30 YEARS IN PUBLICATION

ADJUSTINGTODAY®

Adjusters International Disaster Recovery Consulting

FROM THE EDITOR

Concurrent causation. The tongue-twister nature of the term is indicative of the dilemmas that property damage losses which are impacted by more than one cause have long created for insureds, insurers and the courts. Definitions and interpretations of coverage and exclusions have taken various twists and turns, and continue to do so.

In this edition of Adjusting Today, *author Joseph Harrington traces the origins and evolution of concurrent causation, the insurance industry's actions to address it, and key court decisions — including a very recent one — affecting its implementation. His article draws from and is a timely successor to our previous issue on this subject written by Paul O. Dudey.*

Once again, it is relevant information for any insured whose operations could be damaged or interrupted by more than one of the many exposures to loss a business faces today.

Sheila E. Salvatore
Editor

Concurrent Causation: An Adjuster's Dilemma

By Joseph S. Harrington, CPCU, ARP

Few issues are more vexing for adjusters than when a policyholder incurs damage from two or more causes at the same time and at least one of those causes is excluded from coverage under the applicable property policy.

"Anti-concurrent causation" (ACC) provisions have been around since the 1980s, but the concept and its application was scrutinized and tested again in the aftermath of Hurricane Katrina in 2005 and Superstorm Sandy in 2012.

During both of those events property owners incurred damage from a windstorm — which is generally covered under property insurance policies — followed by damage from a resulting flood and/or storm surge, which is generally excluded (but available through separate flood policies).

As others had previously experienced, distressed policyholders learned that structural damage caused by high winds might not qualify for coverage if the damage was compounded by flood waters or if it could not be determined how much of the damage was caused by wind as opposed to water. Numerous claims ended up in court, with some claimants arguing, among other things, that the Katrina damage resulted from the failure of a levee system, not from natural flooding.

For the most part, however, property insurers have prevailed in their attempts to enforce ACC exclusions. Furthermore, post-Sandy legislative initiatives to ban such exclusions in New York and New Jersey quickly faded as legislators came to fear the potentially negative effects a ban might have on their domestic insurance markets.

According to a table provided online by the law firm Timoney Knox, LLP,[1] as of October 2017 courts in 31 states and the District of Columbia had definitively enforced the application of ACC clauses.

Background

Concurrent causation issues are vexing for adjusters because a rigorous and conscientious investigation of a claim can uncover causes that eliminate an insured's recovery for damage that under other circumstances would have been covered.

Furthermore, ACC provisions give policyholders an incentive to look first for the excluded cause of loss, so they don't get their hopes up and waste their time pursuing a claim that will likely be denied.

> ***'Anti-concurrent causation' (ACC) provisions have been around since the 1980s, but the concept and its application was scrutinized and tested again in the aftermath of Hurricane Katrina in 2005 and Superstorm Sandy in 2012.***

> ***Concurrent causation issues are vexing for adjusters because a rigorous and conscientious investigation of a claim can uncover causes that eliminate an insured's recovery for damage that under other circumstances would have been covered.***

In an earlier edition of *Adjusting Today* (replaced by this edition), the late Paul Dudey explained that the concept of concurrent causation arose as insurers in the early 20th century combined monoline policies for individual perils (fire, wind, etc.) into multi-peril policies.

As Dudey explained, single-peril policies lent themselves to adverse selection, as insureds would tend to buy policies only for those perils they were most directly exposed to. Sales of multi-peril policies would ultimately provide a better spread of risk.

The progression to multi-peril policies started with the addition of lightning coverage to fire insurance and continued with the development of "extended coverage" endorsements for damage due to wind, hail, riot/civil commotion and other perils. Later, coverage for vandalism and other perils was added in "broad perils" endorsements.

The progression culminated with the development of "all risks" property coverage that insured the policyholder for damage by any cause of loss not specifically excluded.

