

INSURANCE LAW

Advantageous Ambiguity? Wind-Water Debate Unresolved in Louisiana

by Eric Michael Liddick

As Louisiana embarks upon another hurricane season, insurers and insureds alike may be forced to contemplate the ambiguous status of Louisiana law as it pertains to a critical insurance policy provision: the anti-concurrent causes clause (ACC clause). Louisiana residents became all too familiar with this provision after the devastating hurricanes of 2005, when they argued with their homeowners insurers about whether damage to their homes was caused by wind (covered) or flood (not covered).

ACC clauses bar coverage when an excluded peril contributes to the insured's loss, either concurrently with the covered peril, or before or after the covered peril. The ACC clause was designed by insurers to avoid the "efficient proximate cause" doctrine. Under the efficient proximate cause doctrine, when a loss was caused by both a covered peril and an excluded peril, the entire loss was covered if the court determined that the covered peril was the dominant or efficient cause of the loss. This in turn entailed the often difficult and expensive process of determining how and in what sequence a loss was caused—the wind versus water fight.

The advent of the ACC clause appeared initially to introduce certainty, even if at the expense of coverage. But in Louisiana, the proper interpretation of ACC clauses remains obscure, because the Louisiana Supreme Court has not addressed its application.

In the federal courts, the Fifth Cir-

cuit developed a significant body of case law on this issue after Hurricane Katrina. Ultimately, the Fifth Circuit—first predicting Mississippi law and later Louisiana law—held that the ACC clause was not ambiguous and enforced it literally. See *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007) (applying Mississippi law); *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007) (applying Mississippi law); *Bilbe v. Belsom*, 530 F.3d 314 (5th Cir. 2008) (applying Louisiana law). In most cases this meant no coverage.

Before the Fifth Circuit's decisions, neither the Mississippi Supreme Court nor the Louisiana Supreme Court had addressed application of ACC clauses. But, in 2009, the Mississippi Supreme Court decided *Corban v. United Services Automobile Association*—a decision that proved the Fifth Circuit's Erie-guess was wrong, at least about Mississippi law. 20 So. 3d 601 (Miss. 2009).

In *Corban*, the Mississippi Supreme Court settled the application of ACC clauses under Mississippi law. The Court fixed on the distinction between "loss" and "damage," noting that once an insured suffers a "loss," the right to indemnification vests, regardless of whether an excluded peril ensues immediately. That is, once a loss occurs, it cannot be undone. Thus, the law in Mississippi as clarified in *Corban* requires that unless the covered and excluded perils act truly "concurrently" (at the same exact time), the ACC

clause does not apply and the insured must be compensated for the loss attributable to the covered peril.

The result in Mississippi raises the question: is the Fifth Circuit's Erie-guess about the status of Louisiana law also incorrect? The question remains unanswered. Until the Louisiana Supreme Court determines the proper application of ACC clauses, the Fifth Circuit's pro-insurer application will remain the rule governing federal district courts when they apply Louisiana law. The Fifth Circuit's application of ACC clauses benefits insurers, permitting a denial of coverage anytime a loss can be attributed to both a covered and excluded peril, regardless of sequence. Accordingly, insurers may decide not to push the issue in state courts, satisfied with their chances when they can remove cases to federal court. Insureds, on the other hand, would benefit from an adoption of Mississippi's position. *Corban* might just supply the impetus necessary to push the Louisiana Supreme Court for a decision.

Until the Louisiana Supreme Court speaks squarely on the ACC clause, ambiguity persists. And with another hurricane season upon us, we might find ourselves without a beacon in the storm. ■

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