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[the business interruption e-source]

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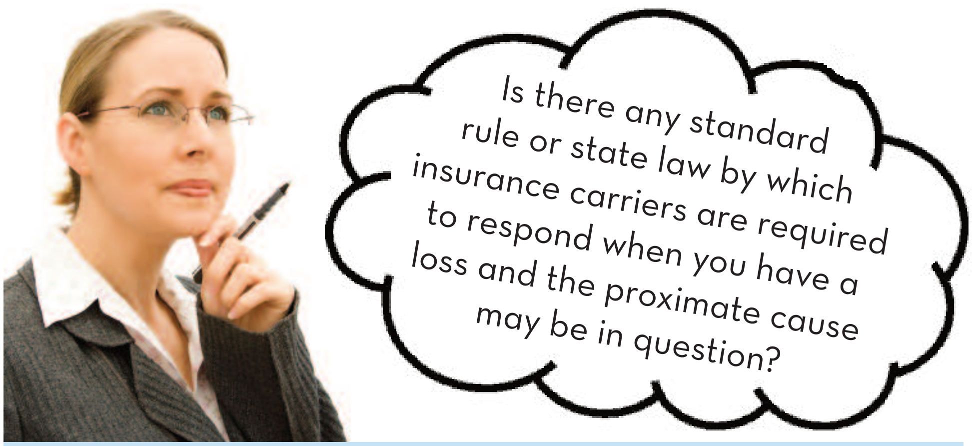

ANTI-CONCURRENT CAUSATION: THE ANSWER

This question, posted by a subscriber to *Be Prepared!*, has to do with concurrent causation and how policy forms handle a hurricane claim when you have wind damage, water damage, wave wash, storm driven water, or rain, etc. A number of carriers have developed "anti-concurrent causation" wording to restrict coverage in these situations.

According to *Investopedia*, the definition of 'concurrent causation' is, **"An insurance theory stating that if loss or damages occur as a result of more than one cause, one of which is covered (insured) while the other is not, the damages are likely to still be compensated for by the insurer."** This theory has been a frequent source of debate and reinterpretation in courts across the U.S. and Canada; insurers have tried to insert anti-concurrent causation clauses into contracts (especially in property/casualty insurance) to restrict coverage against certain perils even if they are involved in 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. A number of different anti-concurrent causation clauses are in use today, and some are more troublesome than others.

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One of the more commonly used clauses is found in the Insurance Services Office Causes of Loss-Special Form (CP 10 30 04 02). It states, **"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."** Then the exclusions are listed. This provision bars coverage whenever an excluded peril directly or indirectly causes damage. Although this is a very unfavorable clause for policyholders, unlike other forms, at least it is limited in scope to excluded causes of loss, which in many instances will leave room for argument over whether an event was a cause or an effect.

When covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril. The doctrine of concurrent causation is not an affirmative defense or avoidance issue; instead, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy. The insured must present some evidence upon which the jury can allocate the damages attributable to the covered peril. Because the insured can recover only for covered events, the burden of segregating the damage attributable solely to the covered event is a coverage issue for which the insured carries the burden of proof. Otherwise, failure to segregate covered and non-covered perils is fatal to recovery.

A practical difficulty with the concurrent causation doctrine is that there is no general basis for distinguishing causes. This is problematic in interpreting broad form insurance policies because the determination of coverage depends on finding at least one covered cause.

Anti-concurrent causation clauses are so named because they are intended, among other things, to be a response to the rule in most jurisdictions that in instances of concurrent causation—where multiple forces independently cause a loss, one of which is a covered peril and the other is not—the insurance policy must respond.

The rules of insurance policy interpretation should be based on common sense and the understanding of the parties to the contract. That way, insurers and policyholders are in a much better position to make sound insurance transaction decisions. In the case of causation theory, it would be an excellent idea to get rid of "proximate cause," "concurrent cause," "efficient proximate cause," and other jargon as a prologue to the development of a set of simple and cogent doctrines.

When a loss occurs, policyholders should keep two things in mind as they evaluate coverage in light of an anti-concurrent causation clause. First, the different clauses in use may lead to different results depending upon the facts of a claim. So, do not assume that just because a court has enforced one clause it would hold that another clause bars coverage. Second, not all courts will enforce these clauses. Moreover, in many instances more than one state's law is potentially applicable to a loss. So, the policyholder should examine the laws of all states which might be applied to determine whether a viable claim exists.

In addition to the importance of determining an initial cause and the issue of "two concurrent causes," it is extremely important to construct an accurate timeline so that issues of concurrent losses can be accurately depicted in court. This is imperative in a state where the court may find that anti-concurrent causation language may be considered irrelevant when a covered cause of loss is the initial trigger for coverage.

A review of case law points out that each loss must be analyzed on a case-by-case basis. The facts of the loss must be reviewed and the exact wording of the policy must be applied to the facts. The case law and any statutory law of the applicable jurisdiction must be referenced. Policyholders should be alert to the presence of those clauses when buying property coverage and aware of how the courts are interpreting them when claims are made. If there is a good probability of incurring loss from these perils, if possible it would be prudent to endorse coverage for them on the policy and eliminate the concurrent causation problem.

b(FUNNY!)

[a little insurance humor]

Coming home, I drove into the wrong house and collided with a tree I don't have.

The other car collided with mine without giving warning of its intentions.

