

Property Insurance Claims with Multiple Causation Losses: Coverage Fundamentals

Evaluating Causation in First-Party Claims with Covered and Non-Covered or Excluded Causes

THURSDAY, APRIL 5, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Rina Carmel, Senior Counsel, Musick Peeler, Los Angeles

Susan J. Field, Partner, Musick Peeler, Los Angeles

Arden B. Levy, Partner, Arden Levy Law, Washington, D.C.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.

Conference Materials

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the + sign next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Continuing Education Credits

FOR LIVE EVENT ONLY

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**
- Click the **SEND** button beside the box

Tips for Optimal Quality

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory and you are listening via your computer speakers, you may listen via the phone: dial **1-866-927-5568** and enter your PIN -when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Evaluating Property Claims With Multiple Causes

April 5, 2012

Susan J. Field and Rina Carmel
Musick, Peeler & Garrett LLP
Los Angeles, California
(213) 629-7600
www.musickpeeler.com
s.field@mpglaw.com
r.carmel@mpglaw.com

Arden B. Levy
Arden Levy Law PLLC
Alexandria, VA & Washington DC
(703) 519-6800
www.ardenlevylaw.com
alevy@ardenlevylaw.com

PROXIMATE CAUSATION

- Tort Law: Fix culpability for damages claimed in the lawsuit.
- Insurance Coverage: Determine whether the specific injury caused by the specific event is covered under policy terms.

Amherst Country Club v. Harleysville Worcester Ins. Co.,
561 F.Supp. 2d 138 (D. N.H. 2008).

POLICY LANGUAGE: COVERAGE CLAUSES

Covered cause of loss required, for coverage to exist.

“We will pay for direct physical loss ... to Covered Property ... caused by or resulting from any Covered Cause of Loss.”

ISO Form No. CP 00 10 06 95 (emphasis added).

POLICY LANGUAGE: EXCLUSIONS

Many policies exclude coverage “for loss caused directly or indirectly by any” excluded causes or perils.

South Carolina Farm Bureau Mutual v. Durham, 380 S.C. 506 (2009) (emphasis added).

APPLICATION

Parties must determine whether one or more of the causes of a loss are covered.

Factors:

- State's approach to causation
- Policy language
 - Coverage clause vs. exclusion
- Facts of claim

all impact whether causation requirement is satisfied.

BURDEN OF PROOF

- Insured bears burden of proving that the cause of loss was a covered risk.
- Insurer bears burden of proving excluded cause caused loss.

STATES' VARIOUS APPROACHES TO CAUSATION

- Efficient proximate cause (“EPC”)
- Concurrent cause rule
- Contracting out of EPC
 - Anti-concurrent causation clause
 - Lead-in clause

STATES' VARIOUS APPROACHES TO CAUSATION

- EPC (majority rule) → If EPC is covered, causation satisfied.
- Concurrent cause → If any covered cause, causation satisfied.
- Anti-concurrent causation / lead in → If any excluded cause, causation not satisfied.

FREQUENT FOCUS IN FIRST-PARTY PROPERTY CLAIMS

- Defining and counting the number of perils.
- Working with consultants to investigate the causes of loss.

LOSSES WITH >1 CAUSE

- Both causes covered → Causation requirement satisfied.
- Neither cause covered → Claim is not covered.
- One cause covered, one not covered → ?? Depends on policy language and state's approach to causation.

LOSSES WITH >1 CAUSE: APPLICATION

Investigating causation can be difficult.

Reasons:

- Highly fact-intensive.
- Often involve scientific or technical issues.
- If EPC applies, may not be possible to identify which cause was the EPC of the loss.

DEFINING & COUNTING PERILS

First steps in investigation may be:

- Facts of loss.
- Policy language.
- State law (if applicable).
- Retaining consultants (if applicable).

DEFINING & COUNTING PERILS

Next steps in investigation may be:

- What perils occurred?
- How many perils occurred?

Policy language and state law may help determine the answers.

Caution: The answers are not always clear!

DEFINING & COUNTING PERILS

The number of perils may depend on the facts of the claim.

- Wind, rain: different perils.
Findlay v. United Pacific, 129 Wash. 2d 368 (1996).
- Rain, flood: not distinct perils.
Kish v. INA, 125 Wash. 2d 164 (1994).

EFFICIENT PROXIMATE CAUSE

DEFINITIONS

“An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.”

Cal. Ins. Code § 530 (emphasis added).

DEFINITIONS

“[T]hat cause ‘which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which that event would not have occurred.’ (citation omitted) ... Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought ...”

Graham v. Public Employees Mutual, 98 Wash. 2d 533, (1983) (emphasis added).

GENERAL PRINCIPLES

- EPC is majority approach.
- Usually a question of fact.
- If facts undisputed → question of law.
- A/k/a
 - Proximate cause
 - Efficient cause
 - Predominant cause
 - Moving cause (except in California)
 - “*The cause*”

GENERAL PRINCIPLES

- Existence of coverage depends on whether the EPC of the loss is a covered cause of loss under the policy – even if excluded perils may have contributed to loss.
 - If yes → causation requirement satisfied.
 - If no → claim is not covered.

