

Concurrent Causation: An Analysis Through The Prism Of Mold-Related Damage

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While roughhousing with his children one Saturday morning, Smith discovers a deep discoloration of his basement carpet. After further investigation, including the retention of an environmental specialist, Smith learns that his home is infected with a highly toxic mold. Facing a lengthy and expensive remediation, Smith asks his insurance agent whether he has any insurance coverage for this expense.

Thereafter, the insurance agent produces a copy of Smith's homeowners insurance policy, and Smith is disheartened to find an express exclusion for loss resulting from mold: "We do not cover direct or indirect loss from . . . mold . . ." Case closed - - no coverage, right? Not so fast.

In addition, to hiring an environmental specialist, Smith also hired a contractor to determine the cause of the mold infestation. That contractor determined that the mold resulted when pipes within the walls of Smith's home froze and then burst allowing water to accumulate. The contractor also determined that the freezing and bursting pipes were the result of defective construction.

So, there were potentially multiple or concurrent causes of Smith's loss: mold, faulty workmanship and the freezing and bursting pipes. This paper, through the prism of mold-related damage, examines the manner in which courts determine coverage for a loss that results from concurrent causes. This paper also addresses the "anti-concurrent causation" policy language promulgated by insurers in an attempt to circumvent the perceived unfavorable treatment afforded by courts to losses resulting from concurrent causes.

I. The Nature of Concurrent Causation

Concurrent causation can be defined as “the action of more than one cause to produce a particular harm or loss.” Rupp's Insurance & Risk Management Glossary (2002). Disputes between insurers and their policyholders arise when there are concurrent causes of a loss and one or more cause is excluded while one or more cause is not excluded, as with the mold-related damage sustained at the Smith home.

In determining whether multiple causes of loss are involved, caution should be paid to distinguishing between *causes* of loss and the *loss* itself. For example, in a recent mold insurance coverage case, an Arizona appellate court reversed an award of summary judgment in favor of an insurance company notwithstanding the fact that the insurance policy contained an express exclusion for loss caused by mold. See Liristis v. American Family Mut. Ins. Co., 61 P.3d 22 (Ariz. App. Ct. 2003). That exclusion provided, in pertinent part, as follows:

We do not cover loss to property . . . resulting directly or indirectly from or caused by one or more of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

* * * *

6. Other Causes of Loss

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c. smog, rust, corrosion, frost, condensation, mold, wet or dry rot.

In finding coverage, the Liristis court accepted the policyholder’s argument that its loss was not caused by mold; rather, the loss was the mold and, accordingly, the exclusion did not apply. Liristis, 61 P.3d at 25-26. “[W]e hold that mold damage caused by a covered event is covered under the [insurance] policy in this case. On the other hand, losses caused by mold may be excluded.” Id. at 25. In light of the Liristis court’s characterization of mold as the *loss*, and not a *cause* of loss, there was only a single cause of loss - - fire (and the water used to extinguish the fire) - - and, therefore, concurrent causes were not involved. But see Cooper v. American

Family Mut. Ins. Co., 184 F.Supp.2d 960 (D. Ariz. 2002) (in a case decided prior to Listiris, the court, applying an identical exclusion, refused to distinguish between mold as the cause of loss and mold as the loss itself).

In another recent mold-related insurance coverage case, the court reached a conclusion seemingly at odds with Listiris, although equally favorable to the policyholder. See Kelly v. Farmers Ins. Co., Inc., 281 F.Supp.2d 1290 (W.D. Okla. 2003). In Kelly, the insurer argued, much like the policyholder in Listiris, that mold was the loss as opposed to the cause of loss and, therefore, the dispute did not involve concurrent causation. The Kelly court, however, rejected that argument and held that mold was a cause of loss because it was identified in the insurance policy as a peril. Id. at 1297-98. The Kelly court then ruled that a jury would decide whether the efficient proximate cause of the policyholder's loss was mold or ruptured pipes that led to the mold. Id. at 1298.

In addition to restricting the concurrent causation analysis to causes of loss, as opposed to the loss itself, the search for concurrent causes should not be extended to remote causes. To illustrate the potentially “endless chain” of causation, one commentator offered the following example:

[C]onsider the destruction of a building: the loss caused by fire, which was caused by a pile of rags igniting in the corner, which was caused by Smith accidentally dropping a lit match in the rags, which occurred because Rover jumped the fence and ran away, which occurred because Rover was large for her breed and was kept in an enclosure with too short a fence, which occurred because Smith could not afford a taller fence.

