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Who is responsible for the reduction in coverage of property insurance policies being marketed?

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Over the past two decades, policyholders have seen the once broad coverage under their "all risk" property policies systematically reduced and curtailed by a combination of factors some driven by the insurance industry itself and others by the composition of the judiciary and all facilitated by the indifference of the insurance regulators.

So who are the culprits who are responsible for this reduction in coverage of the property insurance policies currently being marketed? First and foremost is the Insurance Services Office or ISO. The ISO is headquartered in Jersey City, New Jersey and, among other things, is responsible for developing the policy forms that find their way into the marketplace through the insurance companies that subscribe to the ISO's services. These policy forms are the benchmark for coverage in the industry and even though some insurers may use their own forms, they inevitably are premised on their ISO counterpart.

The ISO is responsive to its subscribers who are insurance companies and adjust and tinker with the wording of the forms if their subscribers complain that the forms are not being interpreted by the courts according to their intention or that courts are extending coverage for certain events beyond that which the insurers contemplated. The evolution of the anti-concurrent causation language is a case in point.

Soon after the introduction of "all risk" property policies, situations arose where there were both covered and uncovered perils interacting in a causation chain and the courts were faced with developing rules for sorting out those types of factual situations. The California courts were the leaders in untangling these complexities. In California, the courts initially applied an "efficient, proximate cause" test to define coverage. So, if the efficient, proximate cause of the loss or dominant cause of the loss was a covered peril, the policy had to respond. Sabella v. Wisler, 59 Cal.2d 21, 377 P.2d 889 (1963).

Under a line of cases after Sabella, the California courts moved off the efficient, proximate cause analysis to adopt a concurrent cause approach whereby, if a loss occurs through a concurrence of covered and uncovered risks, the insurer is liable as long as one of the covered risks is a proximate cause. Cf. State Farm Mutual Automobile Insurance Co. v. Partridge, 10 Cal.3d 94, 514 P.2d 123 (1973); Safeco Insurance Co. of America v. Guyton, 692 F.2d 551 (9th Cir. 1982).

However in Garvey v. State Farm Fire & Casualty Co., 48 Cal. 3d 395, 770 P. 2d 704 (1989), the Supreme Court of California limited the doctrine of concurrent causation to liability cases and the Sabella rule of efficient, proximate cause was to determine the outcome in first party property cases.

Under Garvey, in first party property losses, coverage is determined by isolating the "predominating" cause from the other concurrent causes. The insurance industry still bristled at this concept and argued that it would nullify all the exclusions in the policy for one could find a covered

peril in most every causation chain and juries would inevitably label it the "predominating" cause to yield coverage.

As a response to the doctrine of concurrent causation, the insurance industry and the ISO developed the anti-concurrent language which, in effect, said that if two or more events contribute to a loss and one is covered and one is uncovered, the policy does not respond. Some states like California and Washington have rejected the anti-concurrent causation language as being against public policy as expressed in statutes but most states have accepted it. See Howell v. State Farm Fire and Casualty Co., 218 Cal. App. 3d 1446, 267 Cal. Rptr. 708 (1990).

Thus, the ISO has used the anti-causation language to introduce excluded perils like flood and certain types of water losses even though other causes may be complicit or proximate in causing damage but yet, the entire loss is excepted because of the wording of the anti-concurrent language.

Currently, the ISO wording reads: "We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Form CP 1030 04 02.

The impact of the anti-concurrent language can be disastrous as we can witness from the Hurricane Katrina cases where property is inundated by flood, an excluded peril, and a covered windstorm at the same time and the Louisiana and Mississippi courts are wrestling with application of the literal language which would exclude the entire loss.

Fortunately, at least the Mississippi courts have been very selective in applying the anti-concurrent language.

But now, the insurers are putting in more exclusions that are prefaced by the anti-concurrent causation language such as "rust and corrosion" and "wear and tear". This will severely contract insurance policy coverage. So beware!!!

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