Most of these cases involve the broad State Farm provision discussed above and so may not have wider application. In many states there are no cases interpreting any of the clauses.

As a general rule, the courts have applied three rationales when deciding this issue. 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 anti-concurrent 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 consistent with the policyholder's reasonable expectations. 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 (when interpreting wind policies), have concluded that anti-concurrent 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.

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, anti-concurrent causation clauses are enforceable because they are clear and unambiguous, and entered into by parties who are free to contract as they wish.

Recently, in the *Leonard* case cited above, the U.S. Court of Appeals for the Fifth Circuit stated that an anti-concurrent causation clause in a policy issued by Nationwide Mutual is enforceable under Mississippi law. The Court reasoned that even though the Mississippi courts have applied the proximate causation rule in cases involving coverage for hurricane losses under wind policies, the Mississippi Supreme Court has not addressed the enforceability of anti-concurrent causation clauses in all risk policies. Therefore, the clauses found in all risk policies are not contrary to Mississippi public policy.

While all insurer-drafted property policies contain anti-concurrent causation clauses, some broker forms do not. Avoiding those provisions if possible, or at least choosing a policy with one of the less restrictive provisions, should be a high priority when selecting coverage.

Conclusion

When a loss occurs, policyholders should keep three things in mind. First, the different clauses in use may lead to different results depending upon the facts of a claim. Do not assume that just because a court has enforced one clause it would hold that another clause bars coverage. Second, these clauses are unenforceable under the laws of some states. Finally, 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. Policyholders must be as resourceful in securing coverage as insurance companies are in denying it.

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