Anti-Concurrent Causation Clauses Get More Attention

by Bill Krekstein and Emmett McGowan, Nelson Levine deLuca and Hamilton | Blue Bell, Pennsylvania

Catastrophe losses rarely involve a situation where the loss is solely caused by an excluded peril. Anti-Concurrent Causation (ACC) clauses were drafted to address the scenario where two perils contribute to the same loss. The ACC provisions specify that where an excluded peril contributes "directly or indirectly" to cause a loss, then coverage is excluded "regardless of any other cause or even that contributes concurrently or in any sequence to the loss." A handful of states, including California, have refused to enforce ACC clauses, instead focusing on the predominant or "efficient proximate cause" of loss for coverage purposes.

The wording of ACC clauses is similar but not identical across Bureau and proprietary policies. Nearly 20 states have rulings giving them effect. However, there are distinctions in the language and how courts interpret that language.

Courts and Legislatures

Even amongst the courts that have enforced ACC clauses, there are distinctions. Following Hurricane Katrina, federal and state courts diverged on the extent to which ACC clauses exclude coverage. Considering the common wind vs. flood question, federal courts applying Mississippi law have held that ACC clauses bar coverage even where a covered peril contributes concurrently *or* in any sequence to cause the loss. On the other hand, at least one Mississippi state court has found that ACC clauses are inapplicable where an excluded peril followed a covered peril and combined to cause an indivisible loss, notwithstanding the "any sequence" language found in the ACC clause.

Courts in other states, including New Jersey, have found the wording clear and enforceable. In one New Jersey case, the court examined the "concurrently" and "in any sequence" language and concluded that both provisions were enforceable.[3] With regard to the "in any sequence" portion, the court found that the majority of states rejecting ACC still permitted policy provisions designed to avoid coverage where a loss was due to sequential causes. Courts in other Northeast states gave effect to ACC wording, excluding loss caused "directly or indirectly" by an excluded event. In general, carriers are well-positioned to defend the enforceability of ACC clauses for Hurricane Sandy-related claims.

However, legislatures in affected states have faced intense political pressure to alleviate the exclusionary effect that ACC clauses have had on commercial and personal lines claims. Legislators in New York have proposed legislative restrictions on ACC clauses. Similarly, a New Jersey Assemblyman introduced legislation that would prohibit inclusion of ACC clauses in homeowner policies. No laws have yet been passed in either state. In Maryland, a new law was passed in May requiring insurers to provide annual notices to policyholders that explain the impact and scope of ACC clauses. The law does not otherwise restrict or limit their wording or enforceability.

Tested Wording

Treatment of ACC clauses is state specific, and will usually turn on the specific facts of the case and language of the policy. Several important phrases—"in any sequence" and "directly or indirectly"—have helped insurers overcome arguments of ambiguity and public policy. While a few courts have sought to carve out exceptions in an effort to find coverage for policyholders, most courts have enforced the plain meaning of ACC clauses as excluding coverage where multiple perils contribute concurrently or in any sequence to cause a loss. With Hurricane Sandy disputes now making their way into litigation, it is anticipated that additional judicial guidance and possibly legislative mandates will be forthcoming on the enforceability and language of ACC clauses—both with regard to Sandy claims and future catastrophe losses. ■

More on ACC Clauses

A comprehensive review on the law surrounding anti-concurrent causation clauses is available from Emmett McGowan and the Nelson, Levine, DeLuca and Hamilton law firm. Gen Re plans to publish the full article in early 2014, but you can request a copy now from Emmett at the contact number below, or just call your Gen Re representative.

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