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# Technical Advisory

**TA 252** **May 22, 2006**

**SUBJECT: What Is "Anti-Concurrent Causation"?**

**BACKGROUND:** *"From chaos comes order."* That famous line from the German philosopher Nietzsche seems apropos for what the Gulf Coast states have faced over the last two hurricane seasons. Chaos has been present to one degree or another in so many facets of life since the unprecedented hurricane activity, and the insurance industry has been no exception.

Not surprisingly, losses on such a massive scale have brought an intensive and in some cases rancorous public examination and debate over certain basic insurance principles.

At present, one insurance principle getting the most attention is called "anti-concurrent causation."

**MAIN POINTS:** To fully understand the significance of "anti-concurrent causation," it is necessary to examine the context for the term.

Fundamentally, insurance contracts are intended to provide coverage for certain exposures, but not all possible exposures, thus the insurance forms drafters must design the appropriate policy language to accomplish both objectives.

Theories of causation play a key role in the construction of insurance contracts. Quite often, one event can lead to another event. In some cases, both events are meant to be covered, while in other cases, one event is intended to be covered while the other is not.

There are several key concepts that play a role in loss determination and thus insurance contract language. They are ***proximate cause*** (and ***efficient proximate cause*****),** ***concurrent causation*****,** and ***anti-concurrent causation*****.**

**"Proximate cause."** A basic principle of insurance is the concept of "proximate cause," which has been a fundamental doctrine in insurance for a long time. (Legal scholars cite an 1851 case involving *"mould [sic] damage to delicate French goods"* which were damaged in shipment between Havre and Boston as one of the earliest involving proximate cause.)

The theory of proximate cause generally favors policyholders, as an occurrence covered by the policy could set into motion a chain of events leading to damage to property, even though some of the intervening events in the chain might not be covered.

Essentially, proximate cause is found when there is a chain of causation leading to a loss, the so-called "unbroken chain of events" which every basic insurance text explains. For example, one insurance text defines proximate cause as *"a cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces an event, and without which the event would not have happened."*

For example, if a policy provided only fire coverage, not only is the direct damage by fire covered, but under proximate cause, the collateral smoke damage, as well as damage from the water used by firefighters, is all treated as a loss by fire. That is, the smoke-damaged furniture and drapes, and water-soaked carpet and household contents, were proximately damaged by fire, in an unbroken chain of events originating with the fire.

By contrast, if several days after the fire is out the property owner brings a garden hose into the house to wash down the soot from the walls, and the hose springs a leak which damages other property, that damage is not proximately caused by the fire, since the post-fire activities of the property owner "break the chain" of causation.

In hurricanes, proximate cause is a prime issue in another chain of causation, and that is wind vs. flood. If proximate cause were the only insurance principle in play, then winds which push a wall of water onto the shore, or cause a levee to be overtopped or damaged, the resulting flooding damage would be covered due the proximate cause of wind. However, since personal and commercial property insurance policies were not intended to cover flood damage, the insurance contract is drafted to exclude the flood damage, even if caused by wind. More on that idea in a moment.

**"Efficient proximate cause."** Given that proximate cause involves a chain of events, a frequent dilemma in insurance contract interpretation involves the question of just how far back the chain goes. By comparison, questions of legal liability also involve proximate cause, sometimes called the "but for" rule. That is, for a person to be found legally liable in tort, plaintiffs argue that "but for" the acts of the tortfeasor, they would not be injured, even when the actions of the tortfeasor and the injuries to the plaintiff are separated by a chain of events.

A recent cartoon appearing in many newspapers illustrates the interpretive problem of properly applying the principle of proximate cause in liability cases. A farmer is on the witness stand in court. The plaintiff's attorney says, *"So, you admit that YOU grew the corn that was used to distill the liquor that was consumed by the driver who injured my client!"*

A similar case involving property insurance shows that proximate cause also has its limitations for insureds seeking coverage under their own policies. A hurricane was approaching, so the owner of a horse moved the horse from the barn to a more secure building on the farm. After the storm passed, the horse was returned to the barn, but in a different stall, due to damage at the barn.

The new stall was located adjacent to a stall containing a large supply of grain. The horse was able to kick in some boards and managed to reach the grain. He overate, and later died of founder. The horse owner submitted a claim for the death of the horse due to wind (the hurricane). The court (Louisiana Supreme Court, 1970) rejected the insured's argument, holding that while the wind did play a small role in the chain of events leading to the death of the horse, wind was not the "*efficient proximate cause*." That is, wind was not the *dominant* or primary cause of the horse's death, no more than the corn farmer was the dominant cause of the drunk driving accident.

**"Concurrent causation."** A similar doctrine to proximate cause that also favors policyholders is concurrent causation. Under this concept, multiple factors were involved in causing the loss, with the end result of these so-called "concurrent causes" was one that was excluded under the policy. Most concurrent causation cases involve flood and earth movement losses, and first appeared in California as early as 1963, although the concept gained more acceptance in some courts in the early 1980's.

