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A Complicated Case: Key Points of the Concurrent Proximate Cause Rule

By Kenneth Goleaner and Katrina Smeltzer



Complicated insurance coverage questions arise when a loss results from multiple alleged causes, one of which may be covered and the other clearly excluded. Enter the concurrent proximate cause rule, where an injury with two concurrent proximate causes—one covered and another excluded under an insurance policy—is construed to provide coverage. Missouri is among several states adopting this rule, along with Iowa, Minnesota, New Jersey, Tennessee, Texas, Wisconsin, Vermont, and others.

The concurrent proximate cause rule is separate from the efficient proximate cause rule, which is predominantly a first-party insurance doctrine and permits recovery for a loss caused by a combination of a covered cause and an excluded cause if the covered cause sets the other cause(s) in motion. States such as Arkansas, Massachusetts, Nevada, Oklahoma, South Dakota, and Washington have adopted the efficient proximate cause rule. However, the efficient proximate cause doctrine—at least in Missouri—can be contracted around with appropriate policy language.

In contrast, the concurrent proximate cause rule typically involves third-party liability claims with an injury resulting from a cause falling within a policy exclusion, most often the “assault and battery,” “expected or intended,” “abuse or molestation,” or “auto” exclusions. As an end run around the apparent absence of coverage, savvy plaintiffs’ attorneys frame the claim against the insured—or sometimes against a different insured—as one for negligence, such as for a failure to provide adequate security, negligent supervision, or negligent training. One such example in Missouri involved a shooting outside a nightclub into a crowd of teenagers that struck and killed a sixteen-year-old teenager who had been waiting outside the club to attend a party. The claim found to be covered against the insured nightclub, however, was for negligent failure to provide adequate security and crowd control, not assault and

battery. See *Adams v. Certain Underwriters at Lloyd’s of London*, 589 S.W.3d 15 (Mo. App. E.D. 2019).

In cases involving alleged concurrent causes, courts must analyze the relationship between the loss (the shooting death), the excluded cause (the battery and assault), and the potentially covered cause (the negligent failure to provide adequate security). Some of these courts will broadly apply the concurrent cause rule to hold that as long as the covered cause is a direct cause of the loss, it is a covered loss. Others, such as Missouri, have limited application of the rule by requiring that the concurring causes be independent and distinct from each other for the rule to apply.

In Missouri, recent cases have focused on whether the covered cause is dependent on the excluded cause for success.

But even with this guidance, application can be difficult as courts have labored to articulate a precise formulation for a test. Compare *Adams*, 589 S.W.3d at 33–34 (holding that the negligent failure to provide security outside a nightclub before a party was an independent and distinct cause of the claimant’s son’s death from the assault and battery because an injury was foreseeable from the negligent failure to provide security) with *Safeco Ins. Co. of America v. Yount*, 2020 WL 6445840, Case No. 4:19-cv-00890 (E.D. Mo., Nov. 3, 2020) (slip copy) (holding that the claimant could not state independent and distinct causes of gratuitous undertaking or negligent failure to timely contact emergency assistance, which were covered causes, from the excluded possession and distribution of fentanyl, which was an excluded cause, leading to an overdose).

When faced with potentially covered and excluded causes in the same action—no matter how they are titled—the practitioner should be cautious. Under the concurrent proximate cause rule, a claim that at first glance appears to be excluded may quickly pivot into a covered claim. This can be particularly true where pleadings are subsequently amended to add the potentially covered, concurrent cause.

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And while policy language can limit the effect of this doctrine (for example, use of language “in whole or in part” in an exclusion or excluding supervision or entrustment claims “arising out of” the excluded cause), application of this rule has proved to be unpredictable and inconsistent.

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