

1988

# Village Inn Apartments and Village Partners-Cedar City v. State Farm Fire and Casualty Company : Brief of Respondent

Utah Court of Appeals

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## Recommended Citation

Brief of Respondent, *Village Inn Apartments v. State Farm Fire and Casualty Company*, No. 880632 (Utah Court of Appeals, 1988).  
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# BRIEF

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DOCKET NO. 88 0632

APR 20 1989

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IN THE UTAH COURT OF APPEALS

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VILLAGE INN APARTMENTS and	)	
VILLAGE PARTNERS-CEDAR CITY,	)	
	)	Case No. 880632-CA
Plaintiffs-Appellants,	)	
	)	
vs.	)	
	)	
STATE FARM FIRE AND CASUALTY	)	Priority No. 14.b.
COMPANY,	)	
	)	
Defendant-Respondent.	)	

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BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE RICHARD MOFFAT, DISTRICT JUDGE

---

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### JURISDICTION

Jurisdiction is conferred on the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2a-3(2)(j) and Rule 4A of the Rules of the Utah Court of Appeals.

### NATURE OF PROCEEDINGS

This is a lawsuit for declaratory relief, breach of contract, and bad faith. The lower court granted defendant's motion for summary judgment, ruling that plaintiffs' loss was excluded by the earth movement provision of defendant's policy. (At the hearing, plaintiffs stipulated that their claim for bad faith could be dismissed with prejudice (R. 200).)

### STATEMENT OF THE ISSUES

Defendant accepts plaintiffs' statement of the issue.

### STATEMENT OF THE CASE

Defendant accepts plaintiffs' statement of the case.

### SUMMARY OF ARGUMENTS

Plaintiffs argue that the earth movement exclusion is limited to acts of God or natural phenomena. However, State

Farm's policy plainly states that earth movement is excluded regardless of its cause. In other words, earth movement need not be caused by an act of God in order to be excluded. The policy states:

The Company does not insure for loss which would not have occurred in the absence of one or more of the following excluded events. The Company does not insure for such loss regardless of: a) the cause of the excluded event . . .

. . . . .

- (1) earth movement, whether combined with water or not . . .

See page 6 of the policy, a copy of which is attached hereto in the addendum. State Farm inserted this language into its policies in 1983 in order to make certain that excluded events such as earth movement would not result in coverage even if the loss was attributable to human activity. Every court that has had occasion to consider this new policy language since then has found it to be valid and enforceable. Earth movement is excluded regardless of its cause.

#### ARGUMENT

##### I.

Earth movement is excluded regardless of its cause.

Plaintiffs have failed to quote the critical policy language in their brief. This language is known as the "lead-in" clause to the earth movement exclusion. The clause reads as follows:

The Company does not insure for loss which would not have occurred in the absence of one or more of the following excluded events. The Company does not insure for such loss regardless of: a) the cause of the excluded event; or b) other causes of the loss; or c) whether other causes acted concurrently or in any sequence with the excluded event to the produce the loss:

. . . .

(1) earth movement . . .

See page 6 of the policy, a copy of which is attached hereto in the addendum.

As the lead-in clause plainly states, earth movement is excluded regardless of its cause. Earth movement need not be caused by an act of God, as plaintiffs argue, in order to be excluded. The lead-in clause states: "The Company does not insure for such loss regardless of: a) the cause of the excluded event [earth movement] . . . " Therefore, plaintiffs' argument that earth movement needs to be caused by a natural phenomenon or an act of God simply does not have any merit.

The lead-in clause was inserted in State Farm's policies in 1983 principally to avoid the type of construction which

plaintiffs urge upon this court. As discussed more fully in Gordon and Crowley, Earth Movement and Water Damage Exposure: A Landslide in Coverage, 50 Ins. Counsel J. 418 (1983), a copy of which is attached hereto in the addendum, courts have used either the efficient cause analysis or the ejusdem generis analysis in order to find coverage for the insured in the face of the "most carefully wrought [earth movement] exclusions." Id. at 418. According to the efficient cause analysis, first enunciated by the California Supreme Court in Sabella v. Wisler, 59 Cal. 2d 21, 27 Cal. Rptr. 689, 377 P.2d 889 (1963), if a covered peril sets in motion a chain of events in which the last step may be an excluded peril, the excluded peril will not defeat coverage. Gordon and Crowley refer to this analysis as "focus[ing] on the source of the property disruption." 50 Ins. Counsel J. at 421. Gordon and Crowley refer to the ejusdem generis analysis as "dissect[ing] the language of the policy." Id.

As a result of these two analyses, the "trend across the country [was] to find coverage . . . regardless of policy exclusions." Id. at 425. "[F]aced with a financial drain neither accounted for through premium payments and reserves, nor even anticipated, [insurance companies felt] the earth slipping out from beneath their underpinnings just as surely

as did their insured homeowners." Id. State Farm countered by redrafting the language of its policies. As noted by Michael Bragg in an article entitled Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers, a copy of which is attached hereto in the addendum,

The traditional response of insurers upon discovering that their contract language is not being interpreted by the courts as the drafters intended is to rewrite the language. In fact this alternative is often judicially mandated. Courts have told the insurance industry countless times that insuring agreements will be interpreted broadly and exclusions narrowly. If the insurer desires to exclude some event it must say so clearly and unequivocally.

Forum, Tort and Insurance Practice Section, ABA, Vol. 20, No. 3, 385, 391 (Spring 1985). (The Supreme Court of California recently cited the Bragg article with approval in a case which has not yet been published but was filed on March 30, 1989, Garvey v. State Farm Fire and Casualty Company, (S.F. 25060) Ct. App. A017878.)

As previously indicated, State Farm introduced its new policy language in 1983. Although the lead-in clause has been subject to close scrutiny, 50 Ins. Counsel J. at 426, it has been upheld by every court that has considered it, as discussed infra.

The difficulty of plaintiffs' argument is that plaintiffs fail to realize that the new policy language not only

eliminates the efficient cause analysis but also eliminates the ejusdem generis analysis. (Plaintiffs initially argued that the broken water main was the efficient cause of the loss and hence there was coverage. See letter from plaintiffs' counsel to defendant's counsel attached hereto in the addendum. However, plaintiffs later abandoned this theory in light of the new policy language.) Subclause a) of the lead-in clause eliminates the ejusdem generis analysis and subclauses b) and c) eliminate the efficient cause analysis. This was clearly the intent of State Farm. As Michael Bragg states in his article,

The new language establishes a purging effect by making the occurrence of any of these excluded events an absolute prohibition to a finding of coverage. Thus, once a loss occurs which would not have happened in the absence of an excluded event, there is no coverage. The policy states that this is so "regardless of: a) the cause of the excluded event . . . ."

20 Forum, Tort and Insurance Practice Section, at 393-94.

As indicated above, every court that has had occasion to interpret the lead-in clause has found it to be valid and enforceable. In fact, the very courts which began the trend of finding coverage for the insured in the face of the most carefully wrought earth movement exclusions (the California courts) have honored the redrafted policy language. For example, in Milliken v. State Farm Fire & Casualty Insurance



Company, No. 86-1284-E, Memorandum Decision (S.D. Cal., March 1987), a copy of which is attached hereto in the addendum, the court without hesitation applied the redrafted earth movement exclusion to the "settlement of . . . fill soils" and the "consolidation of [a] utility trench." Id. at 16. The court stated, "Any loss which would not have resulted but for earth movement is excluded, regardless of . . . the cause of the movement." Id. (emphasis in original). In Bayless v. State Farm Fire and Casualty Company, No. WEC 87135 (Los Angeles County, Cal. Super. Ct., Dec. 1986), although summary judgment was not granted because of the existence of a triable issue of fact, the court adjudicated the following issues as being without substantial controversy:

1. The applicable insurance policy excludes coverage for earth movement;
2. Coverage is excluded under the policy regardless of the cause of the earth movement;
3. Coverage is excluded under the policy regardless of whether other causes acted concurrently or in any sequence with earth movement to cause the loss.

See Page 2 of the Order, a copy of which is attached hereto in the addendum (emphasis added).

Similarly, in Turrill v. State Farm Fire and Casualty Insurance Company, No. WEC 104 457 (Los Angeles County, Cal. Super. Ct., May 1987), the court adjudicated the same issues

as being without substantial controversy and therefore "deemed established." See Pages 1-3 of the Order, a copy of which is attached hereto in the addendum.

The only two published decisions also hold that the lead-in clause is valid and enforceable. In State Farm Fire and Cas. Co. v. Martin, 668 F. Supp. 1379 (C.D. Cal. 1987), a copy of which is attached hereto in the addendum, the court held that the policy language was "explicit as to exclusions [and] unambiguous." Id. at 1382. The court further held that "State Farm had an absolute right to limit the coverage." Id. at 1383. (The Martin case was affirmed by the Ninth Circuit on April 10, 1989, the court stating as follows: "[T]he policy exclusions are unambiguous . . . An insurance company has the right to limit the coverage in a policy it issues." A copy of the case is attached hereto in the addendum.) In State Farm Fire and Cas. Co. v. Paulson, 756 P.2d 764 (Wyo. 1988), a copy of which is attached hereto in the addendum, the court said that the lead-in clause was "not ambiguous. It is plain and clear." Id. at 766. The court then concluded its opinion by stating:

[A] court [is restrained] from liberally and unreasonably construing an insurance contract to permit a strained or unnatural interpretation in order to find coverage for innocent victims who are subjects of enormous sympathy. Otherwise, the

effect would be to bind an insurer to a risk that was not contemplated and for which it was not paid.

Id. at 772; see also the companion case to Paulson, State Farm Fire and Cas. Co. v. Bowen, 756 P.2d 773 (Wyo. 1988), where the court reached the same conclusion, a copy of which is also attached hereto in the addendum.

All of the cases cited by plaintiffs are not on point because they do not deal with the new lead-in language contained in State Farm's policies. Nor do the cases deal with earth movement exclusions containing the phrase "whether combined with water or not" following the words "earth movement." State Farm's policy states that earth movement is excluded "whether combined with water or not." See page 6 of the policy. This phrase, together with the lead-in clause, makes it clear that earth movement is excluded even if it is caused by a broken water pipe.

Earth movement is excluded regardless of its cause. The new policy language eliminates the ejusdem generis analysis. Moreover, plaintiffs' own cases seem to cast doubt on whether the ejusdem generis analysis is appropriate in this case. One provision of Jones v. St. Paul Ins. Co., 725 S.W.2d 291 (Tex. App. 1986) which plaintiffs fail to cite is as follows:

We initially address appellant's contention that the doctrine of ejusdem generis limits the scope of the term "earth movement." Under that doctrine, where

words of a specific and particular meaning are followed by general words, the general words are construed to mean only the class or category framed by the specific words. In the exclusion before us, the opposite construction is used. The general words, earth movement, do not follow the specific words, but precede them. The doctrine of ejusdem generis does not apply in such a case.

Id. at 292. Similarly, because the general words "earth movement" in State Farm's policies precede the specific words, the doctrine of ejusdem generis does not apply in this case. Ejusdem generis only applies when a general term follows (as opposed to precedes) an enumeration of specific words. In fact, Black's Law Dictionary 464 (5th ed. 1979) defines ejusdem generis as follows:

[T]he "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

(Emphasis added.) Plaintiffs have misapplied the ejusdem generis doctrine. Furthermore, ejusdem generis is a rule of construction, and rules of construction do not need to be resorted to if the policy is clear and unambiguous. See 2 Couch on Insurance §§ 15:69, 15:70 (2d ed. 1984) ("When the contract is clear, precise, and unambiguous . . . there is no proper scope for a resort to rules of construction.") Since every court that has considered the new policy language has

found it to be clear and unambiguous, ejusdem generis does not apply in this case.

## II.

The phrase "earth movement" is not ambiguous, especially in light of the lead-in clause.

In Lee v. Nationwide Mutual Insurance, CCH 1988 Fire and Casualty Cases 1806 (Tenn. App. 1988) the court considered the definitions of "earth" and "movement" separately and concluded that the phrase "earth movement" applied to "any change of place, position or posture of the soil." Id. at 1808. In Lee a sewer pipe broke beneath plaintiff's home, saturating the soil, and causing the foundation to shift. The policy provided as follows:

The Company shall not be liable for loss:

. . . . .

7. due to any and all settling, shrinking, cracking, bulging or expansion of driveways, sidewalks, swimming pools, pavements, foundations, walls, floors, roofs or ceilings;

. . . . .

12. caused by, resulting from, contributed to, or aggravated by any of the following;

(a) earth movement, including but not limited to earthquake, landslide, mudflow, earth sinking, earth rising or shifting;

. . . . .

2. The following is added to the EXCLUSIONS section:

This policy does not insure under Section I for loss caused directly or indirectly by any of the following exclusions in this policy. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

. . . . .

c. Earth movement;

. . . . .

Id. at 1806. The court held that earth movement, as commonly understood, had occurred in the case and that the loss was therefore excluded:

The words, "earth movement" mean:

differential movement of the earth's crust; elevation or subsidence of land.

Webster's Third New International Dictionary Unabridged.

Taken separately, the meaning of the word, "earth" includes:

fragmental material composing part of the surface of the globe; soil, ground, usually distinguished from bed rock.

Ibid.

The word, "movement" means:

The action or process of moving, change of place or position or posture.

Ibid.

It thus appears that, taken together or separately, the words, earth movement, mean any change of place, position or posture of the soil.

Id. at 1808. The court specifically rejected plaintiff's interpretation of the earth movement exclusion as being limited to natural phenomena. Id. at 1807. A copy of the case is attached hereto in the addendum.

Moreover, an insurance policy should be construed as a whole. Thus, the phrase "earth movement" cannot be interpreted in isolation of the lead-in clause. The lead-in clause specifically states that earth movement is excluded regardless of its cause: "The Company does not insure for such loss regardless of: a) the cause of the excluded event [earth movement] . . . ." Therefore, it would be unreasonable for a layperson to conclude that earth movement meant only earth movement caused by an act of God. What caused the earth movement is irrelevant. The lead-in clause could not make this any clearer.

### III.

#### The policy is not duplicative.

Plaintiffs argue that "earth movement" must not encompass settling because there is a separate exclusion for settling.

However, that exclusion (exclusion 1.e.) does not apply in cases where there are multiple causes as in the case at bar. In multiple cause cases, exclusion 3. applies. This was noted by Mr. David Randel, fire claim superintendent for State Farm, in his deposition.

Q I take it there came a point at which you concluded that Exclusion . . . E did not apply?

A That's correct.

Q At what point was that?

A . . . I would guess that probably from the beginning I would have been referring to Exclusion 3 Subsection B.

Q That's [the] earth movement clause?

A Correct. . . . I'm familiar enough with the policy language that I realized that with the broken pipe that we would have to be relying on that exclusion rather than the settling and shrinking. Because we had a potential concurrent cause situation.

Deposition of David Randel, page 28, lines 4-19.

Furthermore, exclusion 1.e. only applies to "gradual sinking," as noted in the Holy Angels Academy case cited by plaintiffs. 487 N.Y.S.2d at 1007. Gradual sinking did not occur in this case. The soil collapsed. The apartments were built upon sand, silt, and clay -- collapsible soils. When the underground water main broke, the soils lost their weight-bearing capacity and collapsed. Deposition of Ralph E.



Watson, page 20, line 16; page 21, line 22; page 57, line 8; exhibit 1, appendix A, page 3; see also the letter from plaintiffs' counsel to defendant's counsel, attached hereto in the addendum, stating as follows: "We have reason to believe that the soil, when saturated with water, does not actually sink or settle. Rather, it loses its weight-bearing ability. This allows the foundation to sink or shift."

As noted by David Randel, anytime there are multiple causes, exclusion 3. applies and not exclusion 1.e. Therefore, the policy is not duplicative.

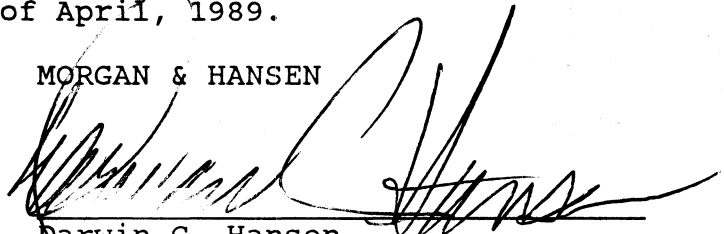
#### CONCLUSION

All of the cases cited by plaintiffs are not on point because they do not address the new lead-in language contained in State Farm's policies; nor do plaintiffs even quote the new policy language in their brief. Every court that has had occasion to consider the new policy language has found it to be valid and enforceable and not ambiguous. Moreover, the policy is not duplicative. The order of the lower court

granting State Farm's motion for summary judgment should be affirmed.

DATED this 30 day of April, 1989.

MORGAN & HANSEN

Two handwritten signatures in black ink, one for Darwin C. Hansen and one for John C. Hansen, written over a horizontal line.

Darwin C. Hansen  
John C. Hansen  
Attorneys for Defendant/  
Respondent

## ADDENDUM

### Policy

Gordon and Crowley, Earth Movement and Water Damage Exposure:  
A Landslide in Coverage, 50 Ins. Counsel J.418 (1983)

Bragg, Concurrent Causation and the Art of Policy Drafting:  
New Perils for Property Insurers, Forum, Tort and Insurance  
Practice Section, ABA, Vol. 20, No. 3, 385 (Spring 1985)

### Letter

Milliken v. State Farm Fire & Casualty Insurance Company, No.  
86-1284-E, Memorandum Decision (S.D. Cal., March 1987)

Bayless v. State Farm Fire and Casualty Company, No. WEC 87135  
(Los Angeles County, Cal. Super. Ct., Dec. 1986)

Turrill v. State Farm Fire and Casualty Insurance Company, No.  
WEC 104 457 (Los Angeles County, Cal. Super. Ct., May 1987)

State Farm Fire and Cas. Co. v. Martin, 668 F.Supp. 1379 (C.D.  
Cal. 1987)

State Farm Fire and Cas. Co. v. Martin, No. 87-6109 (9th Cir.  
April 10, 1989)

State Farm Fire and Cas. Co. v. Paulson, 756 P.2d 764 (Wyo.  
1988)

Lee v. Nationwide Mutual Insurance, CCH 1988 Fire and Casualty  
Cases 1806 (Tenn. App. 1988)

**SECTION I**  
**LOSSES INSURED AND**  
**LOSSES NOT INSURED (cont.)**

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- ance of property, or shortage of property disclosed on taking inventory;
- i. due to any delay or loss of market;
  - j. caused by repeated leakage or seepage of water or steam whether continuous or intermittent from any:
    - (1) heating, air conditioning or refrigerating system;
    - (2) domestic appliance; or
    - (3) plumbing system, including from or around any shower stall or other shower bath installation, bath tub or other plumbing fixture.
2. The Company does not insure for loss either consisting of, or directly and immediately caused by power, heating or cooling failure, or due to change in temperature or humidity, unless the failure or change results from physical damage to the building or to equipment contained therein caused by a Loss Insured. Also, the Company shall not be liable under this exclusion for any loss resulting from riot, riot attending a strike, civil commotion, or vandalism or malicious mischief.
3. The Company does not insure for loss which would not have occurred in the absence of one or more of the following excluded events. The Company does not insure for such loss regardless of: a) the cause of the excluded event; or b) other causes of the loss; or c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss:
- a. occasioned directly or indirectly by enforcement of any ordinance or law regulating the construction, repair or demolition of buildings or structures;
  - b. caused by, ~~resulting~~ from, contributed to, or aggravated by any of the following:
    - (1) earth movement, whether combined with water or not, including but not limited to earthquake, volcanic eruption, landslide, subsidence, mudflow, sinkhole, erosion, or the sinking, rising, shifting, expanding, or contracting of earth;
- (2) flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;
  - (3) water which backs up through sewers or drains;
  - (4) water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors, or through doors, windows or any other opening in such sidewalks, driveways, foundations, walls or floors;
- unless fire or explosion as insured against ensues, and then the Company shall be liable only for loss caused by the ensuing fire or explosion. This exclusion shall not apply to loss arising from theft;
- c. hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack:
    - (1) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces;
    - (2) by military, naval or air forces; or
    - (3) by an agent of any such government, power, authority or forces;
- it being understood that any discharge, explosion or use of any weapon of war employing nuclear fission or fusion shall be conclusively presumed to be such a hostile or warlike action by such a government, power, authority or forces;
- d. insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or custom's regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade;

Fiftieth Year of Publication

# **INSURANCE COUNSEL JOURNAL**

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July **1983**

Issued Quarterly by International Association of Insurance Counsel

## EARTH MOVEMENT AND WATER DAMAGE EXPOSURE: A LANDSLIDE IN COVERAGE

STUART M. GORDON AND DIANE R. CROWLEY  
*San Francisco, California*

**T**HE DISASTROUS RAINS of recent winters have touched off earth movements including landslides and mudflows across the nation; at the same time, court decisions have set off equally unsettling tremors among insurance companies as the most carefully wrought exclusions are ignored or deliberately discarded. This article will trace the development of exposure for earth movements from its origins in the smoke of the great San Francisco earthquake and fire through the current trend favoring recovery regardless of exclusion.