In those cases, homeowners who experienced flood or earth movement losses (both of which are excluded from standard homeowners policies), claimed that various factors contributed to their loss, and the exclusions should not apply. Such contributing factors often cited in many of the flooding cases included poor maintenance of a flood control structure, or the opening of an irrigation canal at the wrong time. In some of the earth movement (mudslide) cases, the contributing factors claimed by policyholders included poor drainage on a hillside, or improper zoning or site work.

As a result of adverse litigation, in which insurance policies were forced to pay claims the insurer had never intended to pay (as separate flood and earth movement insurance was developed for just such exposures), the industry revised the language in the exclusions of homeowners and commercial property policies in 1983.

Prior to the 1983 change, the lead-in wording in the exclusion for flood and earth movement in homeowners and commercial property policies said, *"We do not cover loss resulting directly or indirectly from:"* (flood, earth movement, etc.).

The 1983 change revised that lead-in wording to say, *"We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss:"* (flood, earth movement, etc.).

Simply stated, when there is a loss due to flood or earth movement, the intent of the policy exclusion incorporated in the 1983 revisions is to deflect policyholder claims that some mitigating circumstances or concurrent causes contributed to the flood or earth movement, thus attempting to side-step the exclusions. Whatever the cause or causes leading up to the flood or earth movement, the standard homeowners and commercial property policies clearly intend to exclude such loss.

The revised changes to property policy exclusions introduced in 1983, crafted to bolster and clarify the original intent of the flood and earth movement exclusions in the face of adverse court decisions, are often called "concurrent causation exclusions."

**"Anti-concurrent causation."** In more recent times, these concurrent causation exclusions have also become known as "anti-concurrent exclusions," since their purpose is to prevent the theory of

concurrent causation from providing coverage for losses never intended to be covered by standard property insurance policies.

As is often the case with contract law, there is a constant, on-going tug-of-war over the intended meaning and interpretation of certain provisions. Language is challenged, and each side attempts to make a persuasive and compelling argument in court supporting its viewpoint.

Some court cases from various states will illustrate the legal tug-of-war that has been focused on resolving the dispute between insureds and insurers over these issues. In many cases involving the enforceability of anti-concurrent causation exclusions, plaintiffs raised the issue of the exclusions being in violation of public policy. However, most courts have held that the legitimacy or enforceability of anti-concurrent causation exclusions does not rise to the level of a public policy matter, and are instead merely a point of contract law that can and should be resolved by the courts.

***Flooding caused by vandalism.*** In a Missouri case (1997), vandals had removed sandbags from a levee. The insured claimed the flooding (excluded) was proximately caused by vandalism (covered). Given that the policy contained the post-1983 concurrent causation exclusion (discussed above), the court upheld the insurer's denial of coverage for the flood damage.

***Earth movement caused by broken water pipe.*** The foundation under a home shifted. A broken water pipe under the home was also found. It was not clear from the investigation if the water leak caused the foundation to weaken, or if the shifting foundation broke the water pipe. However, the Mississippi court in 2004 ruled that the anti-concurrent wording in the earth movement exclusion was sufficient to deny the claim, regardless of which event happened first.

***Earth movement due to large trucks.*** Large timber trucks working near the insured's home rumbled up and down a nearby road for many days. The insured later discovered cracks in the walls of his house. He claimed damage by vehicles (covered), but the insurer denied based on the earth movement exclusion. The 1983 case before the Alabama Supreme Court found that the pre-1983 exclusion (see discussion above) for earth movement did not apply.

***Earth movement due to lightning.*** The Alabama Supreme Court had a similar case in 1999. Lightning struck an insured's retaining wall, damaging it and his nearby swimming pool. The insurer paid the claim under the covered peril of lightning. But several months later, the insured noticed cracks in the walls of his home, and filed an amended claim for the damage. The insurer did an investigation, including a soil analysis, and determined that the cracks were caused by the movement of the earth under the house, which could have been caused by the lightning. Relying on the post-1983 anti-concurrent causation wording for earth movement, the insurer denied the claim, and the denial was upheld by the Supreme Court.

***Mold caused by vandalism.*** A landlord suffered damage to a rental house due to the fact that the tenants were using it for a marijuana growing operation. The insured claimed that the damage was due to vandalism (a covered peril), and the insurer did pay damage done to the walls from warping, due to the water and heat used for maintaining the marijuana plants. However, the insurer denied coverage for the mold damage, citing the mold exclusion. The Washington court (2000) ruled in favor of the landlord, although the mold exclusion applied to *"direct and indirect loss from mold."* However,

since the mold exclusion was not within the anti-concurrent causation language, the court ruled that the insured could use the principle of proximate cause to place all the damage under the vandalism peril.

***Mold caused by melting snow.*** A similar mold case was heard by a Michigan Appellate Court in 2003. There, melting snow leaked into a house, causing mold damage. In this policy, the mold exclusion was drafted in the anti-concurrent causation language, and the court upheld the exclusion.

