

Anti-Concurrent Causation Clauses: Why The Value Of Your Property Coverage May Depend On Your State

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A powerful storm pummels your city with high winds and heavy rains. After more than two days of intense wind and rain, the saturated hill behind your factory finally gives way and crashes into it. The building is severely damaged and your business operations are put on hold pending repairs. You need insurance money fast and file a claim with your property carrier. Even though the policy doesn't exclude property damage caused by wind or rain, it does contain an exclusion for earth movement "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." The carrier denies coverage because of the earth movement exclusion. Is the carrier right? As it turns out, the answer may depend on which state's law is used to interpret your policy. Generally, a loss to covered property is covered by a property policy when it is caused by a "covered cause of loss" and no exclusion applies. Many of these policies are written on an "all-risk" basis – that is, "covered cause of loss" refers to any peril that isn't specifically excluded by the policy, such as wind and rain. An "all-risk" policy, however, is something of a misnomer: it can and does have many exclusions, such as that for earth movement in the example above. Courts have fashioned competing doctrines for addressing circumstances where property loss results from a combination of covered and excluded causes. Under the "concurrent cause doctrine," which strongly favors the policyholder, as long as there is a covered "but for" cause of the loss – no matter how insignificant in the chain of causation – the excluded cause cannot be used to defeat coverage. Other courts, seeking to better balance the interests of the insurer and insured, fashioned the "efficient proximate cause doctrine," which focuses on whether the covered cause was the predominant or driving cause of the loss. In recent years, insurance companies responded to these doctrines by inserting "anti-concurrent causation" (ACC) clauses in their policies. These clauses seek to swing the pendulum strongly in the carrier's favor by making the mere existence of an excluded cause the determining factor of coverage. Our example features a typical ACC clause – the loss is not covered where it results from an excluded cause, "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

Comparing the Majority Approach With the California Approach

Most states defer to ACC clauses on the principle that the parties have a right to contract what an insurance policy will and won't cover.

For example, the Texas Supreme Court in recent years ruled that ACC clauses are fully enforceable. *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597 (Tex. 2015). Florida courts appear headed in the same direction. *Liberty Mut. Fire Ins. Co. v. Martinez*, 157 So.3d 486 (Fla. App.

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2015). Only a small handful of states do not enforce them. The most significant of these states is California. Section 530 of California's Insurance Code codifies the efficient proximate cause doctrine, and courts have repeatedly held that insurers cannot "contract around" this statutory mandate with an ACC clause. *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal.4th 747 (2005); *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal.3d 395 (1989). In our example, the wind and rain combined with earth movement caused the loss to the factory. If your business is in Texas or Florida, or those states' laws apply, your policy's ACC clause defeats coverage merely because the excluded landslide is a "but for" cause of the damage to your factory. In the wake of Tropical Storm Harvey and Hurricane Irma, many Texas and Florida policyholders may find themselves with coverage denials if their property policies have ACC clauses that exclude coverage where floods or surface water (i.e. water or precipitation diffused over the ground surface) contribute in any way to property loss. If California law applies, however, the court ignores the policy's ACC clause and uses the statutory efficient proximate cause doctrine. Courts applying the efficient proximate cause test to this very fact pattern have held that, of these causes, the wind and the rain were the proximate causes, because they were critical in setting the landslide in motion. See, e.g., *Safeco Ins. Co. v. Hirschmann*, 773 P.2d 413 (Wash. 1989). As wind and rain are not excluded causes of loss, the loss is covered by the policy even though an excluded cause – the landslide – was also a factor. Importantly, because many property policies also cover economic loss from business interruption resulting from the property loss, under California law, your company would be able to recover its lost profits in addition to its cost of repairing the damage.