### I. The California Experience

The richest source of case law on landslide liability is the state of California, where the unsettled coastal soil, the continental-edge geology, and the hilly geography found in the heavily populated areas combine to create numerous property losses from earth movements and where sympathetic courts have long strained to find relief for those whose homes have been lost. Nearly all "earthquake exclusion" cases date back to the losses sustained in the San Francisco earthquake and fire of 1906. Perhaps because judges and juries of that day shared so heavily in the losses described to them by San Francisco plaintiffs seeking recovery, those plaintiffs became the first beneficiaries of a judicial bias toward the owners of damaged property.

For example, when merchants whose store was destroyed in one of the major fires sweeping the city after the earthquake sought relief, the court found coverage although the policy excluded "loss or damage occasioned by earthquake." The court insisted that the exclusion had to mean that there be a direct connection between the earthquake and the origins of the fire, and that if the fire had started in a distant building and was communicated from one building to the next until it reached the insured property, the earthquake would



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only have been the indirect cause of the loss. The court found that the context of the exclusionary clause showed that it was intended to include only the proximate or immediate cause, and overruled the defendant's demurrer in favor of the property owners.<sup>1</sup>

In more recent times, landslides and mudslides have provided more litigation for the California courts than have earthquakes, as the heavy rains of 1978, 1980,

<sup>1</sup>*Baker & Hamilton v. Williamsburgh City Fire Ins. Co.*, 157 F 280 (ND Cal 1907); see also *Williamsburgh City Fire Ins. Co. v. Willard*, 164 F 404 (9th Cir), cert. denied, 212 US 521 (1908); see also *Richmond Coal Co. v. Commercial Union Assur. Co.*, 169 F 746 (9th Cir), cert. denied, 215 US 609 (1909).

and 1982, have cost Californians hundreds of millions of dollars in property loss,<sup>2</sup> and the rains of 1983 are already adding to the devastation.

The presence in homeowners' policies of stock exclusions for earth movements has led to crushing disappointments for homeowners, angry litigation, and subsequent publicity. A length article appearing in the *San Francisco Sunday Examiner and Chronicle* quoted numerous aggrieved homeowners and their indignant attorneys under a headline which trumpeted "Angry Homeowners Who Say Insurance Firms Left Them Out in the Rain."<sup>3</sup>

Placing the perceptions of these unfortunate homeowners aside, it might appear that it is the insurance companies themselves which have been left out in the rain. The trend among the California courts has been to find coverage even in the face of specific exclusions. For example, in the case of *Hughes v. Potomac Insurance Company*,<sup>4</sup> homeowners sought recovery under an insurance policy after the earth to the rear of their home slid into a creek bordering their lot. They were denied coverage based upon an exclusion for flood or high water damage to the insured dwelling.

Initially, the court found that the policy could be interpreted in such a manner as to cover the damage to the property, even though only the "dwelling building," and not the earth in the back yard, was covered. The court stated that the "dwelling building" suffered real and severe damage when the soil slid away, and until the land was stabilized, the structure could scarcely be considered a "dwelling building" safe for residence.<sup>5</sup>

Secondly, the court found that the exclusion for losses covered by flood or high water could not bar coverage for this loss. Expert testimony as to the cause of the landslide conflicted, but the lower court found that the slide was caused solely by the soaking of the land from heavy rains, rather than by "flood" or "high water." The appellate court stated that even if the trial court had been wrong in that finding, coverage would still apply under the policy.

Looking for guidance to a 1929 personal injury case, the appellate court stated that "when two causes join in causing an injury, one of which is insured against, the insured is covered by the policy."<sup>6</sup> With this theory in mind, the court held that there was coverage under the policy as "appellant has failed to show that respondents' loss would not have occurred 'but for' a peril specifically excepted under the policy."<sup>7</sup>

The next year, California courts expanded their willingness to find coverage in the face of exclusions by eliminating the "but for" language used in the *Hughes* interpretation. In *Sabella v. Wisler*,<sup>8</sup> the California Supreme Court found that when two or more factors are a possible cause of an insured's loss, coverage will be extended regardless of the causes which are excluded by the policy if the "efficient" cause of the loss is not excluded.

In *Sabella*, a home built on fill over an old excavation was damaged by settling. The "all-risk" policy held by the homeowners carried an exclusion for loss by settling, but the court eventually found coverage after the homeowners argued that a sewer pipe below the house was leaking and the escaping water infiltrated the unstable earth, causing the settlement which damaged the house. Balancing the two causes, the excluded settlement and the included peril of damage from faulty plumbing fixtures, the court concluded that the absence of subsidence damages up until the time the pipe began leaking showed that it was the broken pipe which was the predominating or efficient cause of the loss and that

in determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause — the one that sets others in motion — is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.<sup>9</sup>

The *Sabella* court obviously intended that a determination of the "efficient cause" should be distinctly different than the prior *Hughes* "but for" test, as it made a

<sup>2</sup>Norton, *Counseling Clients Whose Property Incurs Earth Movement Damage*, 2:8 CAL. LAW. 26.

<sup>3</sup>*San Francisco Sunday Examiner & Chronicle*, Aug. 22, 1982, at A7.

<sup>4</sup>199 CalApp2d 239, 18 Cal Rptr 650 (1962).

<sup>5</sup>*Id.* at 249.

<sup>6</sup>*Zimmerman v. Continental Life Ins. Co.*, 99 Cal App 723, 726, 279 P 464 (1929).

<sup>7</sup>199 CalApp2d at 245.

<sup>8</sup>59 Cal2d 21, 27 Cal Rptr 689 (1963).

<sup>9</sup>*Id.* at 31-32, citing 6 COUCH, INSURANCE §1466 (1930).

point of disproving the "but for" language in *Hughes*.<sup>10</sup>

This sort of search for the "efficient proximate cause" continued for a few years in such cases as *Sauer v. General Insurance Company*,<sup>11</sup> where, once again, faulty plumbing causing discharge of water into the ground under a house was found to be the cause of the loss, rather than the excluded settling of the earth. *Sauer* appears to extend the rationale of *Sabella* to the extent that neither contribution nor aggravation of an excluded risk will bar recovery as a matter of law when the contribution or aggravation results from a peril which is covered by the policy.

This line of causation analysis continued through a case involving a windstorm, rather than earth movement, in *Gillis v. Sun Insurance Office, Ltd.*<sup>12</sup> Here, an insured boat dock was originally damaged by a gust of wind, then fell into the water and was further damaged by the action of the waves. The policy offered coverage for windstorm damage, but excluded coverage for damage caused by water or waves, whether driven by the wind or not. Admitting that it could not be ascertained whether the final loss was caused by the windstorm or by the excluded waves, the court concluded that the evidence sustained the findings of the lower court that the windstorm was the dominant and efficient cause of the damage, and that the water damage was merely incidental and could not bar coverage.

The *Gillis* case carefully sidestepped several questions, including a determination of whether in every case involving several perils, the insured may recover if one of those perils is insured against, and what the effect of an exclusion would be where the excluded peril precedes the insured peril, or where both operate simultaneously.<sup>13</sup>

The question left open in *Gillis* may not have been answered until 1973, in the case of *State Farm Mutual Automobile Insurance Company v. Partridge*.<sup>14</sup> In this case, the insured, who held both automobile and homeowners' policies through State Farm, was driving his car over rough terrain when he hit a bump, causing a gun, which he

had specially modified to have a hair trigger, to discharge, injuring his passenger. Although the homeowners' policy excluded injuries arising from the use of any vehicle, the court found coverage under both policies, and referred back to the *Hughes*, *Sabella*, *Sauer*, and *Gillis* cases in forming this opinion.<sup>15</sup> The court stated that in the case before it, a risk insured under the homeowners' policy (the modification of the gun) combined with an excluded risk (the negligent use of the automobile) to produce the ultimate injury.

Although there may have been some question whether either of the two causes in the instant case can be properly characterized as the "prime," "moving" or "efficient" cause of the accident, we believe that coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries. That multiple causes may have effectuated the loss does not negate any single cause; that multiple acts concurred in the infliction of injury does not nullify any single contributory act.<sup>16</sup>

In a footnote,<sup>17</sup> the *Partridge* court discussed the "efficient cause" standard of the earlier cases and discarded it as not very helpful in situations like the one at hand where neither the careless driving nor the firing of the gun caused the other to occur, but both combined to cause the injury. The *Partridge* answer to the *Gillis* questions is, then, when concurrent proximate causes lead to an injury, and one cause is covered, the entire loss is covered.

That same year, this rationale was applied to a landslide case following a mild earthquake. In *Strubble v. United Services Auto Association*,<sup>18</sup> the question was raised as to whether the defendant insurer had proved that an excluded landslide was the efficient cause of loss to a home which was covered for earthquake damage, under an "all-risk" policy. The court disregarded the argument that the insured has a duty to find a proximate cause within the policy limits, and stated

in an action upon an all-risk policy such as the one before us . . . the insured does

<sup>10</sup>*Id.* at 33-34.

<sup>11</sup>225 CalApp2d 275, 37 Cal Rptr 303 (1964).

<sup>12</sup>238 CalApp2d 408, 47 Cal Rptr 868 (1965).

<sup>13</sup>*Id.* at 424.

<sup>14</sup>10 Cal3d 94, 109 Cal Rptr 811 (1973).

<sup>15</sup>*Id.* at 104-105.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>35 CalApp3d 498, 110 Cal Rptr 828 (1973).



not have to prove that the peril proximately causing the loss was covered by the policy. This is because the policy covers *all risks* save for those risks specifically excluded by the policy. The insurer, though, since it is denying liability upon the policy, must prove the policy's noncoverage of the insured's loss — that is, that the insured's loss was proximately caused by a peril specifically excluded from the coverage of the policy.<sup>19</sup>

Affirming the coverage determination of the lower court, the court of appeals found that the evidence established that the landslide had been proximately caused by the earthquake, operating through the excluded peril of earth movement. In a footnote, the court stated that it was regarding the earthquake endorsement as merely narrowing the earth movement exclusion, rather than changing the "all-risk" nature of the underlying policy. To hold otherwise would be "a case of the tail wagging the dog," the court concluded.<sup>20</sup>

Finally, on May 17, 1982, a federal court adopted the *Partridge* reasoning in a property damage case, *Safeco Insurance Company v. Guyton*.<sup>21</sup> When record rains accompanying Hurricane Kathleen broke through flood control facilities near Palm Desert, California, extensive flood damage resulted. Safeco policyholders were denied coverage because of a flood damage exclusion; they answered by asserting that their losses were proximately caused by negligence of the local water district in maintaining flood control structures and were therefore covered as damages caused by third-party negligence. A diversity action in the federal district court ended with a ruling in favor of the insurance company based upon an analysis of the flood as the efficient proximate cause of the loss.

On appeal to the Ninth Circuit Court of Appeals, coverage was found with the court quoting directly from *Partridge*: "We believe that coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries."<sup>22</sup> While the insurance company

attacked the appellants reliance upon *Partridge*, arguing that it applies only where two causes operate independently of one another, the court found *Partridge* to be dispositive in the policyholders' favor, and pointed out that the twin causes in *Partridge* were independent only in that each had an independent origin, not that they did not interact. Just as the flood control structures in Palm Desert would not have collapsed without the flood striking them, the gun in *Partridge* would not have fired without the lurching of the car and, in both cases, two independently created conditions interacted to cause a loss.<sup>23</sup> Under this analysis, it is no longer necessary that the chain of events be set in motion by an included peril.<sup>24</sup>

## II. Expanding Exposure Elsewhere

Other jurisdictions may differ in their analyses, yet courts from coast to coast are increasingly finding coverage regardless of exclusions for earthquakes, landslides, earth movements, floods, and the like. While some courts focus on the source of the property disruption, others dissect the language of the policy, and a third group of courts deliberates on the chain of causation.

Courts seem more likely to find coverage in the face of exclusion when the cause the insurer raises as a bar is external to or not inherent in the specified risk which is excluded. For example, in *Peach State Uniform Service, Inc. v. American Insurance Company*,<sup>25</sup> where a portion of a foundation collapsed after heavy rain, a Georgia jury found that relief was barred by policy exclusions for certain earth movements or for water damage. The Fifth Circuit Court of Appeals reversed, finding that coverage was not barred by either of these exclusions.

Criticizing the policy phrase "other earth movements" as ambiguous, the court stated:

Taking the phrase in its contractual context, then, and continuing to resolve ambiguity in favor of the insured, we read *other earth movement* as referring only to phenomena relating to forces operating within the earth itself, and not to the

<sup>19</sup>*Id.* at 504 (citations omitted; emphasis in original).

<sup>20</sup>*Id.* at 505 n. 6.

<sup>21</sup>677 F2d 721 (9th Cir 1982) (opinion published in advance sheets withdrawn at the request of the court).

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>507 F2d 996 (5th Cir 1975).

merely superficial effects of external forces, such as erosion by run-off rainwater.<sup>26</sup>

A few years earlier, another Georgia court had come out with a sharply contrasting verdict. In *Underwood v. United States Fidelity & Guaranty Company*,<sup>27</sup> no coverage was found for damages sustained when a bridge sank during a heavy rainfall immediately after city officials had widened the banks on either side of the privately-owned bridge. The policy had an exclusion for "any earth movement." The jury found that "although the loss might have been incipiently caused by a human agency, it was at least 'contributed to' within the exclusionary language, by an excepted natural agency."<sup>28</sup>

More in line with *Peach State* and with decisions of other jurisdictions, the case of *Souza v. Corvick*<sup>29</sup> found coverage in the face of exclusions for settling and earth sinking when the plaintiff alleged that the damages were caused by the negligent or willful blasting in the construction of adjacent storm sewers. The District of Columbia court held that the exclusion should not be interpreted as barring recovery for damage caused by the subsidence of the property if that subsidence resulted from something other than the conditions of the soil.<sup>30</sup> In contrast is the holding of *Olmstead v. Lumbermens Mutual Life Insurance Company*,<sup>31</sup> an Ohio case which found no coverage for a building so badly damaged by adjacent excavation that it had to be condemned and torn down. The court found that the exclusions for collapse and landslide, including "other earth movement," barred recovery, although the court found neither collapse or landslide, and failed to discuss "other earth movements."

Quite a few cases turn on the language of the policy exclusions, as sometimes exactly the same policy terms provide the bases for totally opposite interpretations. For example, in *Stewart v. Preferred Fire Insurance Company*,<sup>32</sup> a building collapsed when the soil underlying its foundation gave way and the building sank into a pre-existing cavern or mineshaft. Even though the policy covered "collapse," the Supreme

Court of Kansas found no coverage on the basis of an earth movement exclusion which it found to be "really quite specific."<sup>33</sup> The exclusion in question read as follows: "[L]oss caused by, resulting from, contributed to, or aggravated by any earth movement, including but not limited to earthquake, landslide, mud flow, earth sinking, rising, or shifting. . . ."<sup>34</sup>

Precisely the same exclusion was found in the policy in *Wyatt v. Northwestern Mutual Insurance Company*,<sup>35</sup> where it was held to be no bar to coverage for a loss sustained by a building following excavation on contiguous property. The federal district court, applying Minnesota law, found the exclusion so broad as to require some interpretation, and held that the excluded but undefined earth movements, if not limited to natural phenomena, at least would not exclude coverage under the facts at bar.

Looking at the special exclusionary clause in the policy here in question, it seems to cover situations where one single event could adversely affect a large number of policyholders. . . . This gives some force to the view that the various exclusions were not intended to cover the situations as here where "earth movement" occurred under a single dwelling, allegedly due to human action. . . .<sup>36</sup>

In reaching this decision, the federal district court relied on *Sabella* and *Sauer*, and also cited recent Minnesota cases which it found to be consistent in theory.<sup>37</sup>

Unlimited and undefined exclusions for "earth movements" provide the focal point for many subsidence cases. Generally found to be too broad to operate as a bar, "earth movement" is often limited through the doctrine of *ejusdem generis*, which holds that when general words follow an enumeration of specific items, the general words are to be construed as applying only to items of the same general kind as those specifically mentioned.<sup>38</sup> Accordingly, when "other earth movements" is tacked onto a string of disasters, including earthquakes or landslides, the term is to be limited to

<sup>26</sup>*Id.* at 1000.

<sup>27</sup>118 Ga App 847, 165 SE2d 874 (1968).

<sup>28</sup>*Id.* at 875.

<sup>29</sup>441 F2d 1013 (DC Cir 1970).

<sup>30</sup>*Id.* at 1022.

<sup>31</sup>22 Ohio St2d 212, 259 NE2d 123 (1970).

<sup>32</sup>206 Kan 247, 477 P2d 966 (1970).

<sup>33</sup>77 P2d at 969.

<sup>34</sup>*Id.*

<sup>35</sup>304 FSupp 781 (D Minn 1969).

<sup>36</sup>*Id.* at 783.

<sup>37</sup>*See, e.g., Fawcett House, Inc. v. Great Central Ins. Co.*, 280 Minn 325, 159 NW2d 268 (1968).

<sup>38</sup>BLACK'S LAW DICTIONARY 608 (4th ed. 1951).

natural phenomena of the same general description.

With this in mind, the frequently cited case of *Anderson v. Indiana Lumbermens Mutual Insurance Company*<sup>39</sup> found coverage for a homeowner whose property was damaged by expansion and contraction of the clay soil underlying the foundation. The Louisiana appellate court decided that the cracking of the home's foundation could be considered as a "collapse," a covered risk, by defining that term as "a material impairment of structural integrity." The court also held that the earth movement exclusion was too broad, and, if limited by *ejusdem generis*, would be inapplicable. The *Anderson* court stated that it was adopting the view of the Supreme Court of Kansas in an earlier case, *Jenkins v. United States Fire Insurance Company*.<sup>40</sup>

Adopting the same view of the policy term "collapse," and rejecting the majority view which would define the term as a complete change in structure involving a loss of distinctive character or usefulness as a building, *Government Employees Insurance Company v. DeJames*<sup>41</sup> found coverage in another collapse-or-earth-movement case. Construing the policy term "any earth movement" as above, the Maryland court found that, of necessity, such an exclusion did not refer to settlement or damage from normal soil pressures. "To hold otherwise would make virtually meaningless the coverage . . . for it would be difficult to envision many other reasons why a house would collapse."<sup>42</sup>

Building upon the court-imposed limitations of the term "earth movement" seen in *Stewart*, *Wyatt*, and *Anderson*, the Supreme Court of Wisconsin reversed a judgment in favor of the defendant insurance company in a case in which a building constructed along the very edge of a bluff collapsed, following slippage of the unstable soils in the bluff. In *Wisconsin Builders, Inc. v. General Insurance Company of America*,<sup>43</sup> the court pointed out that although the standard exclusion is ambiguous and must be construed against its author, no contract of insurance should be rewritten to bind the insurer to a risk which had not been contemplated and for

which no premium had been paid. For this reason, the court found error below and instructed that the trial court should have limited the definition of "earth movement" for the jury pursuant to the doctrine of *ejusdem generis*.<sup>44</sup>

The courts of many jurisdictions focus on a chain of causation analysis, either in addition to or in place of the analyses of damage source and of policy language mentioned above. A restrictive reading of causation was advanced by the Michigan appellate decision in *Vormelker v. Oleksinski*.<sup>45</sup> The property involved in this case became uninhabitable when unstable soil deposits 120 feet below the surface led to the motion of large masses of land, destroying the building. The policy covered "collapse," but excluded "earth movement." Deciding that "but for" inadequate construction of the building, it would never have collapsed, the court held:

It is our opinion that the exclusions contained in the policy apply only when it can be shown that earth movement *et cetera* was the sole cause of the damage. If it can be shown that the building was improperly constructed (taking into account the type of soil, the geography of the area, *et cetera*) and "but for" the inadequate construction the building would not have collapsed even with earth movement, then the damage should come under the protection of the policy. One of the primary purposes of a policy such as this is to protect against faulty workmanship or planning.<sup>46</sup>

Honoring an exclusion only when the excluded risk was the sole cause of the injury is, after all, just one more way of allowing coverage in the face of an exclusion when concurrent causes combine to cause an injury, as in *Sabella*, *Sauer*, *Safeco*, and many other cases discussed.