Given the exclusions and limitations in "all risk" policies, that phrase became problematic for insurers, who now refer to such policies as offering "open perils" or "special perils" coverage. Although offering broad coverage, open perils policies have several major exclusions, notably for damage caused by earth movement, earthquakes, flood and accidents within machinery.

California Precedents

Controversy over coverage for losses arising concurrently from covered and excluded causes of loss dates from two California court rulings from the early 1980s.

> *... the concept of concurrent causation arose as insurers in the early 20th century combined monoline policies for individual perils (fire, wind, etc.) into multi-peril policies.*

In the 1982 case *Safeco Insurance Co. v. Guyton*[2] the court found an insurer liable for flood damage under an all risks homeowners policy, notwithstanding its flood exclusion.

The court held that flooding which damaged the insured's property resulted from the failure of a third party to maintain flood-control structures. That was not an excluded peril and the court reasoned that the covered (not excluded) peril took precedence over the excluded peril, and thus awarded coverage.

Similarly, in the 1983 case *Premier Insurance Co. v. Welch,*[3] a homeowner's all risks policy was found to cover landslide damage to the insured's home

> *For the most part ... property insurers have prevailed in their attempts to enforce ACC exclusions.*

despite having an 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.

These rulings prompted the Insurance Services Office (ISO), the principal U.S. property/casualty advisory organization, to replace the term "all risks" in its standardized policy forms with "risk of direct physical loss." Also, ISO drafted revised language excluding coverage for losses arising from various deficiencies in construction or maintenance work, among other things.

But California wasn't done yet.

In 1989, that state's supreme court, in *Garvey v. State Farm,*[4] held that appellate courts had misinterpreted the *Safeco* and *Premier* rulings. In Garvey, the justices ruled 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, i.e., the event that led most directly to the loss.

A year later State Farm prevailed again when another California court (in *State Farm v. Von Der Lieth*[5]) ruled that despite evidence of third party negligence in a loss caused by earth movement, the earth movement — not the negligence — was the efficient proximate cause of the loss; coverage was denied because of the earth movement exclusion.

Complete Denials

After decades of legal wrangling and policy adjustments, the latest ACC provision in the ISO Causes of Loss—Special Form (CP 10 30 10 12) reads as follows:

> *We will not pay for loss or damage caused directly or indirectly by any of the following [exclusions listed below]. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss (emphasis added).*

These rulings prompted the Insurance Services Office (ISO), the principal U.S. property/ casualty advisory organization, to replace the term 'all risks' in its standardized policy forms with 'risk of direct physical loss.'

That wording certainly appears intended to forestall any coverage under a property policy for a loss to which an excluded peril has contributed in any way.

The impact of similar wording on policyholders was vividly described by Denver-based attorney Jonathan Bukowski of the Merlin Law Group in an October 2017 blog posting.[6] Commenting on a 2008 ruling regarding the collapse of a roof on a public building following a record snowfall, Bukowski noted that the jury determined that 90 percent of the damage resulted from the weight of the snow, an insured peril, and 10 percent from other circumstances, including those listed in an ACC exclusion. Nonetheless, the Colorado Court of Appeals denied coverage on the basis of an ACC exclusion.

"Under current Colorado law," Bukowski wrote, "if the carrier has included anti-concurrent causation language and can point to some event in the chain of events that was excluded, the carrier can deny coverage for an otherwise covered loss.

"Unfortunately, this allows carriers to preclude coverage for losses concurrently caused as little as 1 percent by uncovered causes, creating illusory coverage and depriving policyholders of their reasonable expectations."

