

ILLINOIS APPELLATE COURT ISSUES FAVORABLE RULING ON ANTI-CONCURRENT CAUSE LANGUAGE

BOZEK V. ERIE INSURANCE GROUP

2015 IL App (2d) 150155

On December 17, 2015 the Illinois Second District Appellate Court handed down a ruling applying Anti-Concurrent Causation (ACC) language in a first-party property policy to preclude coverage as a matter of law. The decision is the first published Illinois appellate court ruling that squarely addresses application of ACC language, and the Court's decision heavily favors the insurance industry.

The case of *Bozek v. Erie Insurance Group*, 2015 IL App (2d) 150155, involved damage to the insureds' empty swimming pool following several days of heavy rains. The rains created substantial hydrostatic pressure in the soils. Pressure relief valves in the pool system, designed to counteract the uplift forces caused by the pressure, failed to work properly. As a result, the pool itself uplifted causing a total loss. The hydrostatic pressure in the soils also caused damage to the concrete pad surrounding the pool.

The insureds tendered the loss to Erie Insurance, their homeowners insurer. Erie retained Engineering Systems, Inc. (ESI) who concluded "the pool lifted upward because the ground water pressure pushed the pool upward because the pressure relief did not function properly." Erie then denied coverage, citing exclusions barring coverage for:

- loss by "pressure or weight of water or ice, whether driven by wind or not, to a ... swimming pool";
- loss by mechanical breakdown; and,
- loss "by water damage, meaning: water below the surface on the ground. This includes water which exerts pressure on, or flows seeps or leaks through any part of a building or other structure, including sidewalks, driveways, foundations, pavements, patios, swimming pools or decks."

Critically, all of the foregoing exclusions were prefaced by the following ACC language: "We do not pay for loss resulting directly or indirectly from any of the following, even if other events or happenings contributed concurrently, or in sequence, to the loss".

The insureds filed a declaratory judgment lawsuit in the Circuit Court of McHenry County, Illinois against Erie, and the parties ultimately filed cross motions for summary judgment. The insureds conceded that loss caused by "pressure...of water" was excluded, but argued that Erie had not established that loss by failure of the pressure relief valves was an excluded "mechanical breakdown." As such, they argued that the failure of the valve (a covered event) preceded the increase in pressure (an excluded event). In their view, the phrase "in sequence to" in the ACC provision meant "subsequent to," such that the ACC language would preclude coverage only where the excluded cause precedes the covered cause. The insureds argued that, because the

excluded hydrostatic pressure came after the failure of the valve, the ACC language did not apply and the claim was covered.

Erie argued that “in sequence to” meant “one after the other” and that the ACC language did not specify in which order the excluded cause must occur. Erie also argued that the ACC language precludes coverage where an excluded cause happened in any sequence within the causation chain.

The Circuit Court adopted Erie’s interpretation of the ACC language and rendered judgment in Erie’s favor. The insureds appealed to the Second District Appellate Court.

The Appellate Court affirmed, finding that the ACC clause barred coverage as a matter of law where the uplift of the pool resulted from the “convergence of two causes”, at least one of which was excluded, that “contributed concurrently” to the loss.

In reaching its decision, the Appellate Court first discussed the history of causation decisions in the first party property context and the varying causation rules that U.S. jurisdictions have implemented. It then noted that ACC clauses were employed in response to concurrent-causation controversies and were intended to avoid application of rules that coverage applies whenever a covered cause is an “efficient” or “dominant” cause of the loss.

The Appellate Court found that a concurrent cause or event exists when two perils converge at the same point in time and operating in conjunction. The Court focused on the point in time when the cause contributes to the loss, not the point in time when the cause of loss comes into existence. For purposes of the insureds’ claim, the Court concluded that, because uplifting of the pool took place due to “concurrent” interaction of the hydrostatic pressure and the failure of the relief valves, the loss was indeed excluded.

Lastly, after examining two Mississippi Supreme Court ACC cases arising out of Hurricane Katrina, the Appellate Court noted that the two causes at issue, hydrostatic pressure and relief valve failure, did not lead to two separate losses as in the Mississippi cases. Rather, the sole loss in the insureds’ claim was the uplifting of the pool and damage to the pool’s concrete pad, both of which were caused by a convergence of the hydrostatic pressure and failure of the relief valve. The Appellate Court concluded that adoption of the insureds’ argument would be an ongoing implementation of Illinois’ “efficient proximate cause” doctrine, which the ACC clause was designed to avoid.

In a last ditch effort, the insureds argued that ACC clauses violated Illinois public policy and were unenforceable. The Appellate Court first noted that only a minority of U.S. courts had adopted that argument but ultimately declined to rule on the issue because the insureds had waived the argument by failing adequately to brief it. The tenor of the Court’s discussion, however, suggested it was not inclined to endorse the public policy argument.

In summary, the Appellate Court’s decision is a well-reasoned, thorough discussion of the ACC clause and should serve as persuasive precedent to other courts applying Illinois law. This decision now provides

insurers with appellate court precedent in Illinois to support a broad application of ACC language where the evidence adduced during the adjustment of the loss establishes that the actual loss the Insured suffered was caused by the convergence of multiple causative events in any sequence, at least one of which is an excluded cause.

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