Along these same lines, when a home in Pennsylvania collapsed into a coal mine shaft burrowing under it, coverage was found even though the policy excluded damage to walls caused by earth movements and damage to the building caused by settling.<sup>47</sup> The court found that earth movement of a sort had taken place, but not the underground lateral movement to

<sup>39</sup>127 So2d 304 (La App Ct 1961).

<sup>40</sup>185 Kan 665, 347 P2d 417 (1959).

<sup>41</sup>256 Md 717, 261 A2d 747 (1970).

<sup>42</sup>261 A2d at 752.

<sup>43</sup>221 NW2d 832 (Wis 1974).

<sup>44</sup>*Id.* at 838.

<sup>45</sup>40 Mich App 618, 199 NW2d 287 (1972).

<sup>46</sup>199 NW2d at 294.

<sup>47</sup>*Shaffer v. Phoenix Ins. Co.*, 21 Pa.D&C.2d 79, 49 Luzerne Leg.Reg.R. 279 (1959).

which it felt the exclusion referred. Similarly, it found the damage was not caused by settling, which it defined as a gradual sinking as the ground yields to the building's foundation. In other words, the presence of excluded factors in the damage scenario did not block coverage.

The frequently-cited case of *Gullett v. St. Paul Fire & Marine Insurance Company*<sup>48</sup> presented a situation in which rocks from a retaining wall came loose and struck the insured building, damaging it. The policy at issue covered damage from falling objects, but excluded landslides and damage caused by underground or surface waters. Although the court found that water flow definitely played a part in the damage, the plaintiff's victory in the lower court was affirmed on appeal. The court decided that the jury could have found that the rocks came loose from the wall through deterioration, rather than through earth movement, and that, since the evidence could support either the covered or the excluded theory of damage, the jury's verdict would stand undisturbed, and their judgment for the plaintiffs would be affirmed.

Another case in which the presence of an excluded cause did not bar coverage when an included cause was also present is that of *Phoenix Insurance Company v. Branch*.<sup>49</sup> A Florida court found coverage for a homeowner suffering a loss following blasting and dredging operations in the construction of a nearby sewer system. While damage caused by dredging was excluded from coverage, damage from blasting was included, and the plaintiffs established at trial that blasting was a cause of the building damage. The defendant insurer then failed its burden of proof to show that the loss arose instead from the cause which was excepted.<sup>50</sup>

Other courts, not content with merely finding an included cause in the chain of causation, insist instead that, before coverage will be found, the included cause must be shown to be the one which set the whole chain of causation into motion. For example, the 1973 Massachusetts case of *Standard Electric Supply Company, Inc. v. Norfolk & Dedham Mutual Fire Insurance Company*<sup>51</sup> found coverage in an all-risk policy which excluded subsurface water

damage when a water pipe in an adjacent basement broke, allowing water to seep into the insured's basement and damage it. Citing Appleman's *Insurance Law and Practice*, the court referred to the "well established principle" that "recovery is allowed 'where the insured risk itself sets into operation a chain of causation in which the last step may have been an excepted risk.'"<sup>52</sup>

The succinctly-worded opinion in the 1980 New York case of *MolyCorp, Inc. v. Aetna Casualty and Surety Company*<sup>53</sup> indicates that a proximate causation analysis is still required in New York. Plaintiff had sought coverage for the loss of a power plant following a mudslide, which was an included risk. Defendants countered that the loss was "caused by, resulted from, contributed to, or aggravated by" surface water, an excluded risk. When plaintiff argued that the burden was on the insurer to establish that the damage was caused solely by surface water, the court rejected this proposition outright: "Plaintiff's construction would eliminate from the exclusion the words 'contributed to or aggravated by' and would limit the exclusionary clause to a case where damage was caused solely by surface water, contrary to the terms contained in the exclusion."<sup>54</sup>

Further, the court found no merit in plaintiff's claim that the applicable law in New York would look to the cause nearest the loss. Rather, the court stated that "the operative test where damage results from two causes, one within and one without the scope of coverage, is to establish which was the proximate cause of the loss — what would the ordinary and reasonable businessman conclude was the cause of the loss?"<sup>55</sup> Criticizing both parties for overlooking the leading New York authorities on point,<sup>56</sup> the court pointed out that the relevant inquiry is which of the causes was the dominant and efficient cause of the loss, usually a factual issue. The court concluded that the approximate construction of the exclusion requires that the excluded risk be the direct, proximate, and efficient cause of the loss, and that the suggested proximate cause standard should apply

<sup>52</sup>*Id.* (citing 5 APPLEMAN, INSURANCE §3083, at 311).

<sup>53</sup>78 AD2d 510, 431 NYS2d 824 (1980).

<sup>54</sup>431 NYS2d at 825.

<sup>55</sup>*Id.*

<sup>56</sup>*Tonkin v. California Ins. Co.*, 294 NY 326, 62 NE2d 215 (1945); *Harris v. Allstate Ins. Co.*, 309 NY 72, 127 NE2d 816 (1955).

<sup>48</sup>446 F2d 1100 (7th Cir 1971).

<sup>49</sup>234 So2d 396 (Fla 1970).

<sup>50</sup>*Id.* at 399.

<sup>51</sup>307 NE2d 11 (Mass Ct App 1973).

with respect to the terms "contributed to or aggravated by" so as to require that the excluded risk be properly related to the occurrence of the loss.

At the opposite end of the continent, the Supreme Court of Washington echoed this New York decision and insisted on a proximate cause analysis in evaluating coverage for a multi-cause loss. In one of the more colorful factual situations in recent landslide litigation, the case of *Graham v. Pennsylvania General Insurance Company*<sup>57</sup> arose from a dispute between two insurance companies and their insureds following the volcanic eruption of Mount St. Helens, in 1980. Hot materials flowing from the eruption began melting the snow and ice flanking the mountain and the glacial ice blocks within the Toutle River Valley. This water, combined with torrential rains from the eruption cloud, existing ground water, water displaced from Spirit Lake, and ash and debris, created mudflows which moved through the valley, eventually destroying the homes of the appellants. The relevant policies excluded earth movement and water damage including flood, but did offer coverage for direct loss by explosion. The homeowners' claims were rejected under either or both of the exclusions.

The trial court stated that even if a jury were to determine the volcanic eruption was an explosion, it would still be necessary to determine whether the loss was the direct result of that explosion. The trial court followed a causation analysis which precluded the plaintiff's claims by stating that the responsible cause of a loss is that which is the "direct, violent and efficient cause of the damage."<sup>58</sup>

In reviewing the earlier case law supporting the trial court's decision, the Supreme Court of Washington concluded that the "immediate physical cause analysis" is no longer appropriate, is inconsistent with the rule in the majority of other jurisdictions, and should be discarded. The court defined the majority rule as "when loss is sustained by the insured, it is necessary that the loss be proximately, rather than remotely, caused by the peril insured against."<sup>59</sup> While this theory allows for

multiple causes acting in combination, a finding of coverage would seem to require that it be the insured peril which set off the chain of causation and that chain remain as an unbroken sequence. "Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produced the loss for which recovery is sought, the insured peril is regarded as the 'proximate cause' of the entire loss."<sup>60</sup>

As proximate causation is a question of fact for the jury, the Washington court remanded the matter for determination of whether the movement of Mount St. Helens was an explosion within the terms of the policy, whether that explosion was preceded by earth movement, and whether the damages were proximately caused by the eruption of the volcano.

The volcanic eruption of Mount St. Helens created monumental devastation and anguish. Nevertheless, the Washington Supreme Court clearly refused to stretch the law in any way to find coverage for the homeless of its state, even when those victims were specifically covered for losses arising from "explosion." Spurning not only the extreme liberality of the California courts, but also the views of many other jurisdictions which find coverage whenever one of the concurrent causes is covered, the Washington Supreme Court demands that a jury perform a labored analysis of proximate causation.

### III. Conclusion

With the recent decision of the Supreme Court of Washington as an exception of almost startling character, the trend across the country is to find coverage for owners of property damaged by earthquakes, landslides, mudflows, subsidence, and similar disasters, regardless of policy exclusions. Insurance companies, faced with a financial drain neither accounted for through premium payments and reserves, nor even anticipated, may feel the earth slipping out from beneath their underpinnings just as surely as did their insured homeowners.

What is necessary to counteract this trend is a case-by-case retrenchment with regard to the standard policy defenses and a search

<sup>57</sup>Nos. 47706-0, 47955-1, slip op. (Wash. Jan. 6, 1983).

<sup>58</sup>*Id.* (citing *Bruener v. Twin City Fire Ins. Co.*, 37 Wash2d 181, 222 P2d 833 (1950)).

<sup>59</sup>*Id.* (citing 18 COUCH, INSURANCE §74:693 (2d ed 1968)).

<sup>60</sup>*Id.* (citing *Franklin Packaging Co. v. California Union Ins. Co.*, 171 NJ Supr 188, 408 A2d 448, 449 (1979) (quoting 5 APPLEMAN, INSURANCE §3083, at 309-11)).

for concurrently responsible parties. Was there non-disclosure or misrepresentation as to the condition of the building or the soil stability at the time the policy was entered? Has there been mitigation of damages? Can liability be passed on or at least shared with neighboring landowners, contractors, soil engineers, governmental entities, or any other party? Is there strict liability for defects in a manufactured lot? Did the builder and the seller disclose all material facts to the new homeowner before the policy was entered? Has there been nuisance or trespass?

More extensive consultation with experts in the relevant engineering fields and more aggressive discovery into the possibility of cross-claims and counter-claims to assert subrogation rights may be the insurer's best strategy for coping with the current judicial trend for ignoring policy exclusions. After paying off the first-party claims of its insureds, the insurer may have to proceed either on its own or in the name of its insured, under its subrogation rights, to recoup as much as possible from all parties who contributed in some way to the insured's loss. In this regard, there may be statute of limitation problems that may bar an effective recovery for the insurer.

Insurance carriers who provide homeowners' coverage in areas where earth movement or flood damages are likely to occur would undoubtedly profit by an in-depth study and evaluation of the possibilities and advantages of rewriting the type of homeowners' coverage they provide. The overly broad, multi-peril policy (rather than more limited coverage for specified perils) may leave the insurer in a far more vulnerable situation than it can handle, financially. In areas of major vulnerability, writing homeowners' policies on a specified-peril basis only, rather than on a multi-peril basis, may be indicated, as the exposure to the substantial damages involved may be more than many carriers can handle no matter how high the rates are for premiums.

One major carrier has already revised its homeowners' policy to provide in part as follows:

We do not insure for loss which would not have incurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of:

- (a) the cause of the excluded events; or

- (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss. . . . We do not insure for loss consisting of one or more of the items below. Further, we do not insure for loss contribute to or aggravate the loss; or described . . . immediately above regardless of whether one or more of the following: (a) directly or indirectly cause, contribute to or aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss. . . .

A challenge to this language on the basis of ambiguity or confusion is expected, as the exclusionary language would remove coverage for a concurrent cause which would otherwise be covered under the policy. The exclusionary language would therefore have to be drawn artfully to exclude coverage effectively for any damages caused by earth movement or water damage or both.

A totally different approach was used recently by the authors of this article when asked to revise a standard homeowners' policy. Rather than deny any coverage for a loss where one of several causes of that loss is excluded, this newly proposed language would exclude only that portion of the loss caused by the excluded risk:

This policy does not insure against loss . . . caused by, resulting from, contributing to, or aggravated by any of the events set forth [in those paragraphs containing the standard exclusions for earth movement, water damage, and the like] even if said event or events may not be the only cause of the loss. There is no coverage hereunder for that portion of any loss that is specifically excluded pursuant to the exclusionary paragraphs set forth hereinabove.

While this approach will require the use of expert testimony to allocate what portion of the loss was caused by covered risks, rather than by excluded risks, the cost of such expert testimony is expected to be minimal in comparison to the savings achieved by paying for only a portion of the loss, rather than for the entire loss.

Other proposed changes in the standard policy were adding "rainfall" to the standard exclusion for flood, surface water, waves, and the like and by adding "from any source whatsoever" to the usual exclusions for water below the surface of the

ground. Finally, it was recommended that an additional exclusion be added for losses arising from faulty, inadequate or defective planning, construction, maintenance, engineering, workmanship, excavation, materials used in construction, and the like. This exclusion would only apply if a peril otherwise excluded by the policy substantially contributed to the loss.

Some insurance carriers have suggested that they may be admitting that there was coverage for the major concurrent causes which heretofore had been specifically excluded, as a result of revising their policies to state specifically that they would not insure a loss which would not have occurred in the absence of one or more excluded causes. The exposure the insurance carriers will face in the future may be so substantial that changes in their policies are required no matter what effect such changes may have on prior claims. The further the courts go with finding coverage

for concurrent causes, even though the major causes were specifically excluded, the more disastrous the results for insurers if carriers do not take some positive action to stem the tide.

As California courts become more and more likely to find coverage where none was thought to exist for earth movement and water damage claims, other progressive jurisdictions in the country are following closely. This could be extremely costly to the insurance carriers who provide homeowners' coverage in areas where such damages are likely to occur. As a result, the current landslide of first-party claims under homeowners' policies may be as disastrous for today's insurers as the San Francisco earthquake was to those insurers who thought they were protected by their earthquake exclusions, but who were faced with an earthquake of their own when the claims were successfully made under the coverage for fire damages.



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THE TIFCIRUM

*Tort and Insurance Practice Section, American Bar Association*  
*Volume XX, Number 3, Spring 1985*



## CONCURRENT CAUSATION AND THE ART OF POLICY DRAFTING: NEW PERILS FOR PROPERTY INSURERS

*Michael E. Bragg*

Causation is a cornerstone of the property insurance contract. From the infancy of the profession, insurers have used causal relationships both to describe the insured event and to define under what circumstances coverage does not apply. The choice has not always been a happy one.

Philosophers and linguists insist that language is merely man's meager attempt to describe the reality of the physical world. We talk of "causes" of an event as if there were such things physically "out there" waiting to be discovered. Thus, we send adjusters, engineers, and geologists to determine the "causes" of a mudslide. While this approach was adopted from the much-heralded scientific method and appeals to common sense, philosophers would laugh at the futility. For them causes are not physical forces waiting to be discovered; they are nebulous relational constructs waiting to be described.

This philosophic premise has two very important corollaries: first, every event has an infinite number of causes; and second, each cause can be described in an infinite variety of ways. Although these statements are beyond serious philosophic challenge, they seem far removed from the practical considerations faced daily by policy drafters, underwriters, and claims persons. The demanding careers of such professionals leave little time to ponder Aristotle's or Bacon's notion of causation. Yet it is only when we come to grips with its philosophic underpinnings that we begin to fully appreciate the legal complexity of concurrent causation and the havoc it creates in the "real world" of claims handling.

At its most elementary level, concurrent causation implies simply that more than one cause of loss or damage can have legal significance. This is hardly a startling revelation to tort scholars. The public policy underlying tort law has long endorsed

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expanded notions of liability to compensate injured victims. Nor is the theory of concurrent causation novel to *liability* insurance carriers whose fortunes follow the legal liability of their insureds.

A 1983 Missouri appellate court decision colorfully illustrates this point.<sup>1</sup> The action arose when Terry Braxton was shot and injured by a drunken gas station attendant following a fight over the making of change. Braxton brought suit against the owner of the gas station alleging negligent supervision of the attendant. A judgment of \$100,000 was obtained but the station's *liability* insurance carrier denied coverage. In so doing it relied on a "firearm" exclusion in the policy which stated, "This insurance does not apply . . . to bodily injury and property damage arising out of the ownership or use of any firearm."<sup>2</sup>

The court cited similar cases from a number of jurisdictions and concluded that the insured's own negligence in failing to properly supervise the attendant was a legally significant cause of the owner's liability. Therefore, under the doctrine of concurrent causation, coverage applied.<sup>3</sup>

Insurance lawyers may well disagree with the court's finding that the negligent supervision of the attendant was a "separate, concurrent and nonexcluded cause" of liability. Nevertheless, nearly all would agree that every basis of liability must be examined. If any nonexcluded basis rises to the dignity of an independent, concurrent proximate cause,<sup>4</sup> coverage under a liability policy will exist.

Liability and corresponding coverage under a third-party insurance policy must be carefully distinguished from the coverage analysis applied in a first-party property contract. Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability. Thus, we discover that:

. . . proximate cause has a different meaning in insurance cases than it has in tort cases. In tort cases the rules of proximate cause are applied for the single purpose of fixing culpability, and for that reason the rules reach back of both the injury and the physical cause to fix the blame on those who created the situation in which the physical laws of nature operated; in insurance cases the concern is not with the question of culpability or why the injury occurred, but only with the nature of the injury and how it happened.<sup>5</sup>

Property insurance then is an agreement, a contract, in which the insurer agrees to indemnify the insured in the event that the insured property suffers a covered loss. Coverage, in turn, is commonly provided by reference to causation, e.g., "loss caused by . . ." certain enumerated perils.

The term "perils" in traditional property insurance parlance refers to fortuitous, active, physical forces such as lightning, wind, and explosion, which bring about the

1. *Braxton v. United States Fire Ins. Co.*, 651 S.W.2d 616 (Mo. App. 1983).

2. *Id.* at 617.

3. *Accord Underwriters Ins. Co. v. Purdie*, 145 Cal. App. 3d 57, 193 Cal. Rptr. 248 (1983); *compare Hartford Fire Ins. Co. v. Superior Court*, 142 Cal. App. 3d 406, 191 Cal. Rptr. 37 (1983).

4. *See Unigard Mut. Ins. Co. v. Abbott*, 732 F.2d 1414 (9th Cir. 1984) applying Montana law; *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973).

5. 43 AM. JUR. 2d *Insurance* § 463 (2d ed. 1982).

loss. Thus the "cause" of loss in the context of a property insurance contract is totally different from that in a liability policy. This distinction is critical to the resolution of losses involving multiple causes.

Frequently property losses occur which involve more than one peril that might be considered legally significant. If one of the causes (perils) arguably falls within the coverage grant—commonly either because it is specifically insured (as in a named peril policy) or not specifically excepted or excluded (as in an "all risks" policy)—disputes over coverage can arise. The task becomes one of identifying the most important cause of the loss and attributing the loss to that cause. As stated in *Couch on Insurance*:

In determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.<sup>6</sup>

In discussing the most important cause of a property insurance loss, "efficient" cause is perhaps preferable to "proximate" cause because of the baggage that the latter term brings with it from the law of torts. But whether the courts and commentators refer to the most important cause as "proximate," "efficient," "dominant," "predominant," "operative," or "active," they have reached a consensus that *one* cause is to be so designated and the loss attributed to it.<sup>7</sup> The selection of this single cause is not simply a random choice among an infinite number of competing events, but rather focuses upon the contract and the parties. For it is the language of the contract and the bargain of the parties that determine whether an event is significant.<sup>8</sup>

To discuss whether a particular cause is significant without understanding the context of the inquiry is jabberwocky. This was perhaps best illustrated by Professor Nicholas St. John Green in an article written for the *American Law Review* over a century ago:

6. 6 COUCH ON INSURANCE, Sec. 1466 (1st ed. 1930) as cited in *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 895, 27 Cal. Rptr. 689, 695 (1963).

7. Brewer, *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141, 1143 (1961); Levit, *Proximate Cause—First Party Coverage*, 1965 ABA SECTION INS., NEG. & COMP. L. PROCEEDINGS 157, reprinted 1966 INS. L.J. 340, 342.