Murray v. State Farm, 203 W. Va. 477 (1998).

GENERAL PRINCIPLES

EPC is the:

- “Predominating” or most “important” cause of the loss.
- Cause that sets other causes in motion (except in CA).

GENERAL PRINCIPLES

EPC need not be the:

- Triggering cause.
- First cause in time.
- Last cause in time.
- Closest cause in place.
- Most distance cause in place.

GENERAL PRINCIPLES

The EPC should not be a remote cause.

Reason: Might result in creating coverage where parties did not intend to do so.

BURDENS OF PROOF

- Insured bears burden of proving that EPC was an insured risk.
- Insurer bears burden of proving exclusions bar coverage.
 - In WA, the word “cause” in an exclusion means “EPC.” *Vision One v. Philadelphia Indemnity*, 158 Wash. App. 91, 104, ¶ 24 (citing cases), *rev. granted*, 171 Wash. 2d 1001 (2011).

APPLICATION

- Define and count perils, based on
 - Policy language,
 - Facts of claim, and/or
 - How state law has construed perils.
- Determine (if possible) what role each peril played in causing the loss.

Julian v. Hartford, 35 Cal. 4th 747 (2005)

1. Heavy rains fell,
2. following which a slope failed above the insureds' home
3. leading to a landslide, which
4. caused a tree to crash into the insureds' home.

Julian v. Hartford, 35 Cal. 4th 747 (2005)

Policy provisions:

- Rain: Weather conditions alone = covered peril.
- Rain-induced landslide: Weather conditions that “contribute in any way with” a landslide = excluded peril, distinct from covered weather conditions peril.

Julian v. Hartford, 35 Cal. 4th 747 (2005)

1. Heavy rains fell,
2. following which a slope failed above the insureds' home
3. leading to a landslide, which
4. caused a tree to crash into the insureds' home.

→ Exclusion barred coverage.

Northwest Bedding v. National Ins. Co. of Hartford,
154 Wash. App. 787 (2010)

1. Heavy snow fell,
2. followed by an unusually fast snowmelt.
3. Gov't diverted water from the snowmelt into man-made drainage ditches,
4. but the water overflowed the ditches and collected on the ground.
5. Because of frozen ground and bedrock close to the surface, the ground could not absorb the water,
6. which flooded the insured's building.

Northwest Bedding v. National Ins. Co. of Hartford,
154 Wash. App. 787 (2010)

Policy excluded two causes of the loss:

- Flood.
- Surface water.

Issue was whether overflow of the drainage system due to third party's actions was an independent peril. (If yes, per policy, it would be a covered peril.)

Northwest Bedding v. National Ins. Co. of Hartford,
154 Wash. App. 787 (2010)

Key principles:

- Exclusion bars coverage if it excludes the EPC of the loss.
- If EPC is a covered peril, exclusions have no effect (*i.e.*, coverage may exist).

Northwest Bedding v. National Ins. Co. of Hartford,
154 Wash. App. 787 (2010)

Court held:

- No coverage, because diversion of water ≠ independent peril.
- Exclusions barred coverage, because diversion of water over a large area, whether from snowmelt or not, is what the average insured would understand “flood” or “surface water” to mean.

Bowers v. Farmers,
99 Wash. App. 41 (2000)

1. Tenants secretly grew marijuana,
2. And to do that, they created artificial environment of warm, moist air,
3. And then **mold** developed and spread throughout the case.

Bowers v. Farmers,
99 Wash. App. 41 (2000)

Policy:

- Mold exclusion
- Coverage for “vandalism or malicious mischief”

Held: Covered claim.

“It was the tenants’ acts, which in an unbroken sequence ... [produced] the result for which recovery is sought[.]” (internal citations omitted.)

CONCURRENT CAUSATION DOCTRINE

CONCURRENT CAUSATION: DOCTRINE

- If any one cause in the causal chain is covered, causation is satisfied for entire loss.

- Minority Rule.

CONCURRENT CAUSATION: DOCTRINE

- “[W]here there are multiple causes for a loss, some of which are insured and others of which are excluded, the insured risk prevails over the excluded risk.”

See American Family Mutual v. Schmitz, 793 N.W.2d 111, ¶ 24 (Wis. Ct. App. 2010), *rev. denied*, 797 N.W.2d 525 (Wis. 2011).

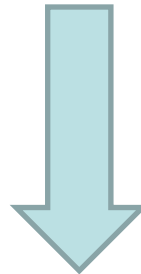
CONCURRENT CAUSATION: APPLICATION

Not Covered / Excluded Cause

Not Covered / Excluded Cause

ONE COVERED CAUSE

Not Covered / Excluded Cause



Causation requirement fully satisfied.

CONCURRENT CAUSATION: POLICY LANGUAGE

- “This policy does not insure against loss or damage caused by or resulting from: ... rust or corrosion ... unless caused by a peril not otherwise excluded by this policy.”

See Davidson Hotel v. St. Paul, 136 F.Supp. 2d 901, 908 (W.D. Tenn. 2001) (emphasis added).