## Concluding comments.

***1. The "flood exclusion" misnomer.*** Much has been made in the current public and legal discourse about exactly what is meant to be included within the "flood exclusion." For example, coastal storm surge, wind-driven waves, and over-topped levees have been frequently described by some observers as "not a flood." Others opine that "all hurricane damage should be covered by a homeowners policy."

Given that the insurance policy is a written contract, it would be instructive to read the so-called "flood exclusion." While every industry has its own jargon and shorthand terms, the insurance industry probably doesn't help itself by referring to the "flood exclusion" – it should more properly be called the "water damage exclusion." Here is the standard water damage exclusion in a homeowners policy. The commercial property policy is nearly identical.

> ***Section I Exclusions***
> ***A.*** *We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area*.
>
> ***3. Water Damage***
>
> *Water Damage means:*
>
> ***a. Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind****; [emphasis added]*
>
> *b. Water or water-borne material which backs up through sewers or drains or which overflows or is discharged from a sump, sump pump or related equipment; or*
>
> *c. Water or water-borne material below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure;*
>
> *caused by or resulting from human or animal forces or any act of nature.*
>
> *Direct loss by fire, explosion or theft resulting from water damage is covered.*

Note the anti-concurrent language in the lead-in wording. In subpart 3.a.(in bold), it is clear that the intent of the exclusion applies more broadly that just to a generic "flood."

By way of comparison, the NFIP Flood Policy defines "flood" as follows:

> ***Flood**, as used in this flood insurance policy, means:*
>
> *1. A general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (at least one of which is your property) from:*
> *a. Overflow of inland or tidal waters;*
> *b. Unusual and rapid accumulation or runoff of surface waters from any source;*
> *c. Mudflow.*
>
> *2. Collapse or subsidence of land along the shore of a lake or similar body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels that result in a flood as defined in A.1.a. above.*

***2. "Wind vs. flood" compared to "wind and flood."*** There is always much debate and disagreement in the post-hurricane environment about whether damage was due to wind or flood. Actually, there are several variations on the issue. Fundamentally, questions of coverage often come down to whether the damage was caused by wind or by flood, or by wind and by flood.

In the **"wind vs. flood"** analysis, there are two separate issues. One, was the property destroyed by the wind before the flooding occurred? Cases often rely on eyewitnesses, and/or forensic evidence that can be gathered after the storm. A number of court cases have been resolved by eyewitnesses, who chose to ride out the hurricane, and saw a home being blown down by the force of the winds before the storm surge or flooding occurred. Insurance literature contains cases dating back to the (unnamed) Galveston hurricane of 1915 on this very issue. Numerous Louisiana courts have also addressed this question over the years.

The other issue in the "wind vs. flood" debate is whether the storm surge or other flooding was caused by the force of the wind – that is, the hurricane winds blew a wall of water ashore, thus, because of proximate cause, the claim should be covered by the peril of wind. However, as noted in the previous discussion above, it is not the intent of standard homeowners and commercial property polices to cover flooding, regardless of the cause of the flooding, thus policies written since 1983 have contained the anti-concurrent causation language relating to flooding (in the water damage exclusion). In large measure, this is because the federal government has had a National Flood Program since 1968 to cover such exposures.

Many courts have upheld the validity of the flood exclusion over the years. In Louisiana, a notable case in 1996 was *Travelers v. Powell* (Federal 5th Circuit), upholding the flood exclusion and anti-concurrent causation language as enforceable and unambiguous).

More recently, in April 2006 a Mississippi court in *Buente v. Allstate* turned back a homeowner's challenge to the enforceability of the anti-concurrent causation wording in the flood exclusion. The court commented that*, "The exclusions found in the policy for damages attributable to flooding are valid and enforceable policy provisions. Indeed, similar policy terms have been enforced with respect to damage caused by high water associated with hurricanes in many reported decisions."*

The **"wind and flood"** debate revolves around how much damage was caused by wind, and how much by flood. Each policy should pay its appropriate share of the damage, as best as that proportion can be determined. If only one policy is in force, then it should still pay only its share of the damage.

By comparison, if a fire damages a home and both cars that were in the garage at the time of the fire, the homeowners policy should pay the damage to the home and garage, while the auto policy should pay the damage to the cars. If the auto policy did not provide any physical damage coverage (so-called "comprehensive" coverage), this should have no bearing on what the homeowners policy pays for the damage to property covered by that policy.

In 2004, a Louisiana appellate court (*Urrate v. Argonaut*) apportioned hurricane-related property damage to a waterfront restaurant between the property insurer and the flood insurer. In addition, the court settled the amount of lost business income attributable to windstorm vs. flooding.

**3. Conclusion.** As the public debate moves forward, it is important that the insurance contract be read with clarity and objectivity. Contract law generally holds that a contract is interpreted as written, where the provisions are clear and unambiguous. Where interpretive issues have arisen, most courts have found the flood exclusion, crafted with the so-called anti-concurrent causation exclusionary wording, to have met this requirement.

**NECESSARY ACTION:** Circulate this Technical Advisory to all appropriate agency staff.