8. See *Bird v. St. Paul Fire and Marine Ins. Co.*, 224 N.Y. 47, 120 N.E. 86, 13 A.L.R. 875 (1918).

The problem before us is not one of philosophy. . . . General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts. There are times when the law permits us to go far back in tracing events to causes. The inquiry for us is how far the parties to this contract *intended* us to go. The causes within their contemplation are the only causes that concern us. (Emphasis in original.)

The question is not what men ought to think of as a cause. The question is what they do think of as a cause. We must put ourselves in the place of the average owner whose boat or building is damaged by the concussion of a distant explosion, let us say a mile away. Some glassware in his pantry is thrown down and broken. It would probably never occur to him that, within the meaning of his policy of insurance, he had suffered loss by fire. A philosopher or a lawyer might persuade him that he had, but he would not believe it until they told him.

For each different purpose with which we investigate we shall find a different circumstance, which we shall then intelligibly and properly call the cause. The man may have committed suicide; we say he himself was the cause of his death. He may have been pushed into the water by another; we say that other person was the cause. The drowned man may have been blind, and have fallen in while his attendant was wrongfully absent; we say the negligence of his attendant was the cause. Suppose him to have been drowned at a ford which was unexpectedly swollen by rain: we may properly say that the height of the water was the cause of his death. A medical man may say that the cause of his death was suffocation by water entering his lungs. A comparative anatomist may say that the cause of his death was the fact that he had lungs instead of gills like a fish. The illustration might be carried to an indefinite extent. From every point of view from which we look at the facts, a new cause appears.<sup>9</sup>

Unfortunately Professor Green's lesson has not always been recalled by the courts. Perhaps due to the judicial fascination with proximate cause in the tort field or the infrequency with which judges encounter property insurance cases, tort causation language has found its way—bag and baggage—into the insurance cases. This unfortunate blurring of distinctions between the law of torts and contracts is typified by the recent flurry of decisions applying the doctrine of concurrent causation to property insurance contracts.

Although a review of case law on a national basis would reveal that several jurisdictions have struggled with issues of concurrent causation in the context of property insurance,<sup>10</sup> California decisions have had particular impact in this developing area of the law.<sup>11</sup> At the core of that state's causation analysis may be its demonstrated passion to find ways to compensate injured parties even at the expense of breaking down common law distinctions between tort and contract. Granting tort remedies

*Id.*, 120 N.E. at 87, 13 A.L.R. at 877.

In last analysis, therefore, it is something in the minds of men, in the will of the contracting parties, and not merely in the physical bond of union between events, which solves, at least for the jurist, this problem of causation.

*Id.*, 120 N.E. at 88, 13 A.L.R. at 879.

9. Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201, 212 (1870) as quoted in Brewer, *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141, 1166 (1961).

10. See *General Am. Transp. Corp. v. Sun Ins. Off., Ltd.*, 369 F.2d 906, 908 (6th Cir. 1966) *aff'g* 239 F. Supp. 844 (E.D. Tenn. 1965); *Fireman's Fund Ins. Co. v. Hanley*, 252 F.2d 780, 785 (6th Cir. 1958) *aff'g* 140 F. Supp. 206 (W.D. Mich. 1956); *Pearl Assur. Co. v. Stacey Bros. Gas Const. Co.*, 114 F.2d 702, 706 (6th Cir. 1940) applying Michigan law; *Essex House v. St. Paul Fire and Marine Ins. Co.*, 404 F. Supp. 978, 991-92 (S.D. Ohio 1975); *Milan v. Providence Wash. Ins. Co.*, 227 F. Supp. 251, 253 (E.D. La. 1964); *Fogarty v. Fidelity and Cas. Co.*, 188 A. 481, 483-84 (Conn. 1936); *Martis v. State Farm Fire and Cas. Co.*, 118 Ill. App. 3d 612, 454 N.E.2d 1156, 1164 (5th Dist., 1983); *Vormelker v. Oleksinski*, 40 Mich. App. 618, 199 N.W.2d 287, 294 (1972); *Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 195 S.E.2d 545, 549 (1973); *Benke v. Mukwonago-Vernon Mut. Ins. Co.*, 110 Wis. 2d 356, 329 N.W.2d 243 (1982); *Kraemer Bros., Inc. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 278 N.W.2d 857 (1979); *Lawver v. Boling*, 71 Wis. 2d 408, 238 N.W.2d 514, 521 (1976). For additional references see Gordon and Crowley, *Earth Movement and Water Damage Exposure: A Landslide in Coverage*, 50 INS. COUNSEL J. 418, 421-25 (1983).

11. *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963); *Strubble v. United States Auto. Assoc.*, 35 Cal. App. 3d 498, 110 Cal. Rptr. 828 (1973); *Gillis v. Sun Ins. Off., Ltd.*, 238 Cal. App. 2d 408, 47 Cal. Rptr. 868 (1965); *Sauer v. General Ins. Co.*, 225 Cal. App. 2d 275, 37 Cal. Rptr. 303 (1964); *Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239, 18 Cal. Rptr. 650 (1962).

for the unlawful withholding of contractual benefits is one example of this judicial passion.<sup>12</sup> The expansion of causation rules may well be another.

The California Supreme Court has never held in a *property* insurance case that there can be more than one legally significant cause of loss.<sup>13</sup> In fact, the leading case of *Sabella v. Wisler*<sup>14</sup> seems to hold just the opposite. Nevertheless, the recent opinions of lower courts cannot be ignored. Moreover, the insurance industry has learned well its lesson that it must not rely on the California Supreme Court to calm troubled waters.

The difficulty of the industry's task in combatting concurrent causation embraces two distinct but related issues intertwined in the court decisions. First, the courts are creating new "causes" of loss never contemplated by property insurance policy drafters. Most important of these new causes are negligence and other human conduct. Such conduct may be active, passive, willful, negligent, imprudent, untimely, or any other word which describes how people act or fail to act. Second, the courts are telling us that the proper causation standard is no longer to attribute the loss to a single proximate cause, but rather to grant coverage if *any* of the causes of the loss has not been specifically excluded.

This second prong of the judicial assault is pointedly illustrated by the instructions given to the jury in a well-publicized recent case:

Under an all risk policy, no matter what the cause of damage, there will be coverage unless every cause of loss is excluded by the terms of the policy.

That is to say, if two or more causes combined to produce a loss, that also will be covered if any cause is not specifically excluded.<sup>15</sup>

Through a judicial blending of these two distinct notions, we now find that if a new cause (e.g., third-party negligence) joins with an excluded cause (e.g., earthquake), the resulting loss may be covered. This precise issue was litigated and *lost* by Safeco Insurance Company following the May 1983 earthquake in Coalinga, Cali-

12. *Gruenbreg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

13. *State Farm Mutual Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973), which is often cited as applying concurrent causation principles to insurance contracts, does so only in the context of the liability portion of the policy.

This distinction was clearly made by the California Supreme Court as noted:

Although there may be some question whether either of the two causes in the instant case can be properly characterized as the "prime," "moving" or "efficient" cause of the accident we believe that coverage under a *liability* insurance policy is equally available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries. (Emphasis supplied for the term "liability" only.)

*Id.* at 105-06, 514 P.2d at 130, 109 Cal. Rptr. at 818.

14. *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

15. Excerpt from jury instructions, *Garvey v. State Farm Fire and Cas. Co.*, No. 760 224 (San Francisco County, Cal. Super. Ct. 1982).

fornia.<sup>16</sup> Safeco subsequently made a corporate decision not to appeal the case and paid earthquake-related losses resulting from the Coalinga incident.

The language of the opinions is sweeping. Viewed collectively, the cases teach that no policy exclusion or exception is inviolable. While the decisions have thus far primarily addressed the "earth movement" and "water damage" exclusions, concurrent causation finds perhaps even more fertile application in the context of the catastrophic exclusions of "war" and "nuclear hazard." Indeed it is difficult to imagine how a war or nuclear incident could occur in the absence of negligence or some other human "cause."

For example, if the driver of a truck carrying nuclear waste negligently collides with another vehicle resulting in the escape of nuclear radiation, would not resulting property damage be concurrently and proximately caused by the driver's negligence? Does it make a difference whether the loss was one caused by or resulting from "nuclear hazard"—a specifically *excluded* peril? Does it matter whether policy drafters did not intend to cover such losses? or; whether the insured paid no premium for this coverage? Perhaps not!

If the insured has an "all risks" policy and the driver's negligence was not specifically excluded, it would seem to present an issue of concurrent causation as applied in the recent decisions. Moreover, the result may be the same had the loss occurred due to the negligent design of the truck, the improper maintenance of the road or the nuclear company's failure to transport the materials by rail. To repeat the words of Professor Green: "The illustration might be carried to an indefinite extent. From every point of view from which we look at the facts, a new cause appears."<sup>17</sup>

From the perspective of the insurance industry, these are not idle issues of intellectual speculation. They jeopardize the very solvency of individual carriers and the ability to conduct the business of insurance. No principles are more deeply ingrained in the minds of underwriters than the selection of risk and the determination of pre-

16. *Safeco Ins. Co. v. Motte*, No. 0298082-9 (Fresno County, Cal. Super. Ct., July 1984).

The "all risks" policy at issue in *Safeco* included recently added concurrent causation language. Safeco had mailed new policies to its insureds approximately fifty days before the Coalinga loss with an effective date three days prior to the May 2, 1983 earthquake. Safeco accompanied the new policy with a letter informing its insureds that there were changes in the new policy, but it did not describe them in detail. The judge ruled that Safeco had not provided sufficient notice to its policyholders and therefore the concurrent causation language was ineffective.

Judge Dennis Caeton then turned to the traditional exclusionary language of the earlier policy. He held that the earth movement exclusion was clear and unambiguous. However, although the peril of earthquake was specifically excluded, he found that the *causes* of the earthquake were not. Expert testimony established that earthquakes are commonly caused by the slippage of tectonic plates underlying the earth's crust. Since the policy did not specifically exclude tectonic plate slippage, the judge held that coverage existed.

Judge Caeton went on to find that even if the slippage of tectonic plates was encompassed within the exclusion for earth movement, the loss would still be covered. Judge Caeton cited the Ninth Circuit's decision in *Safeco v. Guyton*—*infra* note 18—as controlling law in California. Since expert testimony had established that the design of the structure was inappropriate to withstand earthquakes, the judge concluded that the negligent design was a concurrent proximate cause of the loss and therefore created coverage.

17. As cited in Brewer, *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141, 1143 (1961).

mium. Insurers must know with certainty that contract language will be judicially respected. Absent such certainty, only the most cavalier insurer would attempt to write business.

Faced with several adverse California appellate rulings<sup>18</sup> as well as a rapidly developing number of trial court opinions,<sup>19</sup> most companies took immediate and decisive measures. A few, apparently believing that the handwriting on the wall may be a forgery, have taken a "wait and see" posture.

It is to the credit of the insurance industry that the leading trade organizations, rating bureaus and independent writers acted swiftly and responsibly. Despite the gravity of the developing California case law, there was no industry movement to halt property writings in that state. Rather the industry's effort focused on the policy and the legislature.

#### REDRAFTING PROPERTY INSURANCE POLICIES

The traditional response of insurers upon discovering that their contract language is not being interpreted by the courts as the drafters intended is to rewrite the language. In fact this alternative is often judicially mandated. Courts have told the insurance industry countless times that insuring agreements will be interpreted broadly and exclusions narrowly. If the insurer desires to exclude some event it must say so clearly and unequivocally.<sup>20</sup>

The difficulty, of course, is usually not one of intention, but one of language. We humbly acknowledge the inherent artificiality, inadequacy, and imprecision of our language. Yet we ask the policy drafter to forge the magic words that are at once easy for the lay reader to comprehend and at the same time legally sufficient for the court

18. *Safeco Ins. Co. v. Guyton*, 692 F.2d 551 (9th Cir. 1982) *rev'g* 471 F. Supp. 1126 (C.D. Cal. 1979); *Premier Ins. Co. v. Welch*, 140 Cal. App. 3d 720, 189 Cal. Rptr. 657 (1983); *Ashling v. Unigard Mut. Ins. Co.* (not released for publication), Cal. App., 4th Dist., Div. 1 (1982); *Moorehead v. Travelers Ins. Co.* (not released for publication), Cal. App., 2nd Dist., Div. 3 (*atra* 1974).

19. *Farmers Ins. Exchange v. Adams*, No. A021020, Cal. App., 1st Dist., Div. 3 (1984) on appeal from an order granting defendant's demurrer (Marin County, Cal. Super. Ct., Nov. 23, 1982); *State Farm Fire and Cas. Co. v. Sheldon*, No. A021326, Cal. App., 1st Dist., Div. 4 (1984) on appeal from an order granting defendant's motion to dismiss (Marin County, Cal. Super. Ct., Aug. 2, 1982); *Garvey v. State Farm Fire and Cas. Co.*, No. A017879, Cal. App., 1st Dist., Div. 4 (1984) on appeal from a judgment entered in favor of the plaintiff, No. 760 224 (San Francisco County, Cal. Super. Ct., Feb. 18, 1982). For a discussion of this case, see Jordan, *Proximate vs. Concurrent Cause: the California Syndrome*, 1 TEXAS INS. L.J. No. 6 (April 1984); *McKibbin v. Security Ins. Co.*, No. C 178 697 (Los Angeles County, Cal. Super. Ct., Oct. 30, 1981).

20. See *Kane v. Royal Ins. Co.*, No. 83 CV 603, ruling on motion for summary judgment (Larimer County, Colo. Dist. Ct., Feb. 28, 1984).

The *Kane* decision holds that the property losses resulting from the July 15, 1982 failure of the "Lawn Lake dam" were not excluded by the water damage/flood exclusion. Rather the court decided that:

... the "efficient cause of Plaintiffs' damages" was the failure of the dam and not a flood as contemplated within the insurance exclusion.

Lastly, the Defendant companies control the language of the policy and their exclusions, and if they wished to exclude damage from escaping "impounded waters," they could have easily specified and defined such an exclusion.

*Id.* at 4.

to sanction. It is this challenge of writing for a dual audience (laymen and judge), and the often contrary demands of each, that leaves fertile ground for litigation.

When policy drafters from individual companies began to examine concurrent causation, they quickly learned that the issue was overwhelmingly complex. The "solution," in the words of McGeorge Bundy, was as elusive as "picking up a jelly-fish by the corners."<sup>21</sup> No consensus was reached by the industry on the precise language to be employed. Therefore, several approaches now exist, none of which has yet been judicially tested.

State Farm Fire and Casualty Company introduced its revised homeowners policies in California on January 1, 1983. As the first company to issue new policies, the language has been subject to close scrutiny and some criticism.<sup>22</sup>

Nevertheless, the changes made by State Farm are typical of those made by other carriers and will be used here as illustrative of the industry response.

State Farm made four basic changes in its homeowners policies.

1. It removed the term "all risks" from the policy itself as well as all advertising and promotional materials. The insurance industry well understood that "all risks" referred merely to the format of the policy and not to the fact that it protected the insured from every conceivable loss. Unfortunately, the term carried a connotation for some laypersons that the policy contained no exceptions or exclusions. To avoid the injection of the doctrine of reasonable expectations into the controversy, it seemed prudent to stop referring to and selling the policy as "all risks"<sup>23</sup> and to change the language of the coverage grant from "all risks of physical loss" to "accidental direct physical loss."<sup>24</sup> The change merely attempts to reinstate the intent of the earlier coverage grant.

2. It expanded the exclusionary definition of "earth movement" to enumerate a detailed listing of events including earthquake, volcanic eruption, subsidence, and mud flow. Ironically, the new listing closely resembles more historic versions of the industry homeowners policy.

Public and regulatory pressures to develop "easy to read" policies had earlier resulted in eliminating the litany of specific events in favor of the single term "earth

*Compare* Bartlett v. Continental Divide Ins. Co., No. 83 CV 994, granting defendant's proposed order (Larimer County, Colo. Dist. Ct., Jan. 5, 1984). In *Bartlett*, decided more than a month prior to *Kane*, a different judge of the same court held that losses from the same occurrence were unambiguously excluded by an identical flood exclusion.

To hold the term "flood" ambiguous when applied to the great overflowing of water due to the failure of a dam would be a denial of common sense and reason.

*Id.* at 1.

21. McGeorge Bundy quoted in *NEWSWEEK*, Dec. 26, 1967.

22. Gordon and Crowley, *Earth Movement and Water Damage Exposure: A Landslide in Coverage*, 50 *INS. COUNSEL J.* 418, 426 (1983).

23. Insurers have traditionally referred to expansive homeowners policies as "all risks" policies to differentiate them from "named peril" policies. The removal of the term "all risks" has left insurers without a universally accepted industry substitute. The Insurance Services Office coined the term "open peril" policy which is perhaps the most descriptive.

24. For a discussion of direct versus indirect loss, see Gorman, *A Reply to "Proximate Cause—First Party Coverage"*, 34 *INS. COUNSEL J.* 98, 101-03 (1967).



movement." Gains in brevity, however, are almost always accomplished through a loss in precision. In light of judicial demands on insurers to say precisely what they mean, most carriers have returned to describing a dozen or more kinds of excluded activity. This well illustrates the dilemma of writing for the dual audience discussed above.

3. It specifically provided that negligence or other conduct as well as defective or improper design, materials, etc. are not in themselves covered losses. Moreover, the presence or absence of these enumerated items has no effect on coverage. That is, the items neither affirmatively create coverage nor bar recovery if the claim is otherwise payable.

To illustrate how this provision operates in the typical homeowners policy, consider the following two hypotheticals:

- a. A home is improperly designed and constructed to withstand heavy winds common to its geographic location. If the home is subsequently destroyed by a windstorm, the loss is *paid* because the peril of wind is not excluded in the policy. The fact that the improper design or construction of the home or that defective materials may also have been "causes" of the loss is immaterial to the determination of coverage; and
- b. A home is negligently constructed on a site extremely susceptible to mudslides without adequate structural precautions. If the home is subsequently destroyed by mudslide, the loss is *denied* because the peril of mudslide (as well as other forms of earth movement) is specifically excluded. As in the above example, that improper design of the home or defective materials may also have been "causes" of the loss is unimportant to the issue of property insurance coverage. Note, however, that these "causes" *are* very important factors if the homeowner attempts to recover for his loss directly from the contractor based on theories of negligence or warranty. Again, whether "causes" of a loss are significant depends greatly on the context of and reason for the inquiry.

The adopted language attempts to restore traditional property insurance principles. Coverage is determined by an examination of the fortuitous, active, physical perils involved. Negligence and other *liability*-related concepts are irrelevant.<sup>25</sup> The intention of the drafters is to eliminate the new "causes" of loss held to have legal significance in such decisions as *Safeco v. Guyton*<sup>26</sup> and *Premier v. Welch*.<sup>27</sup>

4. And finally, it revised the lead-in language to the exclusions (i.e., ordinance or law, earth movement, water damage, neglect, war, and nuclear hazard). The new language establishes a purging effect by making the occurrence of any of these excluded events an absolute prohibition to a finding of coverage. Thus, once a loss occurs which would not have happened in the absence of an excluded event, there is no coverage. The policy states that this is so "regardless of: (a) the cause of the ex-

25. See *Brodsky v. Princemont Construction Co.*, 30 Md. App. 569, 354 A.2d 440, 443 (1976).

26. *Safeco Ins. Co. v. Guyton*, 692 F.2d 551 (9th Cir. 1982) *rev'g* 471 F. Supp. 1126 (C.D. Cal. 1979).

27. *Premier Ins. Co. v. Welch*, 140 Cal. App. 3d 720, 189 Cal. Rptr. 657 (1983).

cluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss."

Consideration was given to discussing the interaction of covered and excluded perils in terms of proximate or remote causation. While such terminology would parallel existing statutory and case law, attempts to crystalize such concepts in language meaningful to the lay reader proved futile. Furthermore, the potential catastrophic potential of such excluded perils as war, nuclear incident, flood and earthquake demanded that such losses be outside the contract regardless of the interaction of other nonexcluded factors. Therefore, it was decided to structure the exclusions to apply in *every situation* where the loss would not have occurred "but for" the excluded peril.

The Insurance Services Office (ISO), whose forms are widely used in the property insurance industry, introduced its revised homeowners forms and endorsements effective October 1983. Two substantive changes not incorporated in the State Farm policy are worthy of note. First, ISO added a new exclusion labeled "weather conditions." According to ISO's August 9, 1983 circular, this new exclusion is designed to operate similarly to its negligence language. That is, it only applies if a specifically excluded peril contributes in any way with weather conditions to produce the loss. "Therefore," according to the circular, "if the dwelling is damaged due to (the weather condition of) windstorm, coverage is provided; however, if (the weather condition of) heavy rainfall causes flood damage (an excluded peril), the loss is not covered."

