

Anti-concurrent Causation Clauses = New Business

David Dybdahl, CPCU, ARM

The consultants in the Environmental Resource Group in ARMR.Network have discovered a coverage glitch in commercial insurance coverage that creates an opportunity for organic growth and competitive advantages for retail insurance agencies. The Anti-Concurrent Causation (ACC) language in the mold and bacteria exclusions in virtually all commercial general liability and property policies have far reaching unanticipated consequences. The vast majority of insurance buyers are totally unformed of the coverage gap which arises from simple water damage losses in the case of mold, or bacteria out breaks in their premises, operations, products or completed operations. Filling these onerous coverage gaps with appropriately structured environmental coverages creates lucrative new business opportunities for insurance brokers on a surprisingly broad class of business.

What Is The ACC Clause In Insurance Policies

Introduced into property insurance policies in the 1960's the ACC clause has created a great deal of publicity in recent years over its onerous provisions even at the US Senate level. This attention is primarily due to court rulings on home owner's and property insurance policies related to damages caused by hurricanes. Insurance companies are enjoying almost one hundred percent victories in denying losses under the ACC clause at the appellate court level in the states.

Below is a typical ACC clause:

This insurance does not apply....regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

ACC clauses are so named because they are intended to over ride Efficient Proximate Cause and Concurrent Cause of loss arguments to side step exclusions in an insurance policy. In most states where multiple forces independently cause a loss (concurrent causation of loss) one of which is a covered peril and the other is not -- the insurance policy must respond. For example, in one case a policyholder modified a gun to have a hair trigger, and then put the gun in a car which he drove recklessly. The gun discharged, injuring a passenger. The insured's homeowner's policy attempted to deny coverage based on the exclusion in the homeowners policy for losses arising out of the use of automobiles. The denied claim was litigated. In awarding coverage under that policy the court reasoned that although "multiple causes may have effectuated the loss [that] does not negate any single cause"--in that case, the covered negligence in modifying the gun resulted in a covered claim. See *State Farm Mut. v. Partridge*, 514 P. 2d at 130-131 (1973). However if the automobile exclusion in the homeowners policy contained an ACC clause the likely outcome of the case could have been very different for the hair trigger happy homeowner. The AAC clause would bar coverage because an excluded peril, the use of the automobile, was a concurrent cause of the loss.¹

Some anti-concurrent causation clauses are intended to go beyond simply eliminating the concurrent causation argument for coverage. These ACC clauses on steroids can bar coverage when an excluded event is merely a consequence of a covered cause of loss, or follows damage caused by an insured peril. As one court explained in the context of a Hurricane Katrina claim of a family that had coverage for wind and rain, but not flood, if the anti-concurrent causation clause in the family's policy was enforced, it "would mean that an insured whose dwelling lost its roof in high winds and at the same time suffered an incursion of even an inch of water could recover nothing..." *Leonard v. Nationwide Mutual Ins. Co.*, 438 F. Supp. 2d 684 (S. D. Miss. 2006).

¹ MAY 2007 | VOLUME 9, ISSUE 5 - FEATURE STORIES Beware of Anticoncurrent Causation Clauses--They Can Erase Your Property Insurance Coverage - By Finley Harckham

In addition to Concurrent Causation, the Efficient Proximate Cause of loss is another method to side step an exclusion in an insurance policy. The Efficient Proximate Cause concept in adjusting claims seeks to determine the root cause of the loss by asking would the loss have occurred "but for this cause of loss" to determine the proximate cause. The custom and practice in the insurance industry is if the excluded loss resulted because of the covered loss, coverage is granted for the entire loss under the doctrine of Efficient Proximate Cause. The ACC clause as determined by several state courts says if an excluded loss occurs concurrently or any sequence with a covered loss, no coverage is granted for either. Please visit our website at www.armr.net for more information and pertinent case law.

Consider the recently litigated Northrop Grumman loss. They incurred \$1.2 billion in damages to their facility from Hurricane Katrina. Their insurer Factory Mutual paid out only \$15 million in primary limits, but denied payment in the excess policy citing the flood exclusion which contained an ACC clause. The Ninth Circuit Court of Appeals reversed the lower court ruling for coverage and ruled in favor of Factory Mutual who had the ACC clause in the excess insurance contract. While this case is still in litigation, we reference it because of the size of loss and large company involved. If a firm the size of Northrop Grumman is denied coverage, what chance do smaller firms have?

ACC In The CGL

Potential coverage gaps when concurrent forces (some insured and others not) are present is of great concern to ARMR.Net and should be to all insurance agents and brokers, especially when the insurance companies have inserted the ACC clause into the CGL Fungi or Bacteria Exclusion. The impact of this exclusion could be very damaging for insured's. Consider a liability claim against a contractor that involves a speck of mold or bacteria. Note the exclusion does not mention the quantity of these materials needed before the exclusion is triggered.

The typical ISO fungi and bacteria exclusion endorsement reads as follows:

This insurance does not apply to:

Fungi or Bacteria

a. *"Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.*

b. *Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of "fungi" or bacteria, by any insured or by any other person or entity. (Emphasis added)*

Because this is an endorsement to the policy it over rides the other policy provisions in the case of a conflict of terms.

