Default Rules for Concurrent Causation in Insurance Contracts

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A Problems with Concurrent Causation

How does insurance respond…

1 …when a loss is caused by two or more possible causes, if one cause is covered and one excluded by the policy?

Example A. Serial Causation

- two or more causes occurring in sequence, cumulatively, to cause the loss
- independent, individually sufficient causes
- each cause, acting on its own, will cause some portion of the loss (but not the total loss)
- most often first party property insurance

wind + rain + hail =

Example B. Parallel Causation

- two or more causes occurring at the same time, together
- interdependent, individually insufficient causes
- without both causes acting together, the loss could not have happened
- most often third party liability (tort) insurance

negligent worksite cleanup (sign base improperly placed) + negligent driving (sign base not secure) =

2 …if two or more overlapping insurance policies may provide coverage, but one excludes coverage and one grants coverage for a particular cause in a concurrently caused loss?

Automobile Policy Coverage Clause

indemnifies the Insured for bodily injury or property damage arising out of the ownership, use, or operation of an automobile

Commercial General Liability Policy

Coverage Clause: This Policy pays for bodily injury or property damage to which the Insured becomes legally obligated to pay.

Exclusion: This Insurance does not apply to…bodily injury or property damage arising out of the ownership, use or operation of an automobile

Problem: Which insurance policy responds to a loss caused by parallel concurrent causes, like the tort in Example B. above:

- auto policy (covers "auto" negligence only)?
- commercial policy (excludes "auto" negligence)?
- both policies?
- neither policy?

B Possible Approaches to Concurrent Causation

1. Find the Dominant Cause

Process:
- search to find the dominant, proximate, or effective cause
- then ask if that cause is covered or excluded

Where Used:
- majority of US states
- Canada prior to 2001
- Britain (*Wayne Tank* (1973))

Benefits:
- perception that insurer who has agreed to underwrite the main causative risk is saddled with cost of coverage

Problems:
- no consistency: what is the dominant cause? answers differ
- impossible to find dominant cause in parallel concurrent cause situation as all causes necessary for loss
- very high information and administrative costs
- tortured litigation
- error costs extremely high - all-or-nothing approach to insurer
- creates gaps in coverage that no product on market fills

2. Liberal Approach

Process:
- if one cause in causal chain is covered, entire loss is covered

Where Used:
- minority of US states
- Canada (*Derksen* (2001))

Benefits:
- low information and administrative costs to apply
- predictable default rule
- no complexity costs
- avoids gaps in coverage

Problems:
- potential to frustrate exclusionary language
- too pro-coverage: covers losses that may be clearly excluded

3. Conservative Approach

Process:
- if one cause in causal chain is excluded, entire loss is excluded, even if other causes may be covered

Where Used:
- minority of US states
- Britain prior to 1973 (*Leyland Shipping* (1918))

Benefits:
- low information and administrative costs to apply
- predictable default rule
- no complexity costs

Problems:
- creates gaps in coverage that no product on market fills
- denies coverage in all parallel causation situations
- potential to frustrate coverage language

4. Apportionment

Process:
- apportion percentage responsibility to each cause in chain
- covered causes only indemnified for percentage responsibility
- i.e. 10% rain, 20% hail, 70% wind, and if rain only covered cause, policy pays 10% of loss

Where Used:
- proposed by Richard Fierce (not yet applied in court)
- similar to comparative negligence analysis

Benefits:
- acknowledges coverage and exclusionary contractual language
- avoids complete gaps in coverage

Problems:
- some complexity costs for serial causation
- moderate information and administrative costs
- some unpredictability for serial causation
- inapplicable/a draw for parallel causation, as question often too costly/impossible to answer

C Efficient Solution to Concurrent Causation

- separate default rules for serial and parallel concurrent causation

A. Serial Causation

- use apportionment:
  - percentage contributions for each cause in the chain
  - low information and administrative costs
  - first party property policies have surgically tailored specific coverages and exclusions
  - no gaps in coverage, particularly for 'all risks' property insurance
  - most fair result:
    - proportional causation based on proportion of risk underwritten by insurer

B. Parallel Causation

- use liberal approach:
  - inefficient to proportionally divide causes because:
    - multiple causes necessary for loss to occur
    - information and administrative costs too high
    - liability is as wide as tort, unlike property policies
  - avoids inefficiency of dominant cause:
    - simple, predictable default rule
    - avoids complexity costs for assessing multiple causes
  - avoids tortured litigation costs
  - creates no gaps in coverage
  - most fair result:
    - insured's expectation of coverage acknowledged by fact that insurer has to pay for covered cause

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