Cozen, Insuring Real Property, § 48.02 at 48-11. The United States Court of Appeals for the Second Circuit likewise cautioned against focusing on “remote” causes:

Remote causes are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient

physical cause of the loss; it does not trace events back to their metaphysical beginnings.

Pan American World Airways v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1006 (2d Cir. 1974).

II. The Efficient Proximate Cause Doctrine

In determining coverage for losses resulting from concurrent causes, the overwhelming majority of courts apply the “efficient proximate cause” doctrine.¹ A leading insurance treatise described the doctrine as follows:

Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produced the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. It is not necessarily the last act in a chain of events which is, therefore, regarded as the proximate cause, but the efficient or predominant cause which sets into motion the chain of events producing the loss.

5 Appleman, Insurance Law and Practice, § 3083 at 309-11 (1970). See also Frontis v. Milwaukee Ins. Co., 242 A.2d 749, 752 (Conn. 1968) (quoting 6 Couch, Insurance, p. 5303) (“In the determination whether the loss is within an exception in a policy, where there is a concurrence of two causes, the efficient cause—the one that sets the other in motion—is the cause to which the loss is to be attributed, though the other cause may follow it and operate more immediately in producing the disaster.”). This application of the “efficient proximate cause” doctrine is commonly referred to as the “chain of events” approach - - coverage will be found when a non-excluded cause sets in motion a “chain of events” that results in the loss.

Not all courts follow this approach, however. While applying the “efficient proximate cause” theory, some courts look to the “predominating” or “dominant” cause, as opposed to the cause that sets the other causes in motion. See, e.g., Garvey v. State Farm Fire & Cas. Co., 770

¹ A distinct minority of courts have employed either a liberal approach (finding coverage whenever a covered cause of loss is involved) or a conservative approach (finding no coverage whenever an excluded cause of loss is involved).

P.2d 704, 708 (Cal. 1989) (“We use the term ‘efficient proximate cause’ (meaning predominating cause) . . . because we believe the phrase ‘moving cause’ can be misconstrued to deny coverage erroneously, particularly when it is understood literally to mean the ‘triggering’ cause.”); Shelter Mut. Ins. Co. v. Maples, 309 F.3d 1068, 1071 (8th Cir. 2003) (court focuses on which of multiple causes was the dominant of efficient cause of loss).

Still other courts (including those within New York) focus on the cause nearest the loss in determining the efficient proximate cause of a loss.²

As mold-related insurance coverage cases begin to percolate through the judicial system, courts are relying on the efficient proximate cause doctrine in determining coverage. For example, in Shelter Mut. Ins. Co. v. Maples, 309 F.3d 1068 (8th Cir. 2002), the United States Court of Appeals for the Eighth Circuit reversed the entry of summary judgment in favor of an insurer that had relied on a mold exclusion in denying coverage. In that case, mold developed in a home after pipes froze and then burst allowing water to infiltrate. The operative exclusion provided, in pertinent part, “we do not cover loss caused by . . . mold” The court reasoned that “the determinative question is a factual one: whether the frozen pipe or the mold was the dominant and efficient cause of the loss,” an issue on which there was material dispute precluding the award of summary judgment to the insurer. Shelter, 309 F.3d at 1071.

The court in Kelly was likewise asked to determine coverage for mold-related damage that resulted after frozen pipes bust within a home. The insurer moved for summary judgment

² See Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1006 (2d Cir. 1974) (“Remote causes are not relevant to the characterization of an insurance loss.”); Home Ins. Co. v. American Ins. Co., 537 N.Y.S. 2d 516, 517 (App. Div., 1st Dept. 1989) (“the causation inquiry stops at the physical cause of the loss; it does not trace events back to their metaphysical beginning.”); Kosich v. Metropolitan Prop. and Cas. Ins. Co., 626 N.Y.S. 2d 618, 619 (App. Div., 4th Dept. 1995) (even though contractor negligence set in motion a “chain of events” leading to asbestos contamination, there was no coverage under insurance policy that excluded contamination). See also Bruce Oakley, Inc. v. Farmland Mut. Ins. Co., 245 F.3d 1027, 1029 (8th Cir. 2001) (“[i]f the nearest efficient cause of the loss is one of the perils insured against, the courts look no further’ in determining whether the damage is covered by the policy”).