Another significant ISO revision is its treatment of "collapse." Previously, collapse has been insured as a specifically named peril under both the personal property and dwelling coverage grants. ISO removed collapse from the list of covered perils and "excepted" it.<sup>28</sup>

Two reasons precipitated ISO's change in treatment of collapse. First, the peril of collapse has always been somewhat anomalous. Unlike traditional perils such as fire, wind, and theft, "collapse" more often describes the *result* of an occurrence, not the *cause* of one. Thus, it does not fit comfortably with other named perils and is more logically treated separately. Secondly, the adoption of concurrent causation made companies reexamine the drafting approach. They feared that if a massive earthquake occurred, courts might consider the resulting mass of rubble as "caused by" the named peril of collapse. While it is difficult to think of collapse as an independent, concurrent proximate *cause* of an earthquake loss, there is concern that the doctrine of reasonable expectations has not yet been stretched to its ultimate boundaries.

Therefore, ISO steered toward a safe harbor. It created a new paragraph under the heading, "Additional Coverages," to reincorporate coverage for "collapse" caused

28. For a well-developed treatment of the difference between "exceptions" and "exclusions," see E. PATTERSON, *ESSENTIALS OF INSURANCE LAW* (2d ed. 1957).

by certain specified perils such as hidden decay, weight of people or personal property, fire, and explosion. This change does result in a reduction of coverage and has generated both industry and regulatory debate.

Whether any version of the recent policy revisions will successfully ward off concurrent causation, only time will tell. Of particular concern is whether the California courts will accept the admittedly complex language. Although the language represents the industry's best efforts to state its intent and has its genesis in the soundest of business principles, the California courts have been singularly unsympathetic with insurance industry attempts to limit coverage.

Illustrative of this judicial mind set is the 1983 California appellate decision of *Ponder v. Blue Cross*.<sup>29</sup> The dispute in *Ponder* arose out of a health insurance policy which read in part: "Blue Cross shall not furnish benefits for . . . treatment for or prevention of temporo-mandibular joint syndrome."

Both parties agreed that Mrs. Ponder suffered from temporo-mandibular joint syndrome (a "clicking" of the lower jaw). The central issue was whether the language in the Blue Cross policy effectively excluded coverage.<sup>30</sup> The court held that the exclusionary language was too obscurely written and inconspicuously placed in the contract to be given effect. In so holding, the *Ponder* court summarized the applicable contractual rules:

1. Every contract is to be construed against the party who drafted it;
2. An *insurance* contract imposes an even more stringent duty on the court to interpret in favor of the insured;
3. An *exclusion* in an insurance contract is subject to the closest possible scrutiny;
4. A health policy, like traditional property policies, is not just an insurance policy but a contract of *adhesion* offered to the insured on a "take it or leave it" basis; and
5. An exclusion in an adhesion contract must be more than merely precise<sup>31</sup> and unambiguous, it must be (a) *conspicuous* and (b) stated in *plain* and *clear* language.

The court explained these last requirements as follows:

First, the exclusion must be positioned in a place and printed in a form which would attract a reader's attention. Secondly, the substance of the exclusion must be stated in words that convey the proper meaning to persons expected to read the contract.<sup>32</sup>

The court concluded that the Blue Cross language failed both the *conspicuous* and

29. *Ponder v. Blue Cross of So. Cal.*, 145 Cal. App. 3d 709, 193 Cal. Rptr. 632 (1983).

30. The court, not surprisingly, characterized the inquiry somewhat differently.

The central issue on appeal is whether a form insurance contract effectively excludes coverage through a clause couched in undefined technical language not highlighted by location, typeface or otherwise.

*Id.* at 714, 193 Cal. Rptr. at 633.

31. The court went so far as to say that:

Because of the nature of the contract and the contracting parties, the most precise language imaginable may prove insufficient to eliminate coverage.

*Id.* at 718, 193 Cal. Rptr. at 635-36.

32. *Id.* at 719, 193 Cal. Rptr. at 637.

the *plain-and-clear* requirements. Therefore, in the court's words, it "disappointed the reasonable expectations of the policyholder." Policy drafters can only approach such requirements with a deep sense of humility.

As a final reflection on the art of policy drafting, a review of the policy language at issue in *Guyton*—the Palm Desert flood case—is instructive. The policy provided, all in capitals:

#### ADDITIONAL EXCLUSIONS

##### THIS POLICY DOES NOT INSURE AGAINST LOSS:

- 1) CAUSED BY, RESULTING FROM, CONTRIBUTED TO OR AGGRAVATED BY ANY OF THE FOLLOWING:
  - A. FLOOD, SURFACE WATER, WAVES. . ."

Note that the very nature of the "caused by, resulting from, contributed to or aggravated by" language presupposes that other causes may intermix with the excluded events to produce the loss. The clear intent of the exclusionary language is to bar recovery regardless of the sequence or concurrency of other loss-producing factors.

Most insurance experts believe that the insurance industry cannot draft language which more precisely, unambiguously, conspicuously, plainly and clearly tells insureds that they have no coverage for flood losses. Judge Solomon, who authored the federal district court opinion in *Guyton*, agreed:

There is no merit in the insureds' contention that policyholders and insurance companies generally believe that floods are covered. I do not believe that they do. But even if they did, the express language of the policies, written in clear, concise and simple language, excludes floods from covered risks.<sup>33</sup>

Despite this language—carefully drafted as it was—the Ninth Circuit, in reversing Judge Solomon's ruling, found the exclusion would not preclude the payment of flood losses if third-party negligence were also a proximate cause of the loss. Flatly stated, an insurer's ability to contract—at least in California—is in serious jeopardy.

#### THE LEGISLATIVE ALTERNATIVE

Having witnessed judicial rebuff of previous policy-drafting efforts in such cases as *Ponder* and *Guyton*, the insurance industry can ill afford to place total confidence in the most recent policy revisions. Most industry representatives firmly believe that their assets are not protected, at least in California, until salutary legislation has been passed.

Numerous industry meetings were called to discuss the California judicial developments and to attempt to forge a legislative solution. Although every major trade organization and independent property insurance writer participated in the dia-

33. *Safeco Ins. Co. v. Guyton*, *supra* note 26, at 552-53.

34. *Safeco Ins. Co. v. Guyton*, 471 F. Supp. 1126, 1130 (C.D. Cal. 1979), *rev'd*, 692 F.2d 551 (9th Cir. 1982).

logue, a consensus position was difficult to develop. Each company brought to the discussions its own interests, policy forms and interpretation of the California judicial mandate.

Most felt that the policy drafters had successfully removed negligence and other judicially created "causes" of loss from the contract. There was considerably less comfort, however, with the interplay between the contractual causation language and two existing sections of the California Insurance Code. Sections 530 and 532 provide:

§ 530. *Proximate cause*

An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

§ 532. *Specially excepted peril*

If a peril is specially excepted in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted.<sup>35</sup>

These sections codify the long-standing English principles of marine insurance relating to causation.<sup>36</sup> Despite their derivation from marine insurance, they have been frequently cited by California courts in resolving both liability and property insurance cases.<sup>37</sup> An open question remains whether sections 530 and 532 can be suc-

35. CAL INS. CODE §§ 530 and 532 (Deering 1972).

These two statutes were originally enacted in 1872 as sections 2626 and 2628 of California's first Civil Code. They were derived from sections 1431 and 1433 of David Dudley Field's draft of the New York Civil Code of 1865. Sections 1431 and 1433 were subsequently deleted from the New York draft and hence never enacted. This leaves California unique in its codification of insurance causation principles.

Section 530 codifies the traditional marine insurance causation principle applicable to named peril policies. That being, when two perils join to produce a loss—one of which is specifically "insured against" and another of which is "not contemplated," i.e., unmentioned, neither specifically insured against nor specially excepted—coverage depends upon which of the two perils is "proximate." If the peril specifically insured against is found to be proximate, there is coverage; if the unmentioned peril is proximate, there is no coverage. For property subject to all risks protection, of course, all perils are "contemplated" by the coverage grant. Therefore in the absence of a relevant policy exception, coverage would apply regardless of the manner in which the perils combine to produce the loss.

Section 532 provides the traditional marine rule for determining coverage under both named peril and all risks policies in instances quite distinct from section 530. Now one of the perils is "specially excepted"—not simply unmentioned or "not contemplated." Section 532 unambiguously states that, if the loss would not have occurred "but for" the specially excepted peril, there is no coverage. Whether the specially excepted peril is proximate or remote is unimportant. Similarly unimportant is whether the other operative peril is specifically insured against. As long as the specially excepted peril meets the "but for" (cause in fact) standard, the loss is not covered.

Either the California courts have failed to recognize the above distinction or they have considered the results of literally applying section 532 too harsh. Regardless of the reasoning, they have found the provisions of the two sections to be "directly contrary" to each other and have essentially emasculated section 532. [See *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 896, 27 Cal. Rptr. 689, 696 (1963).]

36. *Brewer*, *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141, 1145 (1961).

37. See *State Farm Mutual Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973); *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963); *Sauer v. General Ins. Co.*, 225 Cal. App. 2d 275, 37 Cal. Rptr. 303 (1964); *Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239, 18 Cal. Rptr. 650 (1962).

cessfully altered by contract language. However, section 3268 of the California Civil Code<sup>38</sup> and the case law<sup>39</sup> interpreting that section persuasively support such contractual freedom.

Nevertheless, the possibility cannot be ignored that the courts will declare sections 530 and 532 so entrenched in the law of property insurance that they now represent the public policy of the state and cannot be contractually circumscribed. Fearing such a judicial construction, the insurance industry introduced several bills during the 1982 and 1983 legislative sessions which would have either repealed or amended both sections. These efforts were strongly opposed by the California Trial Lawyers Association and each of the bills died early in the legislative process.

Realizing that broad legislation to resolve concurrent causation had little chance of passage, the insurance industry focused its attention on the one peril whose catastrophic potential endangered its very solvency—the peril of earthquake. Unsuccessful efforts were made during the 1983 session to legislatively exclude earthquake losses from property insurance policies which did not specifically cover earthquakes.<sup>40</sup> Finally, some relief was achieved in 1984 with the passage of Assembly Bill 2865, which became effective on January 1, 1985.<sup>41</sup> This bill was sponsored by a substantial segment of the insurance industry and received the support, at least informally, of the California Insurance Department.

A.B. 2865 has two significant portions. First, it intends to provide absolute protection for property insurers against the peril of earthquake and to resolve the application of concurrent causation to this peril. The bill states that such protection applies regardless of sections 530 and 532 or any other existing laws. At least within this limited context, it should legislatively overrule the rationale employed in such cases as *Guyton*.

As a trade-off for such protection, A.B. 2865 requires that each insurer affirmatively offer earthquake coverage to all existing and new residential property policyholders. This offer, which must be made in a prescribed written format, calls to the attention of the policyholder that the policy does not cover loss resulting from earthquake. If the insured desires such coverage, the insurer will either offer it directly or arrange for another insurance entity to offer it.

Similar to earlier efforts, A.B. 2865 was introduced as a clarification measure to

38. [Parties may waive provisions of code.] Except where it is otherwise declared, the provisions of the foregoing titles of this part, in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, when ascertained in the manner prescribed by this chapter on the interpretation of contracts; and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy. CAL. CIV. CODE § 3268 (Deering 1972).

39. See *Williamsburgh City Fire Ins. Co. v. Willard*, 164 F. 404, 21 L.R.A., N.S., 103 (9th Cir. 1908).

40. See, e.g., Cal. S.B. 958, 1983 Reg. Sess. (as amended on Sept. 7, 1983).

Existing California law prohibits fire and related insurance policies (including homeowners policies) from affording coverage for nuclear loss or damage unless a specific nuclear endorsement is attached. Absent such an endorsement there is no coverage for nuclear loss "whether directly or indirectly resulting from an insured peril." [Cal. Ins. Code § 2079 (Deering 1972).] Unenacted S.B. 958 would have provided identical treatment for the peril of earthquake.

41. Enacted as ch. 916, Laws 1984, Reg. Sess. (to be codified as ch. 8.5—commencing with § 10081—of the CAL. INS. CODE).

reinstate traditional insurer-intended coverage and to legislatively underscore the significance of the earthquake exposure. If people desire earthquake protection, it is readily available for an additional premium. If people choose not to purchase such coverage, their property insurance policy furnishes no coverage for earthquake—regardless of other “causes.”

The enactment of A.B. 2865 hopefully will provide the insurance industry with much needed relief from the peril of earthquake. However, the bill may be cold comfort indeed should the California courts decide that the special legislative treatment of earthquake implies that all other “causes” of loss are covered regardless of policy language to the contrary.

Moreover, the mandatory offer of earthquake insurance provisions of the bill are very troublesome. They have created a great deal of concern throughout the insurance industry that the legislation may result in earthquake writings and corresponding liabilities which exceed the prudent capacity levels established by individual insurers as well as the California Department of Insurance. Although it is not presently known what the level of policyholder acceptance will be for this mandatory offer, a survey conducted by State Farm's research department suggests that earthquake insurance writings may well double.

The added earthquake exposure resulting from the mandatory offer will force insurance companies to seriously reevaluate their underwriting and pricing guidelines. Since a homeowners policy cannot be written in an earthquake-prone area of California without offering coverage against earthquake, insurers may be forced to decline the risk entirely. Such action may result in areas of insurance unavailability or unaffordability, which in turn may spur further legislative action.

#### CONCLUSION

Final resolution of the concurrent causation issue remains elusive. As industry efforts concentrate on California, the rationale of the California decisions has recently surfaced in other jurisdictions.<sup>42</sup> The jellyfish is entering new waters, leaving industry policy drafters, lobbyists and lawyers with the task of searching for the “corner” to extricate the property insurance industry from the most significant and perplexing problems it has faced in decades.

42. See *Mattis v. State Farm Fire and Cas. Co.*, 118 Ill. App. 3d 612, 454 N.E.2d 1156 (5th Dist., 1983); memorandum brief in support of plaintiff's motion for summary judgment, filed Jan. 17, 1983 in *Kane v. Royal Ins. Co.*, No. 83 CV 693 (Larimer County, Colo. Dist. Ct.) at 13-18.

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October 16, 1987

Darwin C. Hansen, Esq.  
110 West Center Street  
Bountiful, Utah 84010

Re: Village Inn Partners v. State Farm Insurance Co.  
Civil No. C-87-01180

Dear Darwin:

Since we are about to embark on discovery, there is one matter I would like to bring to your attention.

Your client denied this claim on the basis of two exclusions: repeated leakage and earth movement. With respect to the second exclusion, I have various arguments as to why that "earth movement" exclusion does not apply. You and I have discussed some of those theories. For example, I will argue that while earth movement itself is excluded, the efficient predominant cause was a covered cause, and therefore the loss is covered. Additionally, we discussed my position that earth movement only applies to natural phenomena.

There is one additional position we will be taking when attacking the earth movement clause. I wanted you to be aware of this before the depositions started. We may argue that the earth movement exclusion does not apply because, technically, there was no earth movement which preceded the loss. We have reason to believe that the soil, when saturated with water, does not actually sink or settle. Rather, it loses its weight-bearing ability. This allows the foundation to sink or shift. The soil would, of course, be displaced at that point, but the actual movement of earth is not what caused the foundation to shift.



Darwin C. Hansen, Esq.  
October 16, 1987  
Page 2

At this time, I am not sure to what extent the facts will bear out this theory. However, in the interest of candor, I wanted you to be aware of this approach. My Amended Complaint may be technically incorrect because it references "soil settlement" in one allegation (§ 5). While there was indeed soil settlement or displacement, we intend to argue that such settlement or displacement was the result of (rather than the cause of) foundation shifting. I suppose I could amend the allegation accordingly, but I would hope that is not necessary in view of this letter.

Sincerely,

  
Thomas J. Erbin

TJE/cs

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RECEIVED

APR 1 1987

EKS&M

TO: State Farm Counsel  
FROM: Craig Simon/Bill Hughes

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JAMES S. MILLIKEN and ) Civil No. 86-1284-E  
JEANNIE S. MILLIKEN, )  
Plaintiffs, )  
v. ) MEMORANDUM DECISION  
STATE FARM FIRE & CASUALTY )  
INSURANCE COMPANY, et al., )  
Defendants. )

STATEMENT OF FACTS

This case arises out of the alleged bad faith denial of insurance coverage and concomitant unreasonable conduct of defendant State Farm Fire and Casualty Company (hereinafter "State Farm") in its investigation of a property damage claim submitted by plaintiffs Jeannie and James Milliken.

On June 3, 1985, the Millikens applied for an insurance package with State Farm (intending, according to their account, to secure "all-risk" or "all peril" coverage for their home). A "Homeowners Policy -- Extra Form 5" (No. 77-89-3958-1, hereinafter "Policy") was then issued, effective June 23, 1985. Apparently the Millikens were not provided with a copy of the Policy at the time of their application, nor was their attention

1 called to any provisions which would defeat their purported  
2 desire to secure all-risk protection.

3 Shortly after applying for the Policy, the Millikens depart  
4 ed on a two-month vacation. They had not received a copy of the  
5 executed Policy until they returned home on August 1, 1985. It  
6 was also at this time that they noticed cracking in the concrete  
7 slabs underlying their residence, garage and patio.

8 On December 5, 1985, the Millikens submitted a claim for  
9 indemnification to State Farm, which received the claim on  
10 December 11 and on December 17 agreed to investigate the loss  
11 (under a full reservation of rights). State Farm claims examine  
12 Charles Garvin made a visual inspection of the Milliken residence  
13 on January 17, 1986. He took fourteen photos of the damaged  
14 areas, which he forwarded to State Farm for its review. At no  
15 time did State Farm or Garvin arrange for a licensed geotechnical  
16 firm to conduct an independent investigation of the site.

17 State Farm denied the Millikens' claim on February 6, 1986.  
18 Garvin's letter of denial cited language in the Policy purporting  
19 to exclude coverage for damage caused by "earth movement" (and  
20 related phenomena that could have caused the cracking). Specifically,  
21 the following exclusionary language was noted:

22 Section I -- Losses Not Insured

23 1. We do not insure for loss to the property described in  
24 Coverage A either consisting of, or directly and immediately  
caused by, one or more of the following:

- 25 i. settling, cracking, shrinking, bulging, or  
26 expansion of pavements, patios, foundation,  
walls, floors, roofs or ceilings;

27 However, we do insure for an ensuing loss from items f  
28 through j unless the loss is itself a Loss Not Insured  
by this Section.

1 2. We do not insure under any coverage for loss (including  
2 collapse of an insured building or part of a building)  
3 which would not have occurred in the absence of one or  
4 more of the following excluded events. We do not  
5 insure for such loss regardless of: a) the cause of  
the excluded event; or b) other cause of the loss; or  
c) whether other causes acted concurrently or in any  
sequence with the excluded event to produce the loss:

6 b. Earth Movement, meaning any loss caused by,  
7 resulting from, contributed to or aggravated  
8 by earthquakes; landslides; mud flow; sink-  
9 hole; erosion; the sinking, rising, shifting,  
10 expanding or contraction of the earth. Earth  
11 movement also means volcanic eruption, explo-  
12 sion or effusion, except as provided in Addi-  
tional Coverages for Volcanic Action.

13 We do insure for direct loss by fire, explo-  
14 sion other than explosion of a volcano,  
15 theft, or breakage of glass or safety glazing  
16 materials resulting from earth movement.

17 c. Water Damage, meaning:

18 (3) natural water below the surface of the  
19 ground. This includes water which exerts  
20 pressure on or seeps or leaks through a  
21 building, sidewalk, driveway, foundation,  
22 swimming pool or other structure.

23 However, we do insure for direct loss by  
24 fire, explosion, or theft resulting from  
25 water damage.

26 3. We do not insure under any coverage for loss consisting  
27 of one or more of the items below:

28 a. conduct, act, failure to act, or decision of  
any person, group, organization or govern-  
mental body whether intentional, wrongful,  
negligent, or without fault;

b. defect, weakness, inadequacy, fault or  
unsoundness in:  
(1) planning, zoning, development surveying,  
siting;  
(2) design, specifications, workmanship,  
construction, grading, compaction;  
(3) materials used in construction or repair;  
(4) maintenance;  
of any property (including land, structures,  
or improvements of any kind) whether on or  
off the residence premises.