Shifting Burdens

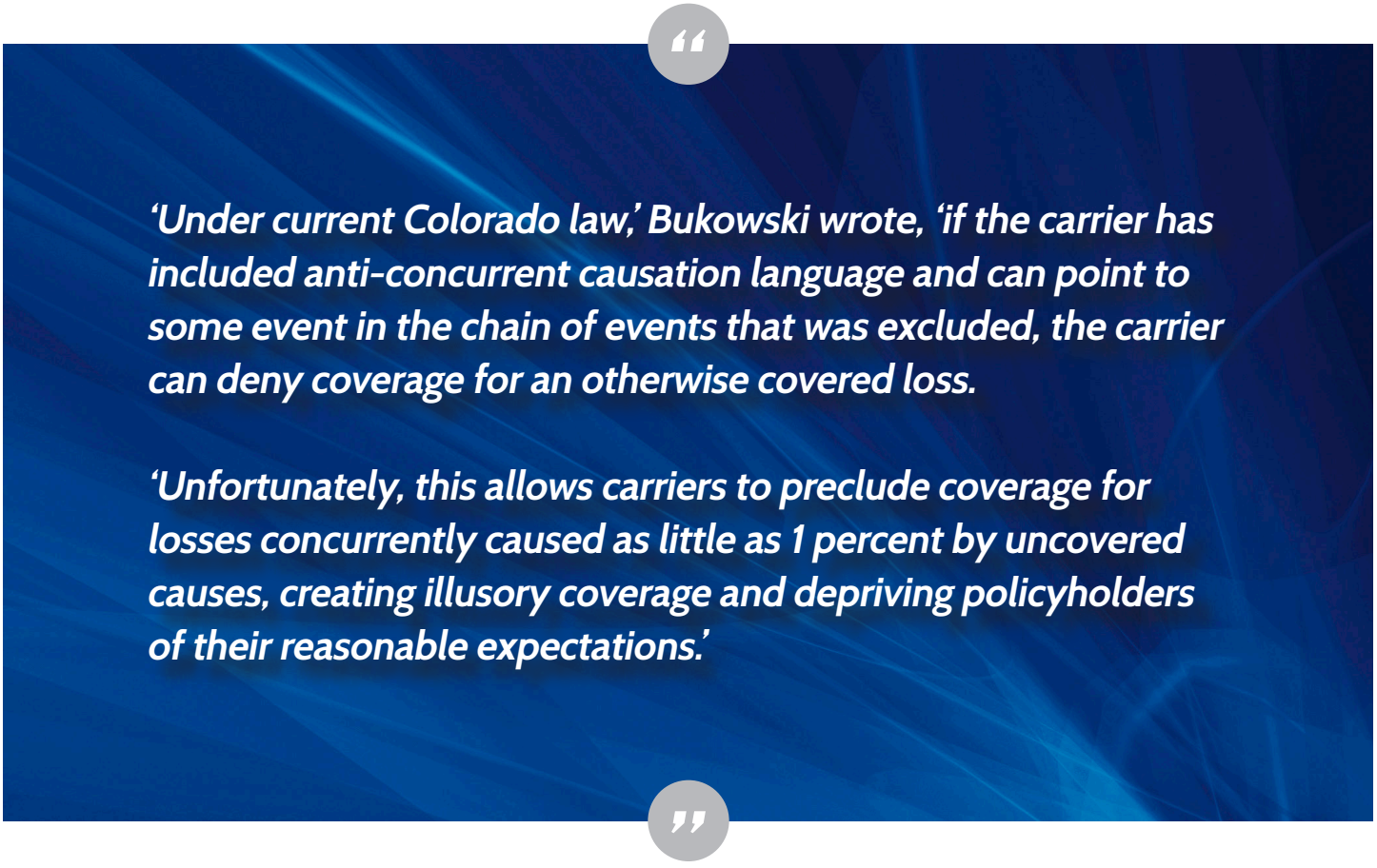
All of that is no reason to give up, however, as the application of ACC exclusions is not universal or ironclad.

California and West Virginia do not enforce ACC provisions, at least not to their full extent, according to Timoney Knox, LLP. Three other states that enforce them (Arizona, Hawaii and Mississippi) have allowed for exceptions to their enforcement and several states (including Florida, Illinois and Ohio) had not definitively ruled on them as of October 2017.

An interesting and potentially hopeful sign emerged in February 2018 from a Florida appeals court. Tampa-based attorney Erin Dunnavant, in another blog post by the Merlin Law Group,[7] described the appeals court's reasoning regarding proper instructions to a jury in a case involving a dispute over concurrent causation.