The Anti Concurrent Causation language in **a.** essentially eliminates Efficient Proximate Cause and Concurrent Causation arguments for coverage under the GL. If mold or bacteria is even alleged to be part of the loss, in theory the GL policy is null and void under this exclusion. Interestingly since bacteria and fungus are omnipresent in every building on the planet earth there is no need to exclude the threatened existence or presence of fungi and bacteria in the building, the presence of these materials in some form is a certainty.

If the contractor is "...in any way responding to..." mold or bacteria and causes a CGL loss, the exclusion clearly allows the insurer the right to deny the loss citing item **b.** of the exclusion. If the contractor merely comes in "contact with" mold or bacteria and also causes a CGL loss, is there coverage? What if the contractor accidentally causes a fire which destroys the building or bodily injury to third parties while cleaning up or assessing mold or bacteria, could the carrier deny the fire claim citing the exclusion? We believe this is very possible depending on the circumstances of the loss because of the wording in item **b.** of the exclusion which essentially excludes any losses from the job not just losses as a result of exposure to fungus and mold.

Consider how this impacts building owners and managers who also have the mold and bacteria exclusion in their CGL policies. They hire various types of building service contractors every day, but most fail to require the proper environmental insurance of these contractors. If for example the contractor causes bodily injury or property damage to third party tenants while in to “clean up” mold or bacteria, the contractor likely has no CGL insurance because of the far reaching consequences of this exclusion. The building owner/manager is now exposed to third party lawsuits and is also completely uninsured because the property owners have the same fungus and bacteria exclusions as the contractors.

It is also important to note building owners have fungus and bacteria exclusions with ACC clauses on their property insurance policies.

New Business Opportunities Abound From ACC Clauses

The ACC clause gives insurance agents and brokers a tremendous opportunity to write new business on existing and new accounts. Any contractor working in buildings that could create a water loss or comes in contact with mold or bacteria now needs pollution/mold insurance. Building owners need to require this coverage of contractors working in their buildings. Plus building owners need to purchase pollution/mold/bacteria coverage with first party clean up and extra expense coverage to protect themselves from excluded claims arising from mold and bacteria in their GL and property insurance programs.

This opens a whole new market for insurance agents. Consider the number of HVAC, plumbing, electrical, janitorial, maintenance, sewer, and restoration contractors insured within your agency or in within your marketing territory. This is likely a very large number of accounts and few agents or brokers are prospecting them with this risk management angle. Add to this the number of building owners and you have a huge untapped production opportunity capable of generating sizeable commissions.

ARMR.Network has developed an entire suite of customized environmental insurance products to address the insurance needs of property owners and contractors at surprisingly affordable prices.

The Coverage Solution

All contractors working in buildings now need a specially crafted Contractors Pollution Liability (CPL) policy to address their mold related loss exposures, even electricians. The electrician along with all the other contractors was sued in the \$95,000,000 mold loss at the Hilton in Hawaii.

The only solution to the ACC coverage gap for restoration contractors actively involved with mold remediation is placing the CGL and Contractors Pollution Liability (CPL) policies with the same insurer in a package policy. Purchasing a CPL policy alone does not fix the coverage gap because the mold/bacteria exclusion in the GL excludes more than the broadest CPL policy can cover. This is because the GL exclusion basically voids out the policy if mold or bacteria in any quantity is even remotely involved with a loss. On the other hand, all CPL policies insure claims that are a result of the emission, discharge, release, or escape of mold as a “pollutant”. If a combined GL/CPL policy is unavailable several insurers have the capability of writing both coverage lines under separate policies for one insured. While this is an imperfect solution for the extremely broad GL mold exclusion, it is better than having separate insurance companies arguing which policy should pay a mold related loss in a classic “It is not my job” argument, or not having CPL at all.

Building owners and managers need an Environmental Impairment Liability based policy with mold and bacteria coverage added by endorsement. This policy will protect them from lawsuits and cleanup costs arising from mold and bacteria including claims arising from the actions of hired contractors. It is also the policy to be used to fill the coverage gap in property insurance policies for mold and bacteria related losses.

PRODUCTION STRATEGY FOR INSURANCE AGENTS

Most contractors and building owners today are unaware of this coverage gap and most are totally uninsured for a risk that has the potential to bankrupt them. We recommend informing the contractor or building owner of the full effects of the mold and bacteria exclusion and its potential to void all CGL coverage by having them read the actual exclusion in their CGL policy. Once they realize a simple water leak can potentially void out all their CGL insurance, they should be concerned and request immediate action to rectify the coverage deficiency.

A similar approach should be used with property insurance policies.

ARMR.Net consultants will provide a review of existing policies to help you determine the need for environmental insurance.

Because environmental insurance was not originally invented to insure contractors working in and on buildings or the buildings themselves there are many hidden coverage defects in most of the environmental insurance policies sold today. Fixing these coverage defects can be exploited to create a competitive advantage on new or existing insurance placements. Good quality CPL and EIL insurance that includes coverage for mold related damages are available for minimum premiums as low as \$5,000 from ARMR.net.

Call an ARMR.Network broker today to discuss this important coverage gap and how we can assist you in properly insuring your clients and prospects.