

SPECIAL REPORT

ANTI-CONCURRENT CAUSATION CLAUSES IN MICHIGAN

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Under Michigan law a loss is not covered when it is concurrently caused by the combination of a covered cause and an excluded cause. Regardless of the number or sequence of covered perils that might contribute to a loss, insurance companies can deny all coverage as long as one of those perils was excluded. This principle was most recently illustrated by the Sixth Circuit in *Iroquois on the Beach, Inc v General Star Indemnity Company*.¹

The Iroquois Hotel is a forty-six-bed hotel and dining room located on historic Mackinac Island. In the summer of 2005, the Iroquois hired a contractor to make certain repairs to the windows and exterior surfaces. During the repairs, the building was inspected by both an architect and a structural engineer. On November 11, 2005, the structural engineer issued a report which identified decay in several areas of the building and expressed a concern about the potential for collapse.

The architect explained that water was entering the building envelope because of an insufficient steel frame that failed to protect the building in windy conditions. He suggested that the damage occurred gradually over the course of several years. The repairs associated with the structural damage totaled between \$1.5 and \$1.6 million.

The Iroquois sought coverage under the terms of its property insurance policy through General Star Insurance Company (“General Star”). General Star promptly denied the claim on the basis of five different exclusions but relying in large part on the exclusion for damage arising out of “...continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.”

Subsequently, the Iroquois filed a lawsuit against General Star alleging that coverage was wrongfully denied. The hotel argued that the continuous seepage exclusion did not apply to this loss because windstorms, a covered loss under the policy, initiated the sequence of events that resulted in the loss. Further, the Iroquois argued that the continuous seepage exclusion did not contain an “anti-concurrent or anti-sequential” causation clause where as other exclusions did.

An anti-concurrent causation clause operates to exclude coverage regardless of any other cause or event that contributes concurrently or in any sequence to the loss. Most recently, we have seen anti-concurrent causation provisions applied in the aftermath of Hurricane Katrina. In those cases, most of the property damage resulted from flooding rather than wind. Subsequently, many property owners turned to their homeowners insurance for relief, only to find that coverage did not apply on the basis of the flood exclusion. The policyholders, on the other hand, argued that coverage should apply since wind was a covered peril which occurred prior to the flooding. Since most policies included an anti-concurrent causation provision, most claims were denied.

In *Iroquois*, the policyholders argued that the omission of an anti-concurrent causation clause within the continuous seepage exclusion indicated that the insurer intended to provide coverage where the loss was caused by wind if it was the first or last step leading to the seepage or leakage of water.² The federal district court disagreed and granted General Star’s motion for summary judgment -- relying on the continuous seepage exclusion. The Iroquois appealed.

In its opinion, the federal court of appeals pointed out that many jurisdictions have adopted the doctrine of “efficient proximate cause,” or what Michigan courts call the theory of “dual or concurrent causation.”³ Under this doctrine, “[i]f the cause which is determined to have set the chain of events in motion, the efficient proximate cause, is covered under the terms of the policy, the loss will likewise be covered.”⁴ Jurisdictions that have adopted this doctrine generally allow parties to contract out of its application by adopting an anti-concurrent, anti-sequential clause.⁵ Said another way, in jurisdictions where the efficient proximate cause doctrine has been adopted, courts will ignore policy exclusions as long as loss was primarily caused by a covered cause of loss. On the other hand, if the

policy included an anti-concurrent causation provision, courts will enforce all exclusions as written, regardless of the primary covered cause of loss.

The Iroquois argued that the court should apply the efficient-proximate cause doctrine because there were two causes, one of which was excluded (seepage of water) and one of which was covered (windstorms), and the covered cause (windstorms) set in motion the chain of events leading to the loss.

The Supreme Court of Michigan has expressly declined to adopt this doctrine, explaining that it found no reason “to introduce a legal theory or doctrine that departs from the literal interpretation of an unambiguous insurance contract.”⁶

Michigan courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.⁷ Moreover, “the language of the parties’ contract is the best way to determine what the parties intended.”⁸

The court also pointed out that in Michigan the policy need not contain an anti-concurrent causation provision in order to avoid the doctrine of efficient proximate cause. If Michigan followed the doctrine of efficient proximate cause, then the adoption of an anti-concurrent causation clause would allow the parties to contract out of the application of that doctrine.⁹ But since Michigan does not follow the doctrine, the addition of such a clause would be surplusage.¹⁰ Consequently, the absence of an anti-concurrent causation clause does nothing to alter Michigan’s default rule that a loss is not covered when it is caused by a combination of a covered risk and an excluded risk.

In conclusion, since Michigan has not adopted the doctrine of efficient proximate cause, a loss is not covered when it is concurrently caused by the combination of a covered cause and an excluded cause, regardless of whether an anti-concurrent causation clause exists within the policy.

¹ 550 F3d 585 (Mich 2008).

² *Simonetti v Selective Ins Co*, 859 A2d 694 (NJ Super Ct. App Div 2004).

³ *Iroquois* at 588.

⁴ *Iroquois* at 558, quoting Couch on Insurance § 101:45 (3d ed. 2008).

⁵ *Id.*

⁶ *Vanguard Ins Co v Clarke*, 438 Mich 463, 475; 475 NW2d 48 (1991), overruled in part on other grounds by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003).

⁷ *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003).

⁸ *Id* at 476.

⁹ *Id* at 476.

¹⁰ *Id*.

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