

## 'Anti-Concurrent Cause' Won't Work In Ariz. Fire Policies

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Anti-concurrent cause (ACC) provisions in first-party property insurance policies allow the parties to contract around the efficient proximate cause rule and exclude a loss caused concurrently by an excluded and a covered peril regardless of which is the predominate or most efficient cause. The majority of jurisdictions, with the notable exception of California, enforce ACC provisions. The United States Court of Appeals for the Ninth Circuit, however, recently negated the enforceability of an ACC provision under Arizona law notwithstanding that Arizona has not adopted the efficient proximate cause rule. The court determined an ACC clause is inconsistent with the Arizona Standard Fire Policy.

### Background

The efficient proximate cause rule provides coverage if the predominate cause of loss was a covered peril, even if other excluded perils also contributed to bringing about the loss. Some states, such as Arizona, have not adopted the efficient proximate cause rule and allow an insurer to limit its liability in the contract. In states that follow the efficient proximate cause rule, an ACC clause alters the rule and excludes loss caused when excluded and covered perils combine to produce a loss, regardless of which was predominate.

In *Stankova v. Metropolitan Property & Casualty Insurance Co.*,<sup>[1]</sup> the Ninth Circuit addressed the enforceability of an ACC clause under Arizona law. In *Stankova*, the insured suffered property loss following a massive wildfire in Northern Arizona in the summer of 2011. The fire destroyed the insured's detached garage and consumed vegetation on the hillside, but left the insured's residence unscathed. About a month later, however, flooding and mudslides destroyed the residence. The insured presented evidence that the loss of vegetation from the fire allowed the water to cause the mudslide, which, in turn, destroyed the house.

The property was insured by a policy issued by Metropolitan. The policy excluded damage caused by flood and excluded earth movement, including mudslides. The insurer accepted coverage for the detached garage as covered fire damage, but denied coverage for the house subsequently destroyed by the mudslide. The policy contained an ACC provision:

We do not insure under any Section I coverage for any loss which would not have happened in the absence of one or more of the following excluded events. We do not insure for any such loss regardless of: (a) the cause of the excluded event; (b) other causes of the loss; or (c) whether such causes acted at the same time or in any other sequence with the excluded event to produce or contribute to the loss.

The district court granted summary judgment to the insurer based on the ACC provision and noted Arizona had not adopted the efficient proximate cause doctrine. The Ninth Circuit reversed, reasoning that under Arizona law all fire insurance policies must conform to New York's standard fire policy of 1943.[2] The court emphasized the New York fire policy as adopted in Arizona provides coverage against all "direct" loss by fire.[3] The Ninth Circuit specifically held that the ACC provision, as it related to loss caused by the peril of fire, is inconsistent with Arizona's standard fire insurance policy and is therefore unenforceable.

The court distinguished *Millar v. State Farm Fire & Casualty Co.*,[4] where the Arizona court of appeals explained that Arizona had never adopted the efficient proximate cause rule. The *Millar* court noted that insurers were free to limit liability by contract unless such limitation would be inconsistent with public policy. In *Millar*, the insured suffered a loss when the earth beneath the insured home collapsed because of water that had escaped from a broken sprinkler system. Even though the policy contained an ACC clause and an exclusion for earth movement, the insured argued that the efficient proximate cause of the loss was the covered peril of water damage. The Arizona court disagreed and noted that ACC clauses were valid and enforceable in Arizona.

Although ACC clauses are valid in Arizona, the Ninth Circuit did not consider *Millar* as dispositive in *Stankova*. Instead, the court relied on Arizona's adoption of the New York standard fire insurance policy. In *Stankova*, the Ninth Circuit noted that the standard fire insurance policy covers all "direct" loss caused by fire and the court looked to New York case law to define the word "direct." Using both New York and Arizona authority, the Ninth Circuit defined "direct" as any loss that occurs in an unbroken sequence and connection between the covered peril and the property loss. According to New York case law, the standard fire insurance policy is not limited to coverage for fire damage only, but it encompasses all losses that are directly, proximately or immediately caused by a fire or combustion.[5]

The court held that a reasonable jury could conclude that the fire directly caused the damage to the house. According to the Ninth Circuit, the insured presented some evidence that no mudslides had previously occurred on the property, that deforestation and erosion can lead to mudslides and that the rainfall was not unusually heavy in 2011. As a result, the court reversed the trial court's grant of summary judgment and remanded for further proceedings.

## **Conclusion**

Only four jurisdictions specifically refuse to enforce ACC clauses. California and North Dakota have done so by statute and Washington and West Virginia have done so through case law.[6] However, the Ninth Circuit refused to enforce an ACC provision where the loss is caused directly by fire.

The Stankova exception is narrow in that fire insurance policies are normally named-peril policies and only cover specifically enumerated causes of loss. For example, New York’s standard fire policy only provides coverage for loss caused by fire and lightning. The Stankova decision is limited to loss caused by the specific peril of fire and an ACC clause will be enforced in Arizona for non-fire losses. It should be noted that 25 jurisdictions have adopted some form of the standard fire insurance policy. Thus, the Ninth Circuit’s reasoning may impact the law in other jurisdictions.

While ACC clauses are enforceable in a vast number of policies and jurisdictions, Stankova has brought the enforceability of such clauses into question for fire losses in Arizona and in states that have adopted the New York standard policy. Stankova might preclude the enforceability of ACC provisions in Arizona under the standard fire insurance policy where fire or lightning produces property loss in a direct or unbroken sequence of events.

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[1] No. 12-17575, 2015 U.S. App. LEXIS 8935 (9th Cir. May 29, 2015).

[2] Ariz. Rev. Stat. § 20-1503.

[3] Id.

[4] 804 P.2d 822, 826 (Ariz. Ct. App. 1990).

[5] Stankova v. Metropolitan Property & Casualty Insurance Co., No. 12-17575, 2015 U.S. App. LEXIS 8935, at \*10 (9th Cir. May 29, 2015).

[6] Leonard v. Nationwide Mutual Insurance Co., 499 F.3d 419, 434-45 (5th Cir. 2007).