

## 2 Problems = Zero Money: The Anti-Concurrent Causation Clause

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When disaster strikes it seems to happen all at once. Electric lines spark, windows shatter, roofs tear off, sump pumps stop and the lights go out. Homeowners see it this way. Insurance companies — and often the courts — see it differently.

Major disasters such as hurricanes create huge losses for property-casualty insurers, which don't want to pay out any more than necessary. Private insurers have already abandoned the flood insurance market, passing that responsibility on to the government's Federal Emergency Management Agency (FEMA). And, very quietly, insurers have been inserting a tongue twister called an anti-concurrent causation (ACC) clause into their homeowners' policies.

The ACC "allows insurance companies to skirt around disaster coverage," says Jacqueline Young in the *Hastings Law Journal*.

The chicken or the egg?

There are nearly as many interpretations of the anti-concurrent causation clause as there are federal and state courts, but ACC usually means that if two losses occur at the same time and one of them isn't covered by insurance, the other won't be either.

For example: You probably have a homeowner's policy that covers you for wind damage. But if your house is destroyed by a wind and flood event such as a hurricane), the ACC clause can put the kibosh on your entire claim. And the flood damage is only covered if you have a separate flood insurance policy.

Here are home insurance basics.

The ACC is the classic "which came first, the chicken or the egg?" quandary that has been stumping courts. Now it is causing anguish to disaster victims of Superstorm Sandy.

The ACC clause has been a small part of voluminous home insurance policies each year since at least the 1980s, says a *New York Times* article. But insurers and homeowners alike didn't pay much attention until 2005, when Hurricane Katrina walloped the Gulf Coast, costing insurers an estimated \$38 billion in claims.

Homeowners who fled before Katrina struck and whose homes were leveled to the slab couldn't tell whether wind or water, or both concurrently, caused the damage.

'Ambiguous . . . and unenforceable'

Numerous court disputes erupted between homeowners and insurance companies, and court decisions changed as often as the weather. But U.S. District Court Judge L.T. Senter, who presided over nearly 1,500 Mississippi cases, issued a key ruling that — ironically — was applauded by both sides.

Judge Senter ruled that victims of Katrina could claim damages from private insurers if they could prove the damage was caused by wind, but couldn't claim damages caused by water unless they had flood insurance. As for the ACC clause, Judge Senter dismissed it as "ambiguous ... and unenforceable."

Despite this, many, if not most, property insurers still squeeze an ACC clause into their home and business insurance policies, say lawyers for disaster victims.

"Chances are you'll see it if you look hard enough," says William "Chip" Merlin, whose law firm helped win a key decision on Katrina coverage in Mississippi's state supreme court. "Check in the exclusions section of your contract."

The typical ACC clause reads like the one insurer Nationwide put into its policies and which Judge Senter called ambiguous: "We do not cover loss to any property resulting directly or indirectly from any of the following [excluded perils]. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss."

Contractually speaking

Not only have ACC clauses been part of homeowners policies in recent years, they've also been expanded and the legalese surrounding them tightened because insurers have won court decisions elsewhere.

Consumer advocate Amy Bach, executive director of United Policyholders, a non-profit consumer organization, says, "We've won a couple of cases in state courts. But federal courts are generally more conservative and most of our wins were wiped out." In federal court a contract is a contract, plaintiffs' lawyers say, even if the homeowner didn't understand it.

Insurers also employ a "wearing-down effect." The effort needed to fight an anti-concurrent causation clause results in more hurricane victims, already suffering from the loss of their homes and financially strapped, choosing to settle rather than fight, particularly if they have to hire both a lawyer and a claims adjuster to prove that the wind came before the water.

"Litigants may not live to see their cases decided," said Philadelphia attorney Randy Maniloff in his analysis of the Mississippi cases.

Insurer vs. insured

Robert Hartwig, president of the Insurance Information Institute (III), which represents the property-casualty industry, says that without exclusionary clauses like the ACC rates would go up for everyone and availability of home insurance will decline. Insurers also lose “the benefit of certainty and predictability” in their calculation of future losses, according to one California case in which they were successful. But opponents argue that the more certainty insurers have, the less certainty homeowners have. “The insurer gains the benefit at the expense of the insured,” says Ron Reitz, president of the National Association of Public Insurance Adjusters.

Reitz also rejects the argument that leaving ACC clauses in policies cuts costs for policyholders. “I do not see premiums being reduced with this reduction in coverage,” he says.

Other critics of the ACC, like the Consumer Federation of America (CFA), argue that — legal or not — an ACC clause is “bad public policy” because it gives insurers a “trapdoor” to get out of offering the basic coverage that policyholders expect and paid for, says a study by Kimberly Myers at the University of Maryland.

The CFA has asked states to block ACC, but so far only California, West Virginia and Washington have restricted its use, says Myers.

Sandy follows Katrina

None of the states that limit use of ACC are among those pummeled last year by Superstorm Sandy, which cost \$70 billion in damages, mostly in New York and New Jersey, and even left the III offices in the dark for almost a week. The III says that 93% of all claims from the October 2012 storm have been resolved with insurance payouts totaling almost \$19 billion.

But there are a lot of dissatisfied customers. Insurers rejected thousands of business claims, says the New York Daily News, while USA Today reports “a growing number” of homeowners are seeking legal help.

Lawyers like Merlin say victims of Sandy might do better if they float the remains of their homes from New York to New Jersey. He and others representing clients in both jurisdictions say New York, which is home to many property-casualty insurers, tends to be a “conservative, insurance-friendly state” while New Jersey’s judiciary is “consumer-friendly.”

In court, plaintiffs’ lawyers are likely to claim negligence: Insurance agents and brokers didn’t explain what an ACC clause is. According to one estimate at this year’s annual III meeting, less than half of those who buy a home insurance policy actually understand what is included in their coverage. Even the chief executive of The Hartford, Liam McGee, said that agents haven’t done a good enough job explaining their products.

‘Untraceable mess’

Policyholders victimized by ACC and other legal language probably should have shopped around for a policy with fewer restrictive clauses, kept better track of their losses and, if possible, remained in their home with a measuring tape, camera and stopwatch to record what damage occurred at what time by wind and tide.

But all that is water under the floor, so to speak. Now the only answer may be to challenge your insurer in court, using a lawyer and an independent claims adjuster.

Even if the case is lost, it could be won later in another court. Since insurance is state-run, a state court decision may trump a federal one, as it did in Mississippi. The whole issue is now so “bastardized,” in the words of Mark Bell in the Connecticut Insurance Law Journal, that lawyers seeking to find precedents will instead find an “untraceable mess.”

Other states, other perils

If New York courts decide in favor of insurers, policyholders may still have the last word. New York Gov. Andrew Cuomo appointed J. Robert Hunter, CFA’s director of insurance and a critic of tactics such as ACC, to a commission on natural disasters. And the state’s Department of Financial Services says it is watching the situation and will “intervene” if the issue becomes problematic.

The more people hurt by ACC, the more likely politicians will take action, says Bach. Although Californians don’t face hurricanes, earthquakes and mudslides are considered “uncovered perils.” So it comes as no surprise that California has one of the nation’s tightest restrictions on ACCs.

The original article can be found at Insure.com:

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