CONCURRENT CAUSATION: APPLICATION

1. Water from rusted water heater
2. Infiltrated duct in electrical room
3. Causing electrical disturbance that activated sprinkler system,
4. leading to water damage.

See Davidson Hotel v. St. Paul, 136 F.Supp. 2d at 908.

CONCURRENT CAUSATION: APPLICATION

- Water flowing from the water heater was a covered loss
- Water onto the duct caused the electrical disturbance
- Insurer argued that damage was caused by the water due to the rusting of the water heater, and rust was excluded
- Proximate cause of loss was covered peril of water, despite other excluded events = coverage

See Davidson Hotel v. St. Paul, 136 F.Supp. 2d at 909-10.

ANTI-CONCURRENT CAUSATION CLAUSES AND LEAD-IN CLAUSES

CONTRACTING OUT OF EPC

- Exclusionary language.
- Terms: “anti-concurrent” or “lead-in” clauses are used interchangeably.
- Some states do not allow this approach (CA, WA, WV). Reason – would subvert policyholders' expectations of coverage.

ANTI-CONCURRENT CAUSATION CLAUSE

- Specific contractual language that bars coverage where any of the causes of the loss is excluded.
- Parties “opt out” of EPC.
- Typically at end of exclusion.

ANTI-CONCURRENT CAUSATION CLAUSE

- Example exclusionary language:
“Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.”

See South Carolina Farm Bureau Mutual, 380 S.C. 506, 509 (2009) (emphasis added).

LEAD-IN CLAUSE

- Typically first sentence of the “losses not insured” provision in exclusion.
- Included in some policy forms beginning in the 1980s.

LEAD-IN CLAUSE: POLICY LANGUAGE

“We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events [list not included]. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these [exclusions]....”

See Thompson v. State Farm, 165 P.3d 900, 902 (Colo. Ct. App. 2007), *cert. denied*, 2007 Colo. LEXIS 629 (Colo. 2007).

LEAD-IN CLAUSE: EXCLUSION EXAMPLES

- Water damage: from water below the surface of the ground that leaks through a foundation, or from flood, even if water is from natural occurring cause.
- Earth movement: caused by construction activities, by water from broken automatic sprinkler system, or for any other reason, even if cause of earth movement was covered.

INVESTIGATING CAUSATION AND WORKING WITH CONSULTANTS

CONSULTANTS: COVERAGE / LEGAL ISSUES

- Burdens of proof.
- Insurer's duty to investigate.
 - Scope of investigation.
- Insured's duty to cooperate.

BURDENS OF PROOF

Retaining consultants may help:

- Insured meet burden of showing claim is covered, or
- Insurer meet burden of showing coverage is excluded.

Garvey v. State Farm, 48 Cal. 3d 395 (1989).

INSURER'S DUTY TO INVESTIGATE

- Insurer has a duty to investigate claims. Retaining consultants may help show that:
 - Insurer met its duty.
 - Investigation was proper and in compliance with state standards.
- Insurer should usually advise insured that it has retained consultants.

SCOPE OF INVESTIGATION

- Insurers can usually investigate first-party property claims in greater depth than third-party claims.
- Thus, insurers can retain consultants, without any risk of prejudicing defense of underlying action (*cf.* third-party claims).

INSURED'S DUTY TO COOPERATE

- Insured has duty to cooperate with insurer's investigation.
 - Generally allow consultants access.
 - Provide information and documents.
 - Provide copy of insured's consultants' reports.

CONSULTANTS: PRACTICAL ISSUES

- Selecting consultants.
- What information and documents should consultants receive?
- Testing (if needed).
- Privilege issues.

SELECTING CONSULTANTS

- What areas of expertise are needed?
 - Building-related claims: Structural engineers, seismic experts, general contractors.
 - Earth movement claims: Geotechnical engineers, seismic experts, structural engineers, soil engineers, geologists.

SELECTING CONSULTANTS

- No conflicts of interest.
- Qualified in the subject matter.
- Keep in mind – they might ultimately have to testify in deposition or at trial.

PROVIDING INFORMATION AND DOCUMENTS

“DO”s both parties should consider:

- Provide consultant with all information, documents, objects, inspection of site / premises.
- Ask for input on whether there are other needed materials.
- Become informed re any necessary testing.

PROVIDING INFORMATION AND DOCUMENTS

“DON’T”s both parties should consider:

- Do not provide copy of policy.
- Do not seek coverage determination.
 - Instead, focus on developing facts that will show what causes caused the loss, and whether causes are covered or excluded.

TESTING

- Assess ASAP the types and extent of testing needed (and whether early testing is required).
- Evaluate whether destructive or scientific testing will come into play.
- Testing results should help lead to better understanding of coverage and how any dispute might play out in litigation.

PRIVILEGE ISSUES

- Communications with consultant during investigation usually not privileged.
- Privilege may kick in when work is performed in anticipation of litigation.
- Carefully consider scope of assigned project and materials provided.
- Carefully evaluate communications.

CONCLUSION

- Know the jurisdiction and applicable causation doctrine.
- Assess policy's insuring agreement and exclusions.
- Identify all possible causes and coverage issues as early as possible.
- Retain any necessary consultants.