1 However, we do insure for any ensuing loss from items a  
2 and b unless the ensuing loss is itself a Loss Not  
Insured by this Section.

3 4. We do not insure for loss described in paragraphs 1 and  
4 2 immediately above regardless of whether one or more  
of the items listed in paragraph 3 above:

5 a. directly or indirectly cause, contribute to  
6 or aggravate the loss; or

7 b. occur before, at the same time, or after the  
loss or any other cause of the loss.

8 However, we do insure for ensuing loss from items 3a  
9 and 3b unless the ensuing loss is itself a Loss Not  
Insured by this Section.

10 The letter then stated:

11 Our observations of the cracking in the slab of the  
12 sort we observed at your home can only be a result of  
13 some type of earth movement, of a sinking, rising,  
shifting, expanding or contracting of the earth. As  
14 you can see from the terms of your policy quoted above  
this sort of earth movement is excluded.

15 The disappointment of the Millikens in having their claim denied  
16 was compounded by their suspicion that Garvin, not a licensed  
17 geotechnical engineer, did not give them a fair evaluation.  
18 Through their attorney they wrote to Garvin on February 12, 1986  
19 and "beseeched" him to undertake a more complete inquiry into the  
20 causes of the damage. Garvin's response was a reaffirmation of  
21 coverage denial.

22 The Millikens filed the instant suit in San Diego Superior  
23 Court on April 10, 1986. Their complaint sets out eight causes  
24 of action:

- 25 1) breach of contract;
- 26 2) breach of the covenant of good faith and fair  
dealing and breach of State Farm's fiduciary  
duties;
- 27 3) fraud;
- 28 4) negligent misrepresentation;
- 5) violation of the California Insurance Code  
(sections 790.02 and 790.03);

- 6) negligence;
- 7) intentional infliction of emotional distress;
- 8) negligent infliction of emotional distress.

State Farm petitioned for removal of the action on June 5, 1986 and the Millikens then moved for remand. Pursuant to a Memorandum Decision dated November 5, 1986, this court denied the motion for remand. State Farm then moved for summary judgment on February 13, 1987. Summary judgment on the first through fifth causes of action is sought on grounds that the Policy excludes the Millikens' loss from coverage, and summary judgment on the seventh and eighth causes is sought on grounds of failure to state a claim upon which relief may be granted. State Farm inadvertently failed to request summary judgment on the sixth ("negligence") cause of action, but at hearing the court agreed to entertain an oral motion on that cause. For the reasons set forth below, the court now finds the arguments of State Farm to be well-taken and therefore grants summary judgment in its favor as to all eight causes of action.

#### DISCUSSION

##### I.

#### Summary Judgment Standards

Federal Rule of Civil Procedure 56(c) allows for the entry of summary judgment where:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56. In a recent discussion of this standard the Supreme Court stated that Rule 56(c) mandates the entry of

1 summary judgment against a party who "fails to make a showing  
2 sufficient to establish the existence of an element essential to  
3 that party's case, and on which that party will bear the burden  
4 of proof at trial." Celotex Corp. v. Catrett, 106 S. Ct. 2548,  
5 2553 (1986).

6 The party moving for summary judgment bears the burden of  
7 proving that there is no genuine issue of material fact and  
8 that judgment may be entered as a matter of law. International  
9 Union of Bricklayers & Allied Craftsmen Local Union No. 20,  
10 AFL-CIO v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir.  
11 1985). Once that burden has been met, however, the opponent  
12 must answer with factual allegations revealing a genuine dispute  
13 of fact. Id.

14 A dispute over a material fact is "genuine," according to  
15 a recent Supreme Court pronouncement, if "the evidence is such  
16 that a reasonable jury could return a verdict for the nonmoving  
17 party." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510  
18 (1986). If a nonmoving party's evidence is "merely colorable"  
19 or "not significantly probative," summary judgment may be  
20 granted. Id. at 2511.

21 Furthermore, the "substantive evidentiary standards that  
22 apply to the case" must guide a judge in determining whether a  
23 factual dispute requires submission to a jury. Id. at 2514.  
24 The Court in Anderson, supra, went on to point out that "at  
25 the summary judgment stage the judge's function is not himself  
26 to weigh the evidence and determine the truth of the matter but  
27 to determine whether there is a genuine issue for trial." Id.  
28 at 2511.

1           Summary judgment may, of course, be partial. Also, a court  
2 may decline to enter summary judgment but at the same time find  
3 that certain facts or issues do not present a genuine dispute.  
4 In such a case a court may enter an order specifying the facts  
5 that are not subject to substantial controversy. Fed. R. Civ. P.  
6 56(d). Here, State Farm has requested that such an order be  
7 entered if summary judgment is denied.

8           Although Rule 56 presents only one standard for summary  
9 judgment, application of the standard over the years has pro-  
10 duced certain rules of thumb. For instance, summary judgment  
11 is usually denied where a case turns on issues of intent or  
12 motive. In this spirit, the Millikens argue that "summary  
13 judgment is generally denied in cases involving insurance  
14 contracts because issues of fact are present concerning whether  
15 the damages involved are within the scope of the insurance  
16 policy." Citing Wright and Miller, 10A Federal Practice and  
17 Procedure § 2730.1, p. 293 (1983). The Millikens further argue  
18 that resolution of these factual issues requires that a policy  
19 be construed in light of the parties' reasonable expectations  
20 of coverage. Finally, the Millikens suggest that summary  
21 judgment is usually inappropriate in insurance coverage cases  
22 because such cases typically present the factual issues of  
23 whether the insurer breached its obligations under the policy  
24 and whether the insurer made certain representations regarding  
25 coverage. These propositions notwithstanding, however, summary  
26 judgment is just as appropriate in insurance cases as it is in  
27 other cases where there is no genuine issue of material fact and  
28 the movant is entitled to judgment as a matter of law. Therefore,



1 as mentioned above and discussed below, summary judgment may be  
2 entered in favor of State Farm in the instant case.

3 II.

4 Coverage Issues Relating to the  
5 First Five Causes of Action

6 A. Ambiguity of the Policy

7 Both parties spend a considerable amount of their discussion  
8 on the issue of the Policy's ambiguity before they address whether  
9 the damage claimed by the Millikens is covered. State Farm's  
10 firm assertion that the Policy is not ambiguous is central to its  
11 argument for summary judgment. This is because construction of  
12 an unambiguous policy may be undertaken by the court as a legal  
13 matter suitable for resolution on a motion for summary judgment.  
14 See Saprota v. Barbagelata, 220 Cal. App. 2d 463, 472 (1963).

15 In developing its argument here, State Farm restates some  
16 familiar maxims. The language of a policy prevails over any  
17 inconsistent or general description of that policy. C & H Foods  
18 v. Hartford Ins. Co., 163 Cal. App. 3d 1055, 1064 (1984). Words  
19 must be given their plain meaning, and if a policy is unambiguous  
20 a court must give effect to that plain meaning and must not  
21 create an artificial ambiguity. See Matsuo Yoshida v. Liberty  
22 Mutual Ins. Co., 240 F.2d 824, 826-27 (9th Cir. 1957). An  
23 exclusionary clause must be conspicuous, plain and clear.  
24 Travelers Ins. Co. v. Leshner, 187 Cal. App. 3d 169, 184 (1986).

25 State Farm avers that the Policy exclusions are abundantly  
26 clear. Clauses affording coverage are located under the boldface  
27 heading "Losses Insured," while exclusions comprise the separate-  
28 ly titled section of "Losses Not Insured." Furthermore, the

1 numbered exclusionary subsections all begin with the simple  
2 declaration, "We do not insure...." What is more, there is a  
3 separate, boldfaced "Earth Movement" exclusion which, according  
4 to State Farm, applies neatly in the instant case.

5 The Millikens argue, contrariwise, that the policy is ambig-  
6 uous and that summary judgment therefore cannot be entered. A  
7 policy provision is ambiguous when it is susceptible to two or  
8 more constructions, both of which are reasonable. Furthermore,  
9 according to the Millikens, ambiguity must be "viewed from the  
10 perspective of a reasonable lay person." Delgado v. Heritage  
11 Life Ins. Co., 157 Cal. App. 3d 262, 272 (1984). A policy should  
12 not be subjected to the fine-toothed inspection of an attorney or  
13 insurance specialist, but instead should be read in its plain,  
14 everyday sense.

15 The Millikens charge that the Policy is ambiguous in several  
16 fundamental respects. An initial ambiguity arises out of the  
17 provision, "We insure for accidental direct physical loss to the  
18 property described in Coverage A except as provided in SECTION 1-  
19 LOSSES NOT INSURED." According to the Millikens, the operative  
20 phrase "accidental direct physical loss" is never defined in the  
21 Policy. Nor is the term "loss" itself defined. This is important  
22 because the Millikens allegedly assumed that they had taken out  
23 an "all-risk" policy. This assumption, they contend, is borne  
24 out by the presence in the Policy of some 60 individual exclu-  
25 sions. The Millikens reason that only an "all-risk" policy would  
26 have such a comprehensive list of exclusions. Thus the structure  
27 of the Policy is ambiguous; the Policy is internally inconsis-  
28 ent. In addition, the Millikens posit that the "Losses Not

1 Insured" terminology is unclear. Each of the numbered exclu-  
2 sions is followed with the declaration that "we do insure for  
3 any ensuing loss...." The term "ensuing loss" is not defined  
4 in the Policy. And, more importantly, the Millikens assert that  
5 the diminution in value of their residence is just the sort of  
6 "ensuing loss" that a reasonable person would expect to be  
7 covered under this exception to the exclusion. Finally, the  
8 Millikens allege that State Farm apparently admitted the ambi-  
9 guity of some of its own terms in responding to several pro-  
10 pounded requests to admit.

11 Having considered the arguments set out above, the court  
12 now finds that the Policy is sufficiently unambiguous to warrant  
13 reading it on its own terms. The Millikens' objections are not  
14 persuasive; the Policy's coverages and exclusions are clearly  
15 categorized, labeled and (to a reasonable degree) defined. It  
16 is an easy task to quibble over definitions and undefined terms,  
17 and it seems to the court that an approach like that taken by  
18 the Millikens could render any policy or provision arguably  
19 unintelligible. The fact that the coverage term "accidental  
20 direct physical loss" is undefined does not reveal a fatal  
21 ambiguity in the Policy, because in this case the operative term  
22 is the "earth movement" exclusion (which is clearly set out).  
23 Thus, even assuming that the coverage term is unclear, the  
24 exclusion term is not. Moreover, the Policy is not internally  
25 inconsistent. The Millikens' argument here relies upon a good  
26 deal of bootstrapping in its effort to establish that just  
27 because an all-risk policy was sought, the presence of exclusions  
28 renders the Policy ambiguous. As admitted by Mr. Milliken

1 at his deposition, the Policy says what it says. (Milliken Dep.,  
2 p. 71) If what the Policy says differs from that which it was  
3 expected to say, that discrepancy goes more to reasonableness  
4 of expectations or bad faith than to ambiguity (see below,  
5 pp. 11-13). Furthermore, although the Policy does not define  
6 "ensuing loss," it does indicate at the outset that only  
7 "physical" losses are covered. Diminution in value would there-  
8 fore not be within a reasonable reading of "ensuing loss."  
9 Finally, having examined State Farm's responses to the Millikens'  
10 requests to admit, the court is satisfied that State Farm was not  
11 admitting in any way the ambiguity of the Policy. Moreover, as  
12 shown herein, the court is further satisfied that the Policy is  
13 not ambiguous.

14 B. Reasonable Expectations

15 Although in some senses it is true, as State Farm contends,  
16 that reasonableness of expectations is only an issue if the  
17 Policy is found to be ambiguous, the unusual facts of this case  
18 recommend that the issue be considered apart from the Policy's  
19 ambiguity. The gist of the Millikens' argument here is that they  
20 applied for an "all-risk" or "all peril" policy but that they  
21 received a policy riddled with exclusions. When the Millikens  
22 submitted their application, they checked a box reading "all  
23 peril." They now maintain that by doing so they expected a more  
24 comprehensive policy than that which was issued. And because the  
25 actual Policy was mailed to their home while they were away on  
26 vacation, they could not inspect and object to the Policy until  
27 they returned. But by the time of their return the damage had  
28 occurred. Therefore, according to the Millikens, the scope of

1 coverage should be determined by their expectations at the time  
2 of application, and not by the limited terms of the Policy.

3 With respect to the first contention, the court is not con-  
4 vinced that the Millikens' application did evince an intent to  
5 secure all-risk coverage. The box on the application which was  
6 marked for "all peril" is included in the deductibles section,  
7 not the coverage section. Thus, it appears to the court that the  
8 Millikens were not indicating that they wanted all-risk coverage,  
9 but instead were simply agreeing to a certain deductible on all  
10 "perils" -- on all risks and occurrences which would otherwise  
11 give rise to claims.

12 Moreover, State Farm points out that Mr. Milliken is an  
13 insurance lawyer who has prosecuted bad faith actions and is  
14 somewhat acquainted with soil mechanics, and then argues that he  
15 did get exactly what he bargained for in the Policy. In other  
16 words, he had no expectation of receiving all-risk coverage. In  
17 an excerpt from his recent deposition, Mr. Milliken indicates  
18 that he knew that some insurers were attempting to exclude con-  
19 current causation coverage from their policies (in the aftermath  
20 of the Coalinga earthquake). (Milliken Dep., p. 70) From this  
21 knowledge, State Farm deduces that Mr. Milliken "is a very, very  
22 sophisticated individual who knew more than the insurance agent  
23 selling the policy." In another deposition excerpt, Milliken  
24 states:

25 I mean, the policy speaks for itself. Whatever it says,  
26 it says. There was no collateral conversation about  
27 the meaning of the policy. I expected the policy to  
28 cover whatever it says it covered and we didn't discuss  
what their intent was in doing it or what my intent was  
in buying it. I bought the policy as it was sold. The  
product is the policy form and that's what I bought.

1 (Milliken Dep., p. 70) In light of this and other evidence,  
2 State Farm concludes that Mr. Milliken did not have a reasonable  
3 expectation of coverage for loss due to earth movement. The fact  
4 that he did not actually read the Policy until after the loss is  
5 therefore beside the point. To find otherwise, and to protect  
6 the Millikens on expectation grounds, would be to conjure up an  
7 untenable principle that exclusions will not be enforced until  
8 they are actually received and read by the insured.

9 In light of the revealing deposition testimony quoted above,  
10 the court finds that the Millikens did not have a reasonable  
11 expectation of coverage for losses due to earth movement. The  
12 Millikens have not shown both that they intended to secure all-  
13 risk coverage and that they communicated that intent to State  
14 Farm. And State Farm has shown that Mr. Milliken (at least)  
15 expected only to be covered by the terms of the Policy as  
16 written. The court declines the Millikens' invitation to fashion  
17 a rule that premises the effectiveness of policy terms upon the  
18 condition that they are read. Such a novel rule would burden  
19 insurers with uncertain expectations and ultimately reward ignor-  
20 ance and sloth on the part of policyholders.

21 C. Reasonableness of Investigation

22 A related reasonableness issue concerns whether State Farm's  
23 investigation of the Milliken claim was reasonable -- complete,  
24 accurate and undertaken in good faith. The Millikens assert  
25 strongly that State Farm's investigation was inadequate. That  
26 investigation, which consisted of a visual inspection by Garvin,  
27 an interview of the Millikens, and State Farm's later analysis of  
28 Garvin's site map and photos, was allegedly too cursory to have

1 been made in good faith. The Millikens challenge the competency  
2 of Garvin and fellow State Farm examiner Thomas O'Mahoney and  
3 allege that the Policy's implied covenant of good faith and fair  
4 dealing required at least a thorough study by a qualified civil  
5 engineer before coverage was denied.<sup>1/</sup> According to the  
6 Millikens, a finding that earth movement has caused the subject  
7 property damage must be based upon a complete investigation by a  
8 civil engineer. Such an investigation, moreover, must be under-  
9 taken in order to comport with an insurer's express and implied  
10 contractual duties (including its fiduciary duty). Here, say the  
11 Millikens, the failure of State Farm to consult with earth  
12 movement specialists constitutes an unreasonable investigation  
13 and a breach of contractual duties.<sup>2/</sup>

14 State Farm argues that its investigation of the Milliken  
15 claim was reasonable, and it is with this argument that the court  
16 is in accord. Surely further studies by expert geologists would

17 1/

18 The Millikens cite the fact that neither Garvin nor O'Mahoney  
19 is an engineer in support of a collateral accusation that the two  
20 examiners are practicing civil engineering without a license, in  
21 violation of California Business and Professions Code § 6730.  
22 This charge, in the court's estimation and in agreement with  
23 State Farm's reply, "borders on the ludicrous." Neither Garvin  
24 nor O'Mahoney purports to be a civil engineer, and neither has  
25 held himself out so as to raise such a suspicion. By contrast,  
26 both do have experience in evaluating earth movement loss claims.  
27 And the opinion of an insurance examiner ought not to be discred-  
28 ited merely because the subject about which he makes a determina-  
tion lies within the special expertise of another professional  
such as an engineer. To hold otherwise would be to disqualify  
most examiners from rendering opinions on any subject except  
insurance -- an absurd result.

26 2/

27 The Millikens here rely on the declaration of Jack Eagan,  
28 a certified engineering geologist who has reviewed this case and  
has concluded: "I do not believe a sufficiently thorough investi-  
gation was performed to cause anyone to render an opinion that  
the damage described was as a consequence of earth movement."

1 have lent credence to whatever conclusion was ultimately drawn by  
2 State Farm. But there is insufficient proof that State Farm's ow  
3 investigation was either too cursory or conducted in an incompe-  
4 tent manner. Garvin was an experienced claims examiner who had  
5 "years of experience in investigating property losses resulting  
6 from earth movement." His on-site review of the damaged property  
7 together with his discussion with the Millikens and other State  
8 Farm examiners, led him to the reasonable conclusion that the  
9 damage would not have occurred absent some movement of the earth.

10 D. Coverage

11 The backbone of State Farm's summary judgment argument is  
12 its assertion that "NO COVERAGE FOR THE LOSS TO THE MILLIKENS  
13 [sic] PROPERTY EXISTS SINCE THE LOSS RESULTED FROM A PERIL  
14 SPECIFICALLY EXCLUDED UNDER THE POLICY." After noting that an  
15 insurer has a right to limit coverage (see Continental Casualty  
16 Co. v. Phoenix Construction Co., 46 Cal. 2d 423, 432 (1956)),  
17 State Farm argues that its investigation was not only reasonably  
18 carried out, it was also accurate. That is, the property damage  
19 at the Millikens' residence was caused by earth movement.

20 3/

21 In reaching this conclusion the court need not rely on the  
22 reports of the Milliken property prepared by the Santa Fe Soils  
23 Company and submitted by State Farm with its reply memo. These  
24 reports, which establish the probability that earth movement did  
25 cause the Millikens' damage, would not be admissible for the pur-  
26 pose of showing that State Farm's investigation was reasonable.  
27 Both parties have properly noted that the reasonableness of an  
28 insurer's denial of coverage must be determined on the basis of  
the facts known to the insurer at the time of the denial. Austero  
v. National Casualty Co., 84 Cal. App. 3d 1, 32 (1978). An  
insurer cannot use hindsight to justify its denial, and cannot  
justify its denial on grounds which differ from those originally  
invoked. As discussed above, however, the court finds the State  
Farm investigation to have been reasonable, even without having  
considered the Santa Fe reports. (See the discussion below on  
use of the reports to show coverage.)



1 State Farm's finding is corroborated by reports of soil  
2 tests conducted by Santa Fe Soils, Inc. in August and December  
3 of 1986. Those reports, released by Magistrate McKee only last  
4 Wednesday, were submitted with State Farm's reply memo.<sup>4/</sup> The  
5 August report states: "Based upon our preliminary observations,  
6 it is our judgment that the indicated site distress is in response  
7 to differential settlement of the underlying fill soils." The  
8 December report includes, among its conclusions, the statement  
9 that "the noted site distress is a result of adverse local condi-  
10 tions. The crack in the garage footings may reflect local consol-  
11 idation of the utility trench backfills in that vicinity." It is  
12 the court's opinion that the observed "settlement" and "consoli-  
13 dation" constitute "earth movement."

