



# TODAY

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## EDITOR'S NOTE

Concurrent causation is a term referring to two or more events acting at the same time or in sequence to cause a loss. The concept of concurrent causation exclusions in insurance policies began after a series of California court rulings found that even though an event, such as earthquake or flood, was clearly excluded from coverage, if another event, i.e. faulty design or maintenance, not excluded, could be

found, coverage could be applied.

In order to restrict coverage to the intended perils, insurers included concurrent causation exclusions in their policies. However, while solving one problem, interpretation of the new language in some cases went so far as to deny coverage formerly offered under all risks policies.

While several courts have rescinded the concurrent causation doctrine, insurers have not, leaving the

adjustment of certain losses up to the interpretation of those involved.

This article, by Adjusters International insurance expert, Paul O. Dudey, CPCU, reviews the history, application and future of the concurrent causation exclusions in most policies. We hope you will find this interesting and useful information in the adjustment of property losses.

*Stephen J. Van Pelt, Editor*

# Concurrent Causation

## HISTORY OF THE CONCURRENT CAUSATION THEORY

*Paul O. Dudey, CPCU*

In the early 20<sup>th</sup> century, property insurance was offered on an individual peril basis. There was fire insurance, to which was then added lightning because of the close relationship of the two perils.

Separately, an insurance buyer could also obtain wind and hail insurance, explosion (but separate boiler explosion coverage from separate underwriters), riot and civil commotion, damage by vehicles, damage by aircraft, vandalism and malicious damage insurance, and various other individual coverages.

But selling these coverages separately led to "adverse selection," as insurance buyers tend to be better underwriters of their own exposures than insurance company underwriters could ever be, and would only buy those coverages for which they perceived a high potential exposure in relation to the cost.

Later, when underwriters began to offer the "extended coverage" endorsement to the fire and lightning policy, which provided most of the above perils (but not boiler explosion or vandalism and malicious mischief



insurance) they found surprisingly that, because the element of adverse selection was minimized, they could price the extended coverage endorsement substantially lower than the cost

(continued on next page)

of insuring all of the various perils separately.

Next came a broad perils endorsement, which added vandalism and various other perils. Then, finally, following the lead of Marine underwriters, insurers began to offer “all risks” insurance, which, instead of covering only perils named in the policy, covered any physical loss or damage to property not specifically excluded.

Along with such items as wear and tear, rust, corrosion, fungus, decay, deterioration, and other naturally occurring and generally considered uninsurable damage, two of the major perils commonly excluded were earth movement (including earthquake) and flood (which usually also included various other kinds of water damage), which were clearly spelled out in the exclusionary language of these policies.

This was a satisfactory arrangement for both insurers and insurance buyers. Earthquake and flood insurance could be purchased separately, the latter usually through the Federal Flood Insurance Program or, to a limited extent, through the surplus lines market.

### Concurrent Causation Coverage

In 1982 and 1983 two court cases in California, which involved a concept known as “concurrent causation,” produced a drastic change in underwriters’ thinking about all

risks coverage. The first case, *Safeco Insurance Co. v. Guyton*, 692 F.2d 551 (1982), found the insurer liable for flood damage under an all risks homeowners’ policy, notwithstanding its flood exclusion, because of the failure of a third party resulting in the flood which damaged the insured’s property. The theory was that negligent maintenance of the flood control structures was not an excluded peril so, using the concept of concurrent causation, the covered (not excluded) peril took precedence over the excluded peril, to allow coverage.

Similarly, in *Premier Insurance*

*Co. v. Welch*, 140 Cal. App. 3d 720 (1983), a homeowner’s all risks policy was found to cover landslide damage to the insured’s home, notwithstanding the earth movement exclusion, because faulty installation of a drain by a third party, not excluded, was held to be a concurrent cause of the loss.

### Concurrent Causation Exclusions

In response to these two claims, the Insurance Services Office (ISO) quickly drafted revised exclusions for their all risks policies and also, believing that the term “all risks”



created the impression in the minds of policyholders that the policy gave more coverage than was intended, dropped the term “all risks” from the forms, replacing it with “risk of direct physical loss” unless excluded or limited. The same or comparable exclusionary language was also adopted on most independently filed forms.

The concurrent causation exclusions found in Section B.3. of ISO Causes of Loss – Special Form CP 10 30 06 96, covering risks of loss not otherwise excluded or limited, reads as follows:

We [the insurer] will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a covered cause of loss, we will pay for the loss or damage caused by that covered cause of loss.

a. Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above [the opening paragraph of the exclusions] to produce the loss or damage.

