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## FEATURE STORIES

### **Anti-Concurrent Cause Language: Should It Have Been Left Out of the Analysis in Katrina Coverage Cases?**

By David Rossmiller, Esq.

Usually insurance coverage law is carried out in the shadows of the legal world. Insurance coverage law seldom has the sexiness or imminence of constitutional law or big tort cases, and also in the eyes of many lacks the import of such areas of law as litigation over anti-trust, patents or securities. With its highly specialized jargon that acts as an entrance barrier to the uninitiated, its off-putting abstraction and reliance on theory, and the fact that it is about insurance, a subject considered by many to be, well, boring, insurance coverage law traditionally has not been prime-time legal stuff. Add to all the other drawbacks of insurance coverage law the bewildering variance in results and methodology between states on even basic coverage questions, and you have a common law stew that few non-specialists care to taste, much less order second helpings of.

That all changed when insurance coverage law was struck by the perfect storm, so to speak—Hurricane Katrina. The widespread damage and human tragedy caused by Katrina hit an insurance demographic that is a natural constituency of the mainstream media: homeowners. And where there is a natural media constituency, politicians will be found, rushing for the reporters and the cameras with the force of hurricane storm surge, all wanting to discuss the implications of the thousands of lawsuits filed by homeowners against insurers who had denied coverage. To a great extent, the initial rounds of Katrina litigation were about two things: the flood exclusions found in every homeowners policy and the lead-in anti-concurrent language that precedes the flood exclusion. Suddenly policyholders, reporters and politicians for whom insurance was largely a foreign language, had phrases like “anti-concurrent cause clause” tripping off their tongues. The anti-concurrent cause clause—which had trouble getting a dinner reservation before Katrina—was now being discussed and debated throughout the media, in Congress, in legal publications, and of course, in briefing in the Katrina coverage cases being played out in Mississippi and Louisiana. Yet there is a good argument that the anti-concurrent cause language in the homeowners policies was irrelevant to the claims being asserted, and never should have played a prominent role, or any role, in these cases at all.

Misconceptions and confusion about the anti-concurrent cause language and its effects abounded, and still do. For example, Mississippi Attorney General Jim Hood, in testimony before the House Financial Services Committee on February 28, 2007, called the anti-concurrent language “a bait-and-switch” that purportedly excludes payment of any covered wind damage if a home was first damaged by wind but later damaged by storm surge and flooding, a position insurers said they were not taking in the Katrina cases. Hood also said that he believed the anti-concurrent language would not stand up to judicial scrutiny in any of the 50 states, which is not accurate—anti-concurrent language is upheld in the vast majority of states, with California and Washington being

notable exceptions. Attorneys briefing the Katrina cases sometimes appeared to be confused themselves as to the reach of the anti-concurrent language, or at least confused about the position the insurer was taking on the language.

For example, in *Tuepker v. State Farm*, in one of the earliest decisions in the Katrina cases, Judge L.T. Senter Jr., of the U.S. District Court for the Southern District of Mississippi, found State Farm's anti-concurrent language ambiguous and unenforceable to the extent the insurer would seek to use it to exclude covered wind damage, merely because flooding also later damaged a home. State Farm, however, in an interlocutory appeal of Senter's ruling to the U.S. Fifth Circuit Court of Appeals, said it had no such interpretation in mind:

In ruling that State Farm's anti-concurrent language is ambiguous, the court below apparently believed that if Plaintiffs' home were damaged by flood or storm surge during Hurricane Katrina, then the lead-in language would preclude coverage even for separate and independent wind damage.... To the contrary, the effect of the lead-in language in such a situation is to preclude coverage for indivisible damage caused by a *combination* of wind and water, since such damage "would not have occurred" in the absence of water damage.

**Accordingly, if the evidence demonstrates that hurricane winds operating independently of water damaged Plaintiffs' roof, that damage would be covered, even if storm surge later destroyed their entire house.** (Boldface emphasis added).