on the basis of an exclusion that provided: “We do not insure for loss either consisting of, or caused directly or indirectly by: rust, mold, wet or dry rot. . . .” After concluding that the efficient proximate cause doctrine was applicable, the court denied the insurers motion for summary judgment due to a factual dispute over whether the proximate cause of the policyholder’s loss was the ruptured pipes or the mold. Kelly, 281 F.Supp.2d at 1298.

In an earlier decided case, the Eighth Circuit affirmed a recovery by a policyholder for mold-related damage to soy beans. Bruce Oakley, Inc., 245 F.3d at 1029. In that case, expert testimony showed that after mold began to grow on the policyholder’s soy beans, heat was generated and eventually caused the beans to burn. The court concluded that heat (a non-excluded cause) was the efficient cause of the loss and, therefore, the policyholder was entitled to coverage: “[i]f the nearest efficient cause of the loss is one of the perils insured against, the courts look no further’ in determining whether damage is covered by the policy.” Id.

Finally, in Bowers v. Farmers Ins. Exch., 991 P.2d 734 (Wash. Ct. App. 2000), the policyholder sought insurance coverage for mold damage that developed in her rental home as a result of the tenants’ conversion of the basement into a hothouse for growing marijuana. The policyholder argued that her loss was caused by vandalism or malicious mischief a covered peril, while the insurer argued that the loss was caused by the excluded peril of mold. The Bowers court concluded that the tenants’ acts of vandalism, “which ‘in an unbroken sequence . . . [produced] the result for which recovery is sought’” was the efficient proximate cause of the policyholder’s loss. Bowers, 991 P.2d at 738.

III. The Effect of “Ensuing” or “Resulting” Loss Clauses

Insurance companies have traditionally anticipated losses that occur after a sequence of events through “ensuing” or “resulting” loss provisions of their insurance policies. An “ensuing”

or “resulting” loss clause brings within coverage a loss from a covered peril that follows as a consequence of an excluded peril. See Aetna Ins. Co. v. Getchell Steel Treating Co., 395 F.2d 12, 16 (8th Cir. 1968); Home Ins. Co. v. McClain, No. 05-97-01479-CV, 2000 WL 144115 at *3 (Tex. Ct. App. Feb. 10, 2000) (“‘Ensuing losses’ mean losses which follow or come afterward as a consequence.”). Pursuant to such clauses, an ensuing loss is covered even if an excluded peril is a “but for” cause of the loss. See Lake Charles Harbor & Terminal Dist. v. Imperial Cas. & Indem. Co., 857 F.2d 286, 288-89 (5th Cir. 1988).

An example of a court relying on an “ensuing” loss clause in finding coverage for mold-related damage is found in McClain. In that case, mold damage resulted to the policyholder’s home after water leaked in to their home from a roof that had been constructed defectively. The relevant exclusion provided that losses caused by the following were not covered:

- “wear and tear, deterioration or any quality in property that causes it to damage or destroy itself,”
- and
- “rust, rot, mold or fungi.”

The exclusion also provided that “[w]e do cover ensuing loss caused by . . . water damage . . . if the loss would otherwise be covered under this policy.” The court concluded that the policyholder was entitled to coverage because the mold ensued as a consequence of the water damage. McClain, 2000 WL 144115 at *4.

Likewise in Bruce Oakley, Inc., the policyholder was permitted to recover for the mold-related damage to its soy beans by arguing alternatively that the soy beans were damaged by fire and, thus, within the “ensuing” loss clause of the relevant exclusion. 245 F.3d at 1028-29. The exclusion at issue in Bruce Oakley, Inc., provided as follows:

We will not pay for loss, damage, or expense caused by, resulting from, contributed to or aggravated by the following causes *except that ensuing fire is covered unless otherwise excluded*:

(2) Wear and tear: deterioration: rust corrosion, or erosion; wet or dry rot; mold; inherent vice; latent defect.