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

c. Faulty, inadequate or defective:

(1) Planning, zoning, development, surveying, siting;

## Summary of the Concurrent Causation Exclusions

- ◆ Loss caused by weather conditions that contribute to an otherwise excluded loss.
- ◆ Loss caused by acts or decisions of any person, group or government body.
- ◆ Loss caused by faulty, inadequate or defective activities such as planning, design, maintenance, or faulty materials.

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance;

of part or all of any property on or off the described premises.

Note that these exclusions do not apply to loss or damage from a covered cause of loss caused by any of these exclusions. However, in the minds of some insurers’ adjusters, especially since the tragedy of September 11<sup>th</sup>, these exclusions are treated as much broader than the exclusions’ authors intended. The

result is that legitimate claims, also involving a concurrent causation exclusion, are sometimes denied even when the resulting loss is by a cause not excluded in the form.

Typically, insurers’ adjusters may seize on any of the b. or c. exclusions and endeavor to apply them to fire, explosion, collapse, or other covered losses, despite the fact that these causes of loss are not excluded. Under the special form (formerly “all risks” form) covered causes of loss are not specifically listed (as they are under the basic and broad forms), so coverage for specific perils may not be obvious to policyholders. In the absence of an alert broker, attorney, or public adjuster, an insured, unfamiliar with the basis for the concurrent causation exclusions, may blindly accept the adjuster’s position and not get paid for a loss that is legitimately

covered under the policy.

In 1989, the California supreme court, in *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704, held that the California appellate courts had misinterpreted the cases discussed above that used the concurrent causation doctrine to allow coverage in the face of a clearly excluded peril. The supreme court stated that when a loss can be attributed to two causes, one covered and one excluded, coverage exists only if the covered peril is the efficient proximate cause of the loss.

Had this decision been adhered to in Guyton and Welsh, perhaps insurers would not have felt a need to add these exclusions. But having added them, ISO and most independent insurers have, up to this point, left them in, with potential harm to insureds who suffer a loss where the efficient proximate cause is a covered (not excluded) cause of loss but one of the excluded causes is also involved.

A case in point, in another California case, *State Farm Fire and Casualty Co. v. Von Der Lieth*, 218 Cal. App. 3d 964 (1990), an appeals court overruled a lower court which had held that third party negligence rather than earth movement was the efficient proximate cause of the loss. In this case, the appeals court found that even though the third party was indeed negligent, this was not the efficient proximate cause of the loss; the earth movement was.

In a Utah case *Alf v. State Farm Fire and Casualty Ins. Co.*, 650 P.2d. 1272 (1993), while the efficient proximate cause doctrine was upheld,

it was not applied when the parties have agreed freely to contract out of it, which the court found to be the case here.

Insureds sometimes will encounter the ordinance or law exclusion and the insurer's reliance on this exclusion to deny recovery for the cost of demolition and debris removal of a structure severely damaged by a covered cause of loss, when authorities condemn the property as a threat to public safety and order it demolished.

But in at least two cases, courts have held that the condition of the building after a loss required its demolition, apart from the authorities' demolition order, setting aside the exclusion. These two cases are *Norfolk & Dedham Mutual Fire Ins. Co. v. DeMarta*, 799 F.Supp.33 (1993) and *Digravina v. Merchants Mutual Ins. Co.*

A number of additional states have also begun to grapple with the problem of concurrent causation. A research project by the Central Arizona Chapter, Society of CPCU, published in May 1988, listed 18 states with cases involving concurrent causation at that time. They were Colorado, Connecticut, Louisiana, Illinois, Iowa, Maryland, Michigan, Minnesota, Mississippi, Missouri, Ohio, New York, Tennessee, Texas, Washington, and Wisconsin. Probably more states could be added to this list since that time. In general, although not entirely, these cases follow the Garvey interpretation that the insured peril must be the "efficient proximate cause" of the loss.

## Future Expectations

There are no signs at this point that ISO is likely to delete the concurrent causation exclusion any time soon. However, as the industry recovers from the September 11<sup>th</sup> disaster, some independent insurers, especially in the surplus lines markets, may begin to offer property coverage with all or some of these exclusions deleted. If so, and if other features of their coverage and price are satisfactory, they will be an attractive alternative to policies with these exclusions intact.

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