

**American Association of Port Authorities
Insurance and Risk Management
Disaster Recovery**

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Beware of Anticoncurrent Causation Clauses

I. Proximate Cause and the General Rule

A. Property Policies are triggered by a covered cause of loss

- all risk policies – triggered by any cause that is not specifically excluded
- named peril policies – coverage for specifically identified perils



B. Traditionally, the proximate causation doctrine has been used to determine the cause of loss

- proximate cause is: “that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury...”
- E.g., water main break is cause of resulting mud slide



C. Some policies extend coverage to covered causes that result from excluded perils.

“We will not cover X. However, if an excluded peril results in a covered cause of loss we will pay ... for the covered loss.”

- Example: earthquake (excluded) causes water damage from broken pipe (covered)



D. Concurrent Causation

- courts traditionally found coverage if there were multiple independent causes of loss, one covered and one excluded
- E.g., wind and flood



E. Anticoncurrent Causation Clauses

- coverage is barred if an excluded “cause” or “event” takes place at any point in the sequence of the loss
 - eliminates the grant of coverage where a covered cause results from an excluded one
 - eliminates the concurrent causation rule



F. Example of anticoncurrent causation clause:

- i. ISO Form (CP 10 30 04 02)

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.



G. Anticoncurrent causation causes applied:

- water main break (covered) results in mud slide (excluded)
- earthquake (excluded) causes water main break (covered)

H. The Leonard Hurricane Katrina case



I. What To Do About Anticoncurrent Causation Clauses?

- i. avoid entirely – broker forms
- ii. if necessary – choose the least onerous
- iii. submit claims with the clauses in mind
- iv. challenge enforceability
 - based upon state law proximate causation rule
 - California, Washington, West Virginia
 - based upon reasonable expectations doctrine
 - Mississippi – federal district court – overruled
 - But, provisions have been upheld in New York, Nevada, Alaska
 - Choice-of-laws is important



TIPS ON GUIDING COVERAGE CLAIMS TO SUCCESSFUL RESOLUTION

1. Help make sure your port is well-covered
 - Review policies
 - Stay up to speed on key issues that affect your risks
 - Customize coverage as needed
 - Make sure you have the state of the art from the policyholder's perspective
 - Avoid choice of law and choice of forum clauses



2. Assemble the right team to prepare the claim

- Risk management
- Property damage experts – adjusters, engineers, contractors
- Accountants
- Brokers
- Lawyers



3. Comply with all policy deadlines and reasonable insurer requests

- property policy deadlines for
 - proofs of loss
 - contractual statutes of limitation
- oppressive information requests
 - comply unless outrageous
 - fighting plays into the insurer's hand



4. Establish a Deadline for the Resolution of the Claim

- develop a realistic timetable and present to insurers
- be proactive in providing information to meet deadline



5. Demand Partial Payments

- demand payments early and often
- leaving large undisputed amounts puts the policyholder at a disadvantage in negotiating a final payment



6. Dealing with Reservations of Rights

- Insist upon a prompt coverage determination
 - Insurers may use lingering reservations as negotiating leverage when it is time to settle the claim



7. Document everything that happens with respect to a claim

- make a record of insurer delays and other potentially improper conduct
 - may influence insurer behavior
 - will be helpful if claim ends up in litigation



8. Be prepared for a race to the courthouse

- Analyze the importance of choice-of-law and forum before the claim reaches an impasse
 - insurance is governed by state law
 - state laws vary significantly on important issues
 - federal and state courts may differ
- Be ready to file at the first indication that claim will not be resolved



9. Litigation or Appraisal?

- Appraisal can be faster and less expensive for determining the amount of damages

BUT

- Appraisal may not be appropriate for resolving coverage issues
 - appraisers typically are not coverage experts
 - appraisers may not give the policyholder the benefit of the legal rules of insurance policy interpretation
 - Typically, appraisers' coverage determination cannot be appealed