This passage appears to make it clear that State Farm's position was not the one Attorney General Hood claimed the insurer was taking—that any amount of excluded flood damage would result in nullification of covered damage. Yet later briefing in another Katrina case before Judge Senter (*Palmer v. State Farm*) appeared to contradict the insurer's own *Tuepker* appellate briefing with this statement:

It is clear that the policy contemplates a situation where there may be two or more losses to property. Pursuant to the terms and conditions of the policy, irrespective of the timing of the losses, or the number of said losses, if but one of those causes of loss is excluded..., then the entire loss is excluded. Here, the reality of Plaintiffs' allegations mean that **even if Plaintiffs were successful in proving that a specific portion of their property was damaged by wind to a particular degree prior to the arrival of the water, because water was in the chain of causation of the destruction of the property, including that portion damaged by wind, then the loss is not covered.** (Emphasis added).

What this passage appears to say is that wind damage, even if it more or less destroyed a house, would not be covered because flood waters later came along and swept the whole thing away anyway, exactly the position that Senter said was untenable and that made the anti-concurrent language ambiguous in the earlier *Tuepker* case. To add to the confusion, the *Palmer* briefing contained a further contradiction: State Farm had actually paid \$2,400 to the Palmers for wind damage to their home, plus some \$16,000 for wind-caused damage to the home's contents. If the anti-concurrent cause language resulted in no coverage for wind at all, as the brief said, shouldn't the wind damage payment have been zero?

An historical or 50-state analysis of anti-concurrent language in property insurance policies is beyond what can or should be attempted in the scope of this article. But some brief background will be helpful in considering the analysis that follows. Anti-concurrent language, although it has in some form been a part of property insurance policies for a hundred years, was formalized in the 1980s and 1990s in "lead-in" clauses to certain exclusions in response to courts' use of the theory of efficient proximate cause to bypass policy exclusions. For instance, suppose a water pipe outside a home freezes and breaks, causing soil to wash away and wrecking driveways, a tennis court and structures in the process. Under the efficient proximate cause theory, the cause is not "earth movement," which is excluded by homeowners policies, but rather a catastrophic breach of the water pipe, which is covered. Anti-concurrent language is intended to take the secondary or concurrent cause from the equation, and look only to the actual, primary cause. Under typical anti-concurrent language, this type of damage would not be covered.

But consider the language of the State Farm anti-concurrent clauses at issue in the Katrina lawsuits such as *Tuepker* and *Palmer*. Quoting from insurance policies is not a pleasant exercise, but this passage is fairly short, and is necessary to look at because it prefaces the section containing the flood exclusion.

We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other cause of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these...

Remember that Judge Senter upheld the flood exclusion itself as unambiguous, and said only that this lead-in language was ambiguous to the extent it purported to exclude covered wind damage. How far Senter's ambiguity analysis would go in a broken-pipe case like the example above is unclear, but in the context of the Katrina cases, it is important to note a huge difference between the broken-pipe scenario and what happened during Hurricane Katrina. With the broken pipe, the excluded earth movement is caused by a covered plumbing break. In Katrina cases, the analogy would be to storm surge driven by wind. However, that analogy is impossible, not because of the anti-concurrent language, but because of the language of the flood exclusion, which precludes coverage for "flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, **all whether driven by wind or not...**" (Emphasis added). The wind that drove the storm surge was therefore removed from the equation by the flood exclusion itself, and the anti-concurrent language was not needed. The wind behind the storm surge, as it fits in the usual causation analysis that figures into the efficient proximate cause and anti-concurrent theories, is not an issue whatsoever.

Instead, what is at issue in the Katrina cases is wind, not as a part of the causal chain of water damage, but as an independent agent of destruction completely separate from the causal chain involving storm surge. Where extensive wind damage occurred along the Mississippi and Louisiana coasts, it preceded the storm surge by some time, with the highest winds sometimes occurring hours before destructive storm surge followed. In some cases, in fact, policyholder experts said homes were demolished by tornadoes long before storm surge came to scatter the rubble about. Now look back at the anti-concurrent language and put it together with the flood exclusion: there is no coverage for "any loss which would not have occurred in the absence of" flooding and storm surge. But because the wind preceded the storm surge, it *would have* occurred, and did occur, in the absence of storm surge; in fact, thousands of homes in northern Mississippi were extensively damaged by wind, and storm surge didn't get within 100 miles of these homes.

Because of this, it is highly debatable whether the anti-concurrent cause language should have been a part of the Katrina cases at all. True, it would have made for fewer fireworks and less entertainment, but it would have also made for a clearer coverage analysis. 🇺🇸

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