Under the court's instructions, according to Dunnavant, an insured under an open perils policy initially must only establish that damage occurred during the policy period.

The burden then shifts to the insurer to determine if there was a sole or efficient proximate cause of the loss. Once that is established, the burden remains with the insurer to establish that the sole or proximate cause was excluded under the policy.



If an insurer provides evidence that an excluded risk was a concurrent cause of the loss, the burden shifts to the policyholder to provide evidence that a loss was also caused by a covered peril acting prior to or concurrently with the excluded cause.

The burden then shifts back to the insurer to demonstrate that the peril cited by the policyholder had little or no contribution to the loss, or that it was excluded from coverage.

In the absence of a sole or efficient proximate cause, or in the absence of ACC provisions, the insurer would bear the burden of presenting evidence that coverage would otherwise be excluded.

Adjusters and policyholders may benefit from how this court defined how the burden of proof shifts from policyholder to insurer in concurrent causation cases. An approach such as this, if widely adopted, could provide policyholders, insurers and their respective adjusters with a commonly understood approach to adjusting claims fairly and efficiently.

> ***All of that is no reason to give up, however, as the application of ACC exclusions is not universal or ironclad.***

> *Adjusters and policyholders may benefit from how this court defined how the burden of proof shifts from policyholder to insurer in concurrent causation cases.*

[1] Timoney Knox, LLP, "Survey of State Law Regarding Enforceability of Anti-Concurrent Causation Clauses," accessed on April 23, 2018 at http://www.timoneyknox.com/insurance-industry/survey-of-state-law-regarding-enforceability-of-anti-concurrent-causation-clauses.
[2] Safeco Insurance Co. v. Guyton, 692 F.2d 551 (1982, U.S. Court of Appeals, Ninth Circuit).
[3] Premier Insurance Co. v. Welch, 140 Cal. App. 3d 720 (1983).
[4] Garvey v. State Farm Fire & Casualty Co., 770 P.2d 704 (1989, California Supreme Court).
[5] State Farm Fire and Casualty Co. v. Von Der Lieth, 218 Cal. App. 3d 964 (1990).
[6] Jonathan Bukowski, "The Realty (sic) of Colorado's Anti-Concurrent Cause Exclusion Law," Merlin Law Group, Oct. 14, 2017, accessed at https://www.propertyinsurancecoveragelaw.com/2017/10/articles/insurance/the-realty-of-colorados-anti-concurrent-cause-exclusion-law/.
[7] Erin Dunnavant. "Court Rejects Jury Instruction Inconsistent with Concurrent Causation Doctrine; Remands for New Trial," Merlin Law Group, Feb. 8, 2018, accessed at https://www.propertyinsurancecoveragelaw.com/2018/02/articles/court-opinion/court-rejects-jury-instruction-inconsistent-with-concurrent-causation-doctrine-remands-for-new-trial/.

ADJUSTERS INTERNATIONAL
The *right* way to settle claims®

CORPORATE OFFICE
126 Business Park Drive
Utica, New York 13502
800.382.2468
Outside U.S. (315) 797.3035
FAX: (315) 272.2054

Editor@AdjustingToday.com

WEB ADDRESSES
AdjustersInternational.com
AdjustingToday.com

PUBLISHER
Ronald A. Cuccaro, SPPA

EDITOR
Sheila E. Salvatore

ADJUSTING TODAY is published as a public service by Adjusters International, Inc. It is provided for general information and is not intended to replace professional insurance, legal or financial advice for specific cases.

Follow *Adjusting Today* on Facebook & Twitter:

Facebook.com/AdjustersInternational Twitter.com/AdjustingToday AT19 3050

ABOUT THE AUTHOR

Joseph S. Harrington, CPCU, ARP

Mr. Harrington is an independent insurance writer and communications specialist. He served for over 20 years as communications director for the American Association of Insurance Services (AAIS). His work has been published in *Best's Review, Rough Notes,* publications of The Institutes, and elsewhere.