

## When Do You Begin The Beguine



**L**urking in the background of every coverage determination involving claims under first party property insurance policies is a necessary tracking of the chain of causes that resulted in the physical damage. Causation analysis is, indeed, fundamental to the investigation that an insurer undertakes before it either accepts liability for the damage sustained or issues a reservation of rights letter and, ultimately, a denial of the claim.

Once the causes of the loss are ascertained, a sorting out has to take place to identify those that are covered by the policy and those that are excluded. Naturally, the most confounding problems arise when there is a co-mingling of covered and uncovered causes that produce the damage. Some of the more perplexing and hotly contested areas of debate under

first party property policies today involve precisely just such an admixture of covered and uncovered causes e.g. mold, pollution, and collapse.

Unlike the physical and social scientists whose perceived wisdom is that there is no simple cause and effect and that all events result from a “multiplicity of interdependent variables interacting” – at least, that is the way my undergraduate sociology professor phrased it – judges and lawyers have had to assign greater weight to some causes over others in order to arrive at conclusions of legal liability in order to decide cases before them. Thus have arisen the concepts of “the efficient proximate cause” or “the dominant cause,” terms that courts employ in their causation analysis.

The framework for all the discussion is usually a first party property insurance policy written on a “risks of direct physical loss” basis. See Insurance Services (ISO) Form CP 1030. This is commonly called an “all risk” policy although as time goes on, more and more risks of loss are either excluded or have dollar limitations imposed like the new policies introduced to cover mold. However, the CP 1030, or some variation of it by manuscript or peculiar insurance company modification, is probably the most widely disseminated policy form used to delineate the perils

covered under a property policy.

As with any “all risk” form, there are certain exclusions from coverage in the CP 1030. The exclusions are sorted in the first place by the different verbiage that introduces them, verbiage that has profound legal effects. One set of exclusions is preceded by what is known as “anti-concurrent causation language” which reads:

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.

This type of exclusionary language is usually reserved to introduce perils involving widespread catastrophic damage such as earthquakes, nuclear hazards, war or military action, flood and tidal waves. Under the anti-concurrent causation introduction, it does not matter if a covered peril intervenes in the chain along with the excluded peril, the entire loss is not covered. However, the courts in three states refuse to enforce the anti-concurrent causation language on the grounds that it violates public policy and they declare that you cannot negate coverage where the efficient proximate cause of a loss is a

covered peril. Those states are California, Washington and, recently, West Virginia.

Another variation of that approach applies to the terrorism exclusions for which the insurance industry is trying to secure state approval. Some states, by statute, mandate a standard fire policy such as in New York, and require insurers to cover "all direct loss by fire" so if a terrorist starts a fire in a building, the insurer is obligated to cover at least the fire damage.

The other exclusions in the usual property policy i.e. wear and tear, rust corrosion, fungus, decay, latent defect, smog, settling, cracking, breakdown, collapse, and certain weather related risks, are all preceded by, "We will not pay for loss or damage caused by or resulting from any act of the following..." However, in most states, this language does not preclude coverage if a covered peril is the "efficient proximate cause of the loss" and the excluded cause results from the covered peril in one unbroken chain. For instance, in order to generate excessive mold there has to be a water event that triggers the mold. If the water event is a covered peril – a broken pipe, for instance – than the efficient proximate cause of the loss is covered water and the loss is covered.

To make matters a bit more complex, a lot of these excluded causes have ensuing loss provisions that state that, although, say, wear and tear may not be covered, if a fire ensues from the worn out wiring, then the fire damage is covered. Thus, the policyholder has two opportunities to con-

struct a covered loss scenario if an excluded peril intrudes in the causation chain: on the front end by identifying a covered peril as the dominant cause of the loss; and on the back end by arguing that the excluded peril initiated a covered peril that generated the damage.

A fact pattern taken from a recent United States Court of Appeals case – *Blaine Construction Corporation v. Insurance Company of North America*, 171 F.3d 343 (1999) – will illustrate the exercise under a court employing the "efficient proximate cause" doctrine. A construction contractor invoked its "all risk" builders risk policy to claim for damages for the cost of replacing ceiling insulation ruined by water that had condensed within the insulation cavity after a subcontractor had failed to install a vapor barrier properly.

The applicable insurance policy excluded coverage for loss or damage caused by "faulty workmanship" but contained an exception for loss or damage "ensuing" from an insured peril notwithstanding that no coverage was provided for the cost of correcting the faulty workmanship. Also, there was an exclusion for "[d]ampness or dryness of atmosphere, extremes or changes in temperature." The lower court accepted the plaintiff's argument on the faulty workmanship exclusion but upheld the insurer's second affirmative defense based on the exclusion for loss or damage resulting from "dampness or dryness of atmosphere" and dismissed the lawsuit.

On appeal, the United States Court of

Appeals, while acknowledging that a subcontractor had negligently installed the vapor barriers thus allowing the accumulation of condensation and ultimately water in the ceiling cavity above the vapor barrier which damaged the insulation, agreed with the plaintiff Blaine Construction that the introduction of moisture and hence water into the insulation was an "ensuing loss" outside the scope of the first exclusion; and that with respect to the dampness or dryness of atmosphere exclusion, the air within a building space is not "atmosphere" as that word is commonly understood and held that INA most likely was referring to weather conditions.

The decision in Blaine was two to one and it goes to show how close some of these "chain of causation cases" have become. The language of "ensuing loss" clauses and the doctrine of "efficient proximate cause" all involve concepts that are difficult to apply in practice because they are a bit artificial and only confirm the fact that the physical and social scientists have got it right and that the law is still searching.

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