I thought the window was down, but found out it was up when I put my head through it.

I collided with a stationary truck that was coming the other way.

A truck backed through my windshield into my wife's face.

GET THE FACTS!

SCIENTISTS ENGINEER BIOTERROR FEARS; NEW MAN-MADE BIRD FLU STRAIN RAISES PROSPECT OF DEADLY PANDEMIC

Scientists are in sharp disagreement about the possibility of another virus, like the deadly flu that killed tens of millions of people around the world a century ago, causing a pandemic. The lack of agreement has led two professional journals to delay the publication of flu research. David Nabarro, an expert at the World Health Organization (WHO), estimated that 20 million to 150 million people could die in the next pandemic. The article also notes that the upcoming publication of a scientific work from researchers in the Netherlands and the University of Wisconsin-Madison on genes that could mutate and make humans susceptible to bird flu could provide terrorists with enough information to reproduce a strain that would cause a pandemic. According to WHO, in the last decade 342 of the 581 people infected with H5N1 avian flu have died, a fatality rate of nearly 60 percent. Some researchers contend that the death rate is skewed because many milder cases are not reported. The critics note that the rate is approximately 120 times higher than for the 1918 flu epidemic and approximately 600 times more than for the 2010 seasonal flu.

According to a January 26, 2012, Page A1, *USA Today* article written by Dan Vergano.

SHIFT IN "GREATEST RISKS" IDENTIFIED FOR UPCOMING DECADE

The World Economic Forum's *Global Risks Report 2012* has identified chronic fiscal imbalances and severe income disparity as the most prevalent risks over the next 10 years. These risks in tandem threaten global growth as they are drivers of nationalism, populism, and protectionism at a time when the world remains vulnerable to systemic financial shocks, as well as possible food and water crises. These are the findings of a survey of 469 experts and industry leaders, indicating a shift of concern from environmental risks to socioeconomic risks, compared with a year ago. Respondents worry that further economic shocks and social upheaval could rollback the progress globalization has brought and feel that the world's institutions are ill-equipped to cope with today's interconnected, rapidly evolving risks.

According to *Global Risks Report 2012, Seventh Edition.* World Economic Forum, *WEF Report,* January 1, 2012.

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Earthquakes are among the most devastating and terrifying natural disasters because they are unforeseen. Fortunately, most property can be replaced or restored when the right insurance protection is in place, but too often that is not the case because **earthquake damage is excluded in standard commercial property insurance policies.** Some earthquake damages may be covered if this peril is endorsed onto the policy. Don't give this risk a low priority. Review your insurance policy to make certain you have the proper coverages in place, and don't overlook your contingent business income exposure.

Take control of your risk!

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The Business Income website everyone's talking about!

You will find a simplified explanation of the commercial property insurance policy, 26 industry-specific electronic Business Income worksheets that identify your exposures, and the only electronic contingent BI worksheet in the industry that helps you find out how dependent you are on your suppliers. We're also in the process of adding an electronic, do-it-yourself Business Interruption claim section. No more excuses. Get it done on **BusinessIncomeWorksheets.com!**

BE INFORMED! How Do I Value Business Interruption Exposures?

The traditional focus of net income exposure valuation is the net income; the so called “bottom line” of the income statement. However, this net income value may not be the “real” net income value the organization faces. Determination of net income is affected by the type of accounting methodology used. An organization will often use Generally Accepted Accounting Practices (GAAP) for one purpose, Internal Revenue rules for another purpose, and management accounting principles for their own internal use. All three can result in different net income purposes. Which one is the “real” net income?

One problem of valuing the net income exposure is determining which source of financial information should be used. Using a financial statement can be a good first start, but only if you know the type of accounting system under which the financial statement was prepared. Financial statements created by following GAAP present standardized information in standardized formats, but these rules may not reflect the real net income exposure the organization faces.

Another problem is measuring the extent of the interruption or disruption. Since insurance contracts are annual, it is easy to focus on an annual amount of net income exposure. However, most interruptions are not twelve months in length. Further, the interruption is frequently more of a disruption or a decrease in activity rather than a total cessation. The challenge is to attempt to determine the duration and the extent of the interruption or disruption. Income losses have a tendency to follow Murphy’s Law; the loss will happen at the worst possible time. For organizations that have seasonal variations in activity either in sales or production, the estimation of the value of the interruption must consider when the interruption would occur. Naturally, the most conservative estimate would assume the interruption would occur at the worst possible time.

In short, BI exposures are a paradox, both easily identified and totally unknown, both easily quantified and totally unquantifiable. Yet the successful handling of BI exposures, a natural by-product of every economic transaction, is key to the survival and success of any organization.

Article from *ROUGH NOTES*, Risk Manager’s Forum, *Valuing Business Interruption Exposures*, by Rich Rudolph, PhD, CPCU, ARM, ARP, APA, AIAF, AARN.

For expert BI claim preparation and presentation, call Business Interruption Consultants, Inc. at 307.433.8180 or email us at info@bisimplified.com. THERE IS NO OBLIGATION AND THE INITIAL CONSULTATION IS FREE!

PLEASE CONTINUE TO GIVE US YOUR COMMENTS AND ASSOCIATED ARTICLES ON TOPICS OF INTEREST.

WE WELCOME YOUR INPUT!

Send us your comments, questions and jokes to be published in upcoming issues.

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