

Anti-Concurrent Causation Endorsements in CGL Insurance Policies: A Word of Caution

Avoid possible declination of coverage for construction defect claims

WHILE I HAVE NOT performed exhaustive research into the origin of anti-concurrent causation (ACC) endorsements on insurance policies, or how or when they migrated from first-party property policies to commercial general liability (CGL) policies, they have done so. The result for Colorado's construction professionals may rear its ugly head as an unwelcome and surprising outright declination of coverage for construction defect claims.

ACC endorsements state that if there are two causes of damage, and one of which is covered by a policy and one of which is not, the carrier can invoke the ACC endorsement to disclaim coverage for all of the damage. An exemplar ACC endorsement is ISO Form CG 21 67, entitled "Fungi or Bacteria Exclusion." The pertinent language of the endorsement reads:

This insurance does not apply to: "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.



Consider this example: A roof leak in a home, caused by a construction defect, results in damage to attic insulation, drywall, and the owner's personal belongings. As a result of the leak, mold growth also forms on the wetted construction materials and owner's belongings.

Without an ACC endorsement, the carrier may disclaim coverage for the cost of repairing the defective work, pursuant to a "your work" exclusion, and the cost of remediating the mold itself, pursuant to a typical mold exclusion, but would likely cover the cost of repairing or replacing the resultant damage to the construction materials and owner's belongings.

With an ACC endorsement, the carrier may deny coverage for all of the damage because it would not have occurred, at least in part, but for the presence of mold. In other words, since one of the causes of damage is not covered, the carrier may disclaim coverage for the entire claim.

While courts in a handful of states have rendered ACC endorsements void as against public policy, Colorado courts have not done so. Therefore, you may want to discuss this topic with your insurance producer to determine if your policy contains an ACC endorsement and whether it is feasible to obtain CGL insurance which does not contain an ACC endorsement. ○



Photo: Forestpath | Dreamstime.com