As discussed above, the policyholder's soy beans were damaged when the formation of mold caused the buildup of heat and ultimately resulted in the burning of the soy beans. Thus, the court reasoned as follows:

The witness' testimony reveals that . . . they observed fire: there was smoke, heat and orange light. Consequently, [the policyholder] may recover under the "ensuing fire" exception to the exclusions, as the policy should be interpreted in a manner favorable to the insured.

Bruce Oakley, Inc., 243 F.3d at 1028-29.

As reflected in Bruce Oakley, Inc., in order to recover under an "ensuing" loss clause, a policyholder must be able to demonstrate a separate, covered and "ensuing" cause of its loss. For example, in Myers v. State Farm Fire and Cas. Co., No. C8-02-62, 2002 WL 154673 (Minn. Ct. App. July 16, 2002), a Minnesota appellate court rejected a policyholder's claim for coverage under a "resulting" loss clause due to an inability to demonstrate a separate covered and "ensuing" cause of loss:

The [policyholders] home lost its value because it was contaminated by mold or fungus. The loss of value was to the property. There was no separate, covered cause, like the a fire that burst suddenly, that caused the loss of value to the [policyholders'] home or the damage to their personal property. To interpret the resulting-loss clause as urged by the [policyholders] would negate the policy exclusions.

Myers, 2002 WL 154673 at *6 (emphasis added).

By the same token, coverage will be denied where the covered cause of loss precedes the excluded cause of loss. See Feiss v. State Farm Lloyds, No. Civ.A. H-02-1912, 2003 WL 21659408 (S.D. Tex. June 4, 2003). In ruling in favor of the insurer, the Feiss court concluded that the "ensuing loss" exception was inapplicable due to the fact that the arguably covered cause of loss (i.e., water damage) preceded the excluded mold loss. Feiss, 2003 WL 21659408 at *8.

IV. Anti-Concurrent Causation Policy Language

In response to what it perceived as pro-policyholder decisions under the efficient proximate cause doctrine, the insurance industry promulgated anti-concurrent causation language. A representative anti-concurrent causation clause provides: “Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.” See Cooper v. American Family Mut. Ins. Co., 184 F.Supp.2d 960, 962 (D. Ariz. 2002). Thus, these clauses purport to circumvent the efficient proximate cause analysis by providing that a loss is excluded if an excluded cause contributes in any way to the loss.

Many jurisdictions that follow the efficient proximate cause doctrine permit parties to “contract around” it through anti-concurrent causation language. See, e.g., TNT Speed & Sport Center, Inc. v. American States Ins. Co., 114 F.3d 731, 733 (W.D. Okla. 2003); Preferred Mut. Ins. Co., v. Meggison, 53 F.Supp.2d 139, 142 (D. Mass. 1999); Assurance Co. Am., Inc. v. Jay-Mar, Inc., 38 F.Supp.2d 349, 354 (D. N.J. 1999). Several jurisdictions, however, have refused to permit parties this circumvention of the efficient proximate cause doctrine. See Murray v. State Farm Fire and Cas. Co., 509 S.E.2d 1, 15 (W. Va. 1998) (attempt to circumvent the efficient proximate cause doctrine conflicts with the reasonable expectation of the parties and is unenforceable); Howell v. State Farm Fire and Cas. Co., 218 Cal. Rptr. 708, 711-12 (Cal. Ct. App. 1990) (anti-concurrent causation language violates the statutory and judicial law of California); Safeco Ins. Co. of Am. v. Hirschman, 773 P.2d 413, 414 (Wash. 1989) (parties may not contract around the efficient proximate cause doctrine).

Moreover, at least one court has rejected an insurer’s attempt to circumvent the efficient proximate cause doctrine where the pertinent policy language did not explicitly accomplish that result. See Kelly, 281 F. Supp.2d at 1299-1300 (exclusion for losses ““consisting of, or caused

directly or indirectly by: . . . mold” not sufficient to circumvent the efficient proximate cause doctrine.)

V. Conclusion

So, notwithstanding the exclusion for mold, Smith may yet be covered for his mold-related loss. If the courts in his jurisdiction apply the efficient proximate cause doctrine and it is determined that the efficient proximate of his loss is a non-excluded peril, coverage should be available. Thus, in this case, as is so often the case, the first impression regarding coverage was deceiving. As with all insurance coverage disputes, any final analysis should be made only after a thorough review of the operative policy language and controlling law.