14 Because Policy exclusion 2(b) of "Losses Not Insured" explic-  
15 itly denies coverage for damages which would not have resulted but  
16 for earth movement, State Farm proposes that the question of cover-  
17 age is easily resolved: no coverage. State Farm points out that  
18 the earth movement exclusion is couched in broad terms. Any loss  
19 which would not have resulted but for earth movement is excluded,  
20 regardless of either the cause of the movement or whether some  
21 other force combined with the movement to cause the damage.<sup>5/</sup>

22 <sup>4/</sup>

23 Although, as mentioned in note 3 above, the reports may not  
24 be used to establish the reasonableness of State Farm's investi-  
25 gation, they may be used to establish the cause of the damage to  
26 the Milliken property. There is no requirement that a court  
27 confine its inquiry to the evidence which is known to an insurer  
28 at the time that a claims decision is made.

29 <sup>5/</sup>

30 Compare Sabella v. Wisler, 59 Cal. 2d 21 (1963) (coverage  
exists where included peril is efficient cause which sets in  
motion other excluded perils, where the combination of perils  
causes loss).

1 State Farm goes on to argue that the Millikens have not  
2 presented any facts which indicate a possibility of coverage. I  
3 a letter to Garvin shortly after State Farm's denial of coverage  
4 counsel for the Millikens speculated about some possible alter-  
5 native explanations for the damage, which might have been covered  
6 by the Policy. Examples included: 1) negligent placing and com-  
7 pacting of fill material prior to construction of the Millikens'  
8 residence; 2) the introduction of water into weak or unstable  
9 formational material; and 3) the use of inadequate grading  
10 equipment. State Farm insists, however, that each of these  
11 scenarios would result in a similar denial of coverage. The  
12 first is excluded by sections 3(b) and 4 of "Losses Not Insured,"  
13 the second by sections 2(b), 2(c), 3 and 4, and the third by  
14 section 3(b)(1) and 3(b)(3). State Farm concludes:

15 In short, there are no facts before this Court indicat-  
16 ing any possibility that the applicable insurance policy  
17 issued to plaintiffs by State Farm provided coverage for  
18 any "direct accidental physical loss" not excluded by  
19 Section I -- Losses Not Insured. Indeed, every cause  
20 posited by plaintiffs reflects an absence of coverage.

21 On the strength of this conclusion State Farm requests the  
22 entry of summary judgment on the Millikens' first five causes of  
23 action. The Millikens have not directly confronted State Farm's  
24 assertion that the damage was caused by earth movement. That  
25 is, the Millikens have not come forward with facts sufficient to  
26 overcome the proof that State Farm has offered (especially in the  
27 form of the Santa Fe soils reports). Rather, the Millikens have  
28 proposed various alternative forces that could have caused the  
damage. None of these has been supported by the facts, however,  
and several have been shown to fall within Policy exclusions any-

1 way. The court is therefore satisfied both that there no longer  
2 remains a genuine dispute over the facts of causation and that t  
3 explicit Policy exclusion for earth movement losses operates to  
4 deny coverage.

5 E. Validity of the Exclusions

6 As if to anticipate one of the Millikens' objections, State  
7 Farm included in its moving papers an argument that the Policy's  
8 exclusions are not contrary to public policy. According to State  
9 Farm, an insurer need not cover all risks, and certain risks may  
10 be excluded at the insurer's behest. If the court were to find  
11 the subject exclusions to violate public policy, then a parade  
12 of horrors would follow: State Farm "will become insolvent"  
13 and premiums "will have to be increased to a point that they will  
14 be out of reach to virtually all homeowners." The private con-  
15 tractual agreement will have been tampered with, and financial  
16 interests of State Farm's prior insureds will be jeopardized.

17 So as not to disappoint, the Millikens do argue that the  
18 subject exclusions are void as against public policy. But even  
19 if the presence of their argument was expected, its substance is  
20 somewhat inventive. Rather than positing policy grounds for  
21 invalidating the exclusions, the Millikens here revive their  
22 "reasonable expectations" analysis (presented above). Because,  
23 they argue, standard-form insurance policies are adhesion con-  
24 tracts, an insurer must bring to the insured's attention any  
25 provisions that would frustrate the coverage that is sought.  
26 Exclusions must be conspicuous, plain and clear. Gray v. Zurich,  
27 65 Cal. 2d 263, 271 (1966). Moreover, say the Millikens, even  
28 clear exclusions are not effective until the policy is delivered.

1 unless they were adequately explained at the time of application  
2 Logan v. John Hancock Mutual Life Ins. Co., 41 Cal. App. 3d 988  
3 995 (1974). In this case, the earth movement exclusion (which is  
4 apparently a recent addition to such policies) was not explained  
5 to the Millikens at the time of their application. Therefore,  
6 because the Millikens presumed they were securing all-risk cover  
7 age and because State Farm had only recently rewritten its  
8 policies to exclude earth movement losses, the Millikens assert  
9 that their reasonable expectation was that the Policy to be issued  
10 would cover the sort of loss incurred. At the very least, State  
11 Farm had a duty to inform the Millikens that earth movement would  
12 not be covered.

13       These arguments merely restate the "expectations" claims dis-  
14 cussed above, and for the reasons previously explained the court  
15 finds them to be unmeritorious. The record does not reflect any  
16 evidence of overreaching on the part of State Farm. Instead, it  
17 reveals that Mr. Milliken was a sophisticated buyer who was aware  
18 of certain restrictive trends in insurance policy writing and who  
19 therefore probably expected less than complete coverage for such  
20 occurrences as earth movements. Furthermore, because the precise  
21 date of the damage is unknown, the facts could support an infer-  
22 ence that the Policy was delivered by the time of the damage.  
23 Then the exclusion would have been effective even though it had  
24 not been explained at the time of application and even though the  
25 Millikens had not yet read the Policy. State Farm would then have  
26 done all possible to put the Millikens on notice of the exclusions.  
27 In any case, no authority has been brought to the court's atten-  
28 tion for striking down the earth movement exclusion on its face.

1           F. The Milliken Claims

2           On the basis of the above discussion, the court finds the  
3 first five Milliken causes of action to be unmeritorious and  
4 vulnerable to State Farm's motion for summary judgment. Because  
5 the discussion proceeded along general lines and did not address  
6 the counts individually, the causes of action are again set out  
7 and briefly commented upon below.

8           1. Breach of Contract

9           The claim for breach of contract must fail because, as  
10 developed at length, the court finds that earth movement did cause  
11 the damage to the Millikens' property, that claims for earth  
12 movement were excluded from the Policy, and that State Farm's  
13 investigation of the claim was reasonable and sufficient to  
14 satisfy the requirements of the contract.

15           2. Breach of the Implied Covenant  
16           of Good Faith and Fair Dealing

17           The Millikens argue that State Farm's denial of coverage  
18 after only a cursory inspection of the damaged property, where  
19 such inspection was conducted by a claims agent who "hasn't  
20 even taken a basic geology course," constituted a breach of  
21 the Policy's implied covenant of good faith and fair dealing.  
22 An implied covenant of good faith and fair dealing is read  
23 into every contract of insurance. Egan v. Mutual of Omaha  
24 Ins. Co., 24 Cal. 3d 809, 818 (1979), cert. denied and appeal  
25 dismissed, Mutual of Omaha Ins. Co. v. Egan, 445 U.S. 912  
26 (1980). The covenant requires the insurer to act fairly and  
27 reasonably with respect to claims of its insureds. According  
28 to the Millikens, an insurer must not seek to deny claims, but

1 must act so as to find a basis for paying a portion of a claim,  
2 even if the insurer believes there to be no coverage. Further-  
3 more, good faith requires an insurer to make a thorough investi-  
4 gation of the grounds for a denial of coverage. Egan, supra,  
5 at 819.

6 State Farm argues, and this court has found, that the inves-  
7 tigation of the Milliken claim was reasonable and undertaken in  
8 good faith. Garvin was an experienced claims agent who had often  
9 investigated cases involving property damage caused by earth  
10 movement. There has been no breach of the implied covenant of  
11 good faith and fair dealing.

12 2A. Breach of Fiduciary Duty

13 The Millikens rely again on Egan, supra, for the proposition  
14 that insurers hold themselves out as fiduciaries and therefore  
15 owe their insureds a special duty of care. 24 Cal. App. 3d at  
16 820; Delos v. Farmers Ins. Group, 93 Cal. App. 3d 642, 656  
17 (1979). In the instant case, the Millikens have alleged three  
18 breaches of this special duty: 1) the failure to conduct a  
19 thorough investigation of the possible causes of the damage;  
20 2) the failure to point out the "earth movement" exclusion in  
21 the Policy (a recent addition to such policies); and 3) the  
22 failure to point out that an "accidental direct physical loss"  
23 policy is not the same as an all-risk policy.

24 The court finds that State Farm has not breached its fiduc-  
25 iary duties because: 1) its investigation was sufficient, 2) the  
26 "earth movement" exception was communicated to the Millikens via  
27 the clear Policy language; and 3) the Millikens did not have a  
28 reasonable expectation of all-risk coverage.

1           3. 4. Fraud and Negligent Misrepresentation

2           The Millikens' third and fourth causes of action are for  
3 fraud and negligent misrepresentation. These claims purportedly  
4 encompass the triable fact issues of whether or not oral misrep-  
5 resentations were made to the Millikens and whether the Millikens  
6 justifiably relied on those representations. Furthermore, these  
7 claims (which are identical, except that the latter does not  
8 require proof of intent to defraud) will be cognizable regard-  
9 less of how the coverage issue is resolved. If coverage is  
10 denied, the Millikens will assert that they were led to believe  
11 that the Policy would cover all risks. And if coverage is found,  
12 the Millikens will retain their action on the basis of the  
13 implied representation that State Farm would conduct a thorough  
14 investigation of all possible bases for coverage and pay any  
15 relief due. According to the Millikens, there is a triable  
16 issue here in any event.

17           Consistent with the findings made above, however, the  
18 court is convinced that State Farm did not misrepresent either  
19 the Policy's coverage or the extent of the investigation which  
20 would be provided upon the bringing of a claim for indemni-  
21 fication. Neither does the court find evidence that the  
22 Millikens reasonably relied to their detriment on represen-  
23 tations made by State Farm.

24           5. Violation of Insurance Code Sections 790.02 and 790.03

25           The Millikens further allege that State Farm's unreasonable  
26 procedures for investigating claims of its policyholders violate  
27 California Insurance Code sections 790.02 and 790.03 (especially  
28 sections 790.03(h)(3) and 790.03(h)(5)). Section 790.02 prohibits

1 the commission of "an unfair or deceptive act or practice in the  
2 business of insurance." Sections 790.03(h)(3) and 790.03(h)(5)  
3 prohibit "[f]ailing to adopt and implement reasonable standards  
4 for the prompt investigation and processing of claims arising  
5 under insurance policies" and "[n]ot attempting in good faith to  
6 effectuate prompt, fair, and equitable settlements of claims in  
7 which liability has become reasonably clear." West's Ann. Cal.  
8 Ins. Code §§ 790.02, 790.03 (1972 and 1986 Supp.).

9 Because the court has found that the State Farm procedures  
10 are reasonable and have been implemented in good faith in the  
11 instant case, and in the absence of any showing of an unfair or  
12 deceptive act or practice, summary judgment on the Millikens'  
13 fifth cause of action is warranted.

### 14 III.

#### 15 The Sixth Cause of Action

16 The Millikens' sixth cause of action is for "negligence."  
17 Inasmuch as this cause cannot be sustained unless the court  
18 determines that State Farm has breached some duty, and given  
19 the above discussion which establishes that State Farm has not  
20 breached any of its duties, the court now finds that State  
21 Farm's oral motion for summary judgment on this cause of action  
22 is well taken.

### 23 IV.

#### 24 The Emotional Distress Claim

25 As their seventh cause of action, the Millikens allege that  
26 "State Farm pursued an outrageous course of conduct, intention-  
27 ally and/or recklessly, proximately causing plaintiffs' severe  
28 emotional distress, shock and other highly unpleasant emotions."



1 As their eighth cause of action, the Millikens allege that it was  
2 foreseeable that they would suffer severe emotional distress and  
3 shock if State Farm improperly handled their claim. What is  
4 more, such "severe emotional distress, shock and other highly  
5 unpleasant emotions" were suffered by the Millikens.

6 State Farm has separately argued for summary judgment on  
7 these causes of action. Regarding the claim for intentional  
8 infliction, State Farm argues that its conduct (i.e. the conduct  
9 of everyone at State Farm who was associated with the Millikens'  
10 Policy and claim) was not "so outrageous that no person in a  
11 civilized society should be required to bear it." Soto v. Royal  
12 Globe Ins. Corp., 184 Cal. App. 3d 420, 430 (1986). The viola-  
13 tion of statutory duties alone (if such violation were found)  
14 would not constitute the sort of conduct which is actionable  
15 as an intentional infliction of emotional distress. Id. at  
16 431. Because, according to State Farm, this court may find as  
17 a matter of law that the conduct was not outrageous, summary  
18 judgment is appropriate.

19 The Millikens oppose summary judgment on the intentional  
20 infliction count on two grounds. First, they note that abuse of  
21 a protected relationship by one in a relative position of power  
22 may amount to outrageous conduct. Second, they urge that the  
23 outrageousness of State Farm's conduct is a question for the  
24 jury in any case.

25 As State Farm has pointed out in its reply, however, the  
26 issue goes to the jury only if the situation presented is one  
27 "[w]here reasonable men may differ." See Alcorn v. Anbro  
28 Engineering, Inc., 2 Cal. 3d 493, 499 (1970). And in the

1 instant case the court is not satisfied that reasonable people  
2 could differ. State Farm's conduct, although perhaps falling  
3 short of an ideal of informativeness or thoroughness, was not  
4 sufficiently outrageous that a jury could find for the Milliken  
5 on this issue. Summary judgment may therefore be entered on the  
6 seventh cause of action.

7 In moving for summary judgment on the eighth cause of  
8 action, State Farm summarizes the standard recently discussed  
9 by the California Supreme Court in Ochoa v. Superior Court,  
10 39 Cal. 3d 159 (1985): a cause of action for negligent infliction  
11 of emotional distress lies where it is foreseeable that  
12 emotional shock would result from an abnormal event. See also  
13 Soto, supra, at 433. The court in Soto found that a failure  
14 timely to pay workers' compensation benefits was not an "abnormal  
15 event." Similarly in the instant case the failure to indemnify  
16 the Millikens would not support a claim for negligent infliction  
17 of emotional distress.

18 The Millikens attempt to rehabilitate their claim by argu-  
19 ing that State Farm's mishandling of the instant claim was a  
20 breach of the parties' special relationship of trust and confi-  
21 dence. Although there may have been such a trust relationship  
22 between State Farm and the Millikens in this case, the court  
23 finds that the facts simply do not support a finding of a breach  
24 of that relationship. Nor do the facts show either that the  
25 Millikens' purported emotional shock was foreseeable or that  
26 the shock resulted from an abnormal event. Summary judgment  
27 must therefore be entered in favor of State Farm on the  
28 Millikens' eighth cause of action.

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CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing and for the reasons set forth above, this court hereby grants the motion of defendant State Farm Fire and Casualty Company for summary judgment on all eight of the causes of action stated in the complaint of plaintiffs Jeannie and James Milliken.

DATED: March 26, 1987.

  
\_\_\_\_\_  
WILLIAM B. ENRIGHT, Judge  
United States District Court

Copies to:

Plaintiffs

Defendants

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APR - 1 1987  
CLERK US DC

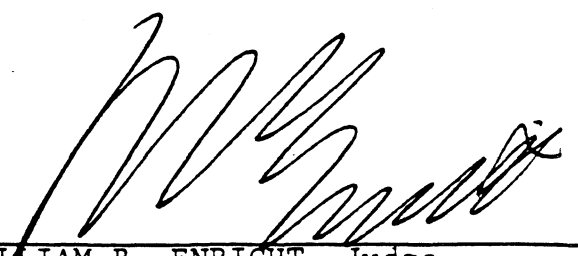
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JAMES S. MILLIKEN and ) Civil No. 86-1284-E  
JEANNIE S. MILLIKEN, )  
Plaintiffs, )  
v. ) A M E N D E D  
STATE FARM FIRE & CASUALTY ) O R D E R  
INSURANCE COMPANY, et al., )  
Defendants. )

For the reasons set forth in the court's Memorandum Decision dated March 26, 1987, the motion of defendant State Farm Fire and Casualty Company for summary judgment is hereby granted as to all eight of the causes of action brought by plaintiffs Jeannie and James Milliken.

IT IS SO ORDERED.

DATED: April 1, 1987.

  
WILLIAM B. ENRIGHT, Judge  
United States District Court

Copies to:  
Plaintiffs  
Defendants

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK

1N20 U. S. COURT HOUSE

840 FRONT STREET

SAN DIEGO, CALIFORNIA 92189

WILLIAM W. LUDDY  
CLERK

PHONE:  
(714) 293-5600  
FTE: 895-5600

April 1, 1987

Anthony E. Shafton  
11620 Wilshire Blvd 6th Fl  
Los Angeles, CA 90025

Berger Kahn Shafton & Moss  
4215 Glenco Ave  
Marina Del Rey CA 90292

William D. Hughes  
450 B st Ste 1450  
San Diego, CA 92101

RE: Milliken VS State Farm Fire & Casualty Co 86-1284E(CM)

You are hereby notified that amended order

in each of the above entitled cases was x Filed and x Entered.

Date Filed 4-1-87

Date Entered 4-1-87

x Copy enclosed

           Copy not enclosed

I hereby certify that this notice was mailed on 1 APR 1987.

WILLIAM W. LUDDY, Clerk

By

C. GUARDADO

Deputy

KNAPP, PETERSEN & CLARKE  
A PROFESSIONAL CORPORATION  
LAWYERS  
70 UNIVERSAL CITY PLAZA, SUITE 400  
UNIVERSAL CITY, CALIFORNIA 91608  
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ORIGINAL FILED

DEC 31 1986

COUNTY CLERK

Attorneys for Plaintiff and Defendant STATE FARM FIRE AND  
CASUALTY COMPANY, an Illinois corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

JOHN R. BAYLESS, et al.,	)	CASE NO. WEC 87135
	)	(Consolidated with
Plaintiff,	)	WEC 090135)
	)	
vs.	)	
	)	
STATE FARM FIRE AND CASUALTY	)	<del>PROPOSED</del> ORDER
COMPANY, etc.,	)	
	)	
Defendants.	)	

RE.

AND ALL CONSOLIDATED ACTIONS.

On December 5, 1986, defendant State Farm Fire and  
Casualty Company's (State Farm) motion for summary judgment,  
or in the alternative, for summary adjudication of issues, came  
on regularly for hearing in Department R of the above-entitled  
court, before the Honorable David M. Rothman, Judge presiding.

Barry Bartholomew appeared on behalf of plaintiff and  
defendant State Farm. Neil Rockwood appeared on behalf of  
plaintiffs and defendants John R. Bayless and Monica R. Bayless.

///

WILLIAM F. FLEMMING & CLARKE  
A PROFESSIONAL CORPORATION  
LAWYERS  
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UNIVERSAL CITY, CALIFORNIA 91608  
(818) 508-5000

1 IT IS HEREBY ORDERED as follows:

2

3 State Farm Fire and Casualty Company's motion for summary  
4 judgment is denied.

5

6 State Farm Fire and Casualty Company's motion for summary  
7 adjudication of issues is granted as to issues 1, 2, 3 and 4,  
8 as follows:

9

10 1. The applicable insurance policy excludes coverage  
11 for earth movement;

12

13 2. Coverage is excluded under the policy regardless  
14 of the cause of the earth movement;

15

16 3. Coverage is excluded under the policy regardless  
17 of whether other causes acted concurrently or in any sequence  
18 with earth movement to cause the loss, said causes including  
19 but not being limited to, surface water, sub-surface water,  
20 settling, shrinking, bulging or expansion of the residence or  
21 foundation thereof, or the conduct, act, failure to act or  
22 decision of any person, group, organization or governmental  
23 body whether such be intentional, wrongful, negligent or without  
24 fault;

25

26 4. There is no coverage under the applicable policy  
27 of insurance for property damage ensuing from the Big Rock Mesa

28 ///

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1 landslide, save for any ensuing loss caused by fire as provided  
2 for in the policy.

3  
4 The above four issues are deemed established and the  
5 action shall proceed as to the issues remaining.

6  
7 The court denied State Farm's issue number five on  
8 the grounds that a triable issue of fact exists as to whether  
9 there was any misrepresentation made to the Baylesses concerning  
10 whether the policy issued on the Seaboard residence was similar  
11 to those issued to the Baylesses on other properties owned by  
12 them, and whether there was a misrepresentation as to the coverage  
13 afforded by the policy issued on the Seaboard residence.

14 DEC 31 1986

15 DATED:

DEC 29 1986 R4.

DAVID M. ROTHMAN

JUDGE OF THE SUPERIOR COURT

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MAY 4 1987  
COUNTY CLERK

Attorneys for Defendant STATE FARM FIRE AND CASUALTY COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

ROBERT SCOTT TURRILL, etc., ) Case No. WEC 104 457  
Plaintiffs, )  
vs. ) ORDER GRANTING SUMMARY  
ADJUDICATION OF ISSUES  
[PROPOSED]  
STATE FARM FIRE AND )  
CASUALTY INSURANCE COMPANY, )  
et al., )  
Defendants. )

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

On April 17, 1987, in Department <sup>WEC</sup> "K" of the above-entitled  
court, <sup>The Honorable Richard G. Harris, Judge presiding,</sup> defendant STATE FARM FIRE AND CASUALTY COMPANY's

Motion for Summary Judgment or in the Alternative for Summary  
Adjudication of Issues came on regularly for hearing. Based  
on the moving, opposing and reply papers, and oral arguments  
by both parties, IT IS HEREBY ORDERED:

The motion for summary judgment is denied.

Summary Adjudication is granted as to the following  
ten issues. At any trial of this action, the below specified  
issues shall be deemed established and the action shall proceed

1 as to the issues remaining.

2 1. The insurance policy applicable from 7/25/85 to  
3 7/25/86 excludes coverage for earth movement;

4 2. Coverage is excluded under the policy applicable  
5 from 7/25/85 to 7/25/86 regardless of the cause of the earth  
6 movement;

7 3. Coverage is excluded under the policy applicable  
8 from 7/25/85 to 7/25/86 regardless of whether other causes  
9 acted concurrently or in any sequence with earth movement  
10 to cause the loss, said causes including but not being limited  
11 to, surface water, subsurface water, settling, shrinking,  
12 bulging or expansion of the residence or foundation thereof,  
13 or the conduct, act, failure to act or decision of any person,  
14 group, organization or governmental body whether such be  
15 intentional, wrongful, negligent or without fault.

16 4. There is no coverage under the policy applicable  
17 from 7/25/85 to 7/25/86 of insurance for property damage  
18 ensuing from landslides in Potrero Canyon, if any, save  
19 for any ensuing loss caused by fire as provided for in the  
20 policy.

21 5. The insurance policy applicable from 7/25/83 to  
22 7/25/85 excludes coverage for earth movement;

23 6. Coverage is excluded under the policy applicable  
24 from 7/25/83 to 7/25/85 regardless of the cause of the  
25 earth movement;

26 7. Coverage is excluded under the policy applicable  
27 from 7/25/83 to 7/25/85 regardless of whether other causes  
28 acted concurrently or in any sequence with earth movement

1 to cause the loss, said causes including but not being limited  
2 to, surface water, subsurface water, settling, shrinking,  
3 bulging or expansion of the residence or foundation thereof,  
4 or the conduct, act, failure to act or decision of any person,  
5 group, organization or governmental body whether such be  
6 intentional, wrongful, negligent or without fault;

7 8. There is no coverage under the policy applicable  
8 from 7/25/83 to 7/25/85 of insurance for property damage  
9 ensuing from landslides in Potrero Canyon, if any, save  
10 for any ensuing loss caused by fire as provided for in the  
11 policy;

12 9. The policies in effect from July 25, 1983 through  
13 July 25, 1986, do no insure against loss caused by the actions  
14 of third parties. Where a proximate cause of damage is  
15 third party acts or inaction, such acts are not an insured  
16 risk within these policies.

17 10. There is no coverage under the policies in effect  
18 from July 25, 1983 through July 25, 1986 for losses, if  
19 any, proximately caused by the actions of third parties.

20 IT IS FURTHER ORDERED that the above ruling is made  
21 without prejudice to defendant bringing another motion for  
22 summary judgment on the ground that the only policy sued  
23 on was for the policy periods July 25, 1983 through July  
24 25, 1986, and summary judgment should be granted by reason

25 ///

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UNIVERSAL CITY, CALIFORNIA 91608  
(818) 508-5000

1 of the above adjudication of issues. Plaintiff is directed  
2 in any opposition to address whether the July 25, 1978 through  
3 July 24, 1983 policies are a part of this lawsuit.

4  
5 DATED: MAY 4 1987

RICHARD G. HARRIS

JUDGE OF THE SUPERIOR COURT

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*Adjudication of Plaintiff Crawford*

With respect to plaintiff Crawford's claim. This Court grants summary judgment in favor of plaintiff Crawford with respect to his claim regarding DISCO's refusal to grant his clearance because of his "homosexual activity and susceptibility to coercion." Use of these factors alone violates Crawford's rights under the equal protection clause. With respect to Crawford's other claims, the Court grants summary judgment in favor of defendants.

*Defense Central Index of Investigations Claim*

Because this claim is not included in plaintiff's Third Amended Complaint, the Court may not consider it.

Accordingly, good cause appearing, IT IS HEREBY ORDERED that:

1. plaintiffs' motion for summary judgment is granted in part and denied in part and defendants' motion for summary judgment is granted in part and denied in part.

2. defendants' policy of subjecting plaintiffs to expanded investigations and mandatory adjudications is declared to violate plaintiffs' rights under the first and fifth amendments to the United States Constitution;

3. defendants' reasons for denying plaintiff Dooling a Secret clearance and subjecting him to further investigation and adjudication is declared to violate plaintiff Dooling's rights under the first and fifth amendments to the United States Constitution;

4. defendants' reasons concerning homosexuality for denying plaintiff Crawford a Secret clearance are declared to violate plaintiff Crawford's rights under the fifth amendment to the United States Constitution;

5. defendants are enjoined from subjecting plaintiffs to expanded investigations, mandatory adjudications, or any other procedures based on plaintiffs' sexual orientation, homosexual activity, or membership in a gay organization;

6. plaintiffs' attorney shall be awarded a reasonable attorney's fee under 28 U.S.C. § 2412.

IT IS SO ORDERED.



STATE FARM FIRE AND CASUALTY  
COMPANY, a corporation, Plaintiff,

v.

Steven M. MARTIN and Peggy D.  
Martin, individuals, Defendants.

Steven M. MARTIN and Peggy D.  
Martin, individuals,  
Counter-claimants,

v.

STATE FARM FIRE AND CASUALTY  
COMPANY, a corporation,  
Counter-defendants.

No. CV 86-6672 (CBM).

United States District Court,  
C.D. California.

July 9, 1987.

Memorandum Order Granting Summary  
Judgment Oct. 20, 1987.

Homeowners' insurer sued for declaratory judgment that damage to insureds' home was not covered by policy. Insureds counterclaimed for insurer's alleged refusal to pay under terms of policy, breach of implied covenant of good faith and fair dealing, and violations of California Insurance Code. The District Court, Consuelo Bland Marshall, J., held that: (1) language in homeowners' policy, providing that policy provided no coverage for any loss that would not have occurred "but for" an excluded event regardless of whether covered events may have contributed thereto, did not violate any provision of California Insurance Code, so as to be enforceable as written, and (2) insurer did not breach duty of good faith and fair dealing.

Insurer's motion for summary judgment granted.

### 1. Insurance ⇐146.7(8)

Absent some ambiguity, court could not "construe" exclusions in homeowners' policy so as to provide coverage, but had to enforce exclusions as written.

### 2. Insurance ⇐427

Language in homeowners' policy, providing that policy provided no coverage for loss that would not have occurred "but for" excluded event, regardless of whether covered events may have contributed thereto, did not violate any provision of California Insurance Code, so as to be enforceable as written. West's Ann.Cal.Ins.Code § 530.

### 3. Insurance ⇐602.2(1)

Homeowners' insurer which denied coverage when covered home began to crack and bulge, on ground that damage would not have occurred but for excluded events such as earth movement, did not breach its duty of good faith and fair dealing, where there was no indication that insurer's investigation was inadequate or substandard or that insurer unduly delayed by waiting three months in order to investigate claim.

Jeffrey H. Leo, Daniel L. Gardner, Douglas R. Irvine, Parkinson, Wolf, Lazar & Leo, Los Angeles, Cal., for plaintiff.

Paul B. Witmer, Jr., P.C., Santa Ana, Cal., for defendants.

#### MEMORANDUM ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF

CONSUELO BLAND MARSHALL, District Judge.

This matter is before the Court on plaintiff State Farm Fire and Casualty Company's motion for summary judgment. A hearing was held on June 1, 1987 before Honorable Consuelo B. Marshall, United States District Judge, presiding. The Court having reviewed the pleadings, moving papers, oppositions, replies, all exhibits presented by the parties, all pertinent authority and having heard the arguments of

counsel, hereby issues the following memorandum order.

### I. FACTS

This action is based on denial by plaintiff State Farm of a claim by defendants under their homeowners insurance policy.

Defendants Steven and Peggy Martin purchased the residential property that is the subject of the insurance claim in early January, 1984. On January 4, 1984, defendants purchased a homeowners insurance policy from State Farm insurance. The policy issued was contained in Form Policy 7175.

Sometime between May 5, 1984 and August 6, 1985, defendants noticed cracking and other related problems on their property, including bulging, corrosion and tilting.

On January 4, 1985, the policy was renewed as contained in Form Policy 7185.

On August 6, 1985, defendants submitted a claim to State Farm for cracking and related problems on their property, and on September 4, 1985 they met with Chiquita Ector, State Farm claims representative, in their home, and Ector inspected the premises.

On October 16, 1985, Jim Damm, State Farm claims superintendent sent defendants a "reservation of rights" letter setting forth possible exclusions under the policy.

Sometime in October of 1985, Tim Welch, a senior engineering geologist at the time employed by American Earth Technologies, investigated the cause of damage to defendants' property at the request of State Farm.

In his report to State Farm, dated October 21, 1985, Welch stated the potential causes of distress to be one or more of the following:

1. Settlement of subgrade soil;
2. Expansion of subgrade soil;
3. Sulfate crystallization within the subgrade soil;
4. Sulfate attack to the cement foundations;
5. Poor foundation construction.

State Farm sent a copy of this report to the defendants' attorney on September 15, 1986.

Subsequently, Welch states in his declaration, further tests were conducted and further investigative work done, which led him to conclude that sulfate crystalization was not, in fact, a potential cause of the damage to the Martin's property.

State Farm filed the complaint in this action on October 15, 1986, seeking declaratory relief, including a ruling that the insurance contract does not provide coverage for the losses contained in defendants claim against the insurance policy.

Defendants filed an answer and counterclaim on November 4, 1986. The counterclaims included the following:

1. Refusal to pay under terms of the policy;
2. Breach of implied covenant of good faith and fair dealing;
3. Violation of California Insurance Code Section 530;
4. Bad faith conduct in violation of California Insurance Code Section 790.03(h).

## II. PARTIES' CONTENTIONS

Plaintiff contends that all potential causes of the trauma to the defendants' property were expressly excluded under their insurance policy. Plaintiff specifically cites in its moving papers to Form Policy 7175, section I, at 1(f), 2(b), (c)(3), and 3; and Form Policy 7185 Section I, at 1(f), (h), (i), 2(b), (c)(3), 3(a)(b), and 4(a), (b). These restrictions are essentially the same in both years.

Plaintiff argues that the language contained in these sections of the policy is explicit and lists earth movement, underground water, contamination and deterioration as causative events which are expressly excluded. Plaintiff further argues that the contract is unambiguous in its explanation that resulting damage which would not have occurred in the absence of one of these excluded events is also excluded from coverage, no matter whether or not other concurrent causes exist. Plaintiff contends that under California caselaw it has an

absolute right to limit coverage under an insurance policy and that because defendants had a copy of the policy at all times herein, they are charged with knowledge of the terms of that policy. Moreover, plaintiff explains that defendants did not pay for an "all-risk" policy; to require plaintiff State Farm to pay for excluded perils would, in turn, require the company to raise the premiums on all such restrictive policies in order to stay financially sound; this would harm the group of all insureds.

Plaintiff contends that because it did not unreasonably delay in investigating defendants' insurance claim, and because there was a reasonable basis for denial of plaintiff's claim, it is not in violation of California Insurance Code § 790.03.

Plaintiff asserts that in drafting the insurance policy in question, the company did not disregard or violate California Insurance Code § 530. Finally, plaintiff contends that all counterclaims are time barred by the one-year limitations period imposed by the policy.

Defendants, in opposition, contend that based on California law, the policy must be construed narrowly against the insurer and so as, if semantically possible, to provide indemnity to the insured.

Moreover, defendants contend that this is a situation where coverage should exist pursuant to California Insurance Code § 530 because the earth movement and other excluded causes were concurrent with a non-excluded cause of damage—sulfate crystalization.

Defendants claim that summary judgment against their counter-claims based on the one-year contractual limitations period is improper because there is a triable issue of fact as to what losses are affected by the limitation, when the limitations period commenced, and whether State Farm is estopped to assert or has waived the limitations defense.

## III. DISCUSSION

### A. Ambiguity

[1] Defendants cite *Safeco Insurance Co. v. Guyton*, 471 F.Supp. 1126 (C.D.Cal.

1979) for the rule of strict construction against insurers, i.e., the proposition that "[i]f any ambiguity or uncertainty exists an insurance policy is construed strictly against the insurer and most liberally in favor of the insured." *Safeco*, 471 F.Supp. at 1129. However, what plaintiff fails to note is that the case goes on to explain that the rule

... is subject to an important limitation, ... it is applicable only when the policy actually presents such uncertainty, ambiguity, inconsistency or doubt. In the absence thereof, the courts have no alternative but to give effect to the contract of insurance as executed by the parties. Accordingly, when the terms of the policy are plain and explicit the courts will not indulge in a forced construction so as to fasten a liability on the insurance company which it has not assumed. *Safeco*, 1471 F.Supp. at 1130.

In *Safeco*, the Court, in fact, found that there was no coverage. Moreover, the policy involved in *Safeco* was what is termed an "all-risk" policy; its coverage was more broad, in general, than that under the policy currently at issue.

The language of the policy herein is explicit as to exclusions. The Court must give full effect to the policy as written.

Defendants have presented no evidence to dispute plaintiff's allegations and supporting declarations that defendants had timely received copies of the reservation of rights letter, detailing exclusions, following submission of their claim. Nor have defendants made allegations or provided any evidence that representations were ever made by plaintiff that the policy purchased would be an all-risk policy.

#### B. Coverage

[2] The language of this policy form is unambiguous as to the sections limiting coverage. In Form 7175, effective from January 1984 to January 1985, the policy specifically states in "Section I," "Loss not insured" at 1(f) that there is no coverage for loss "consisting of, or directly and immediately caused by, one or more of the following:

f. wear and tear; marring; ... deterioration; ... contamination; ... settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundations, walls, floors, roof, or ceiling; ..." (Ector Decl., Exh. 12 at 0023).

Moreover, the policy specifically states that it does not insure for any loss that would not have occurred in the absence of certain events, including earth movement and water damage (Section I, 2(b)f, (c), "regardless of ... any other causes, or whether other causes acted concurrently or in any sequence with the excluded event to produce the loss." (*Id.*)

Defendants, in opposition, cite *Sabella v. Wisler*, 59 Cal.2d 21, 27 Cal.Rptr. 689, 377 P.2d 889 (1963), for the proposition that this language is violative of California Insurance Code § 530. However, in *Sabella* the insurer attempted to rely on California Insurance Code § 532, alone, to argue that because one cause or "peril" was excluded, the loss would not have occurred in the absence of that peril, the loss is automatically exempted, even if another covered cause directly led to the loss. The Court in *Sabella* was focusing on interpretation of Cal. Ins. Code § 530, and held that the insurer could not rely on section 532 alone, but must read that section in conjunction with section 530, which provides:

An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

The court in *Sabella* was addressing the construction and applicability of section 532 of the statute. Here, the insurance policy itself expressly and explicitly includes in its language a provision which states that for certain causes, the "but for" argument raised by the insurer in *Sabella* will apply to limit coverage. While the court in *Sabella* would not extend the statute so as to imply such restrictions on coverage of concurrent causes, there is nothing in the law denying the insurer the right to include such language as a term of the contract itself. The insurer, here State Farm, had



an absolute right to limit the coverage contained in the language of the policy itself. "An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected." *Continental Casualty Co. v. Phoenix Construction Co.*, 46 Cal.2d 423, 432, 296 P.2d 801 (1956).

The only evidence provided by defendants in opposition to the motion for summary judgment are portions of the transcript of the deposition of Tim Welch, the geotechnical expert who investigated the premises for State Farm and who supplied a declaration in support of State Farm's motion. These portions of the deposition only show that sulfates were considered at the time of the initial investigation to have been a potential contributing factor. This does not impeach or contradict the declaration of Welch, who stated that sulfate crystallization was, at first, listed as a potential cause. Moreover, this evidence in no way negates the fact that *even if* sulfate crystallization was a potential cause, the broad exclusionary language of the contract would disallow coverage. Defendants have provided no independent evidence of their own which in any way negates the evidence presented by plaintiff that excluded perils, including earth movement, settling and deterioration, were the primary causes of the damage.

In *Celotex v. Myrtle Nell Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the Supreme Court clarified the standard to be used in analyzing motions for summary judgment brought pursuant to Federal Rule of Civil Procedure 56. The Supreme Court held that the language of Rule 56(c) requires entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", assuming that party has had adequate time for discovery. 106 S.Ct. at 2552-53. The Supreme Court explained its reasoning by stating that "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* at 2552.

Here, defendants' complete failure to provide any evidence in support of its dispute as to the causes of damage to their home, coupled with the Court's duty to give effect to the unambiguous contractual language, necessitates that the Court grant summary judgment in favor of plaintiff on these issues.

### C. Counterclaims

Based on the foregoing analysis, including *inter alia*, the fact that the language of the insurance policy is unambiguous as to exclusions and the fact that defendants have failed in their burden of proof to provide any evidence to negate the alleged fact that earth movement was proximate cause of the damage to defendants' dwelling, the Court finds that under the *Celotex* standard defendants have failed to provide any evidence that State Farm's failure to pay on defendants' claim was a breach of the policy or that in drafting the language of the policy in question State Farm breached California Insurance Code § 530.

#### 1. *Bad Faith; California Insurance Code § 790.03(h)*

California Insurance Code § 790.03 provides a list of descriptions of prohibited actions by insurance companies; commission of these acts is statutorily defined as unfair and deceptive act or practice. Section (h) provides a list of fifteen activities considered to be unfair claims settlement practices.

Defendants have provided the Court with no evidence that State Farm has violated any of these provisions or has otherwise acted in bad faith.

#### 2. *Duty of Good Faith and Fair Dealing*

[3] In *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 108 Cal Rptr. 480, 510 P.2d 1032 (1973), the California Supreme Court explained when a cause of action for breach of duty of good faith and fair dealing would lie.

That responsibility [the duty of good faith and fair dealing] is not the requirement mandated by the terms of the poli-

cy itself—to defend, settle, or pay. It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith discharging its contractual responsibilities. Where in doing so, it fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. *Id.* at 574, 108 Cal.Rptr. 480, 510 P.2d 1032.

Defendants have provided no evidence that State Fair breached its duty in the process of investigating and ultimately denying defendants' claim. Based on the evidence and the allegations before the Court, there is no indication that the investigation by State Farm was inadequate or substandard or that State Farm unduly delayed in the investigation process.

### 3. Contractual Limitations Period

In support of its motion for summary judgment, plaintiff State Farm has argued that defendants' counterclaims are untimely under the one-year limitations period imposed by the language of the insurance policy. Defendants essentially raise an equitable argument that plaintiff is estopped from raising this defense because it did not inform defendants that their claim was denied until after the one-year period had, based on plaintiff's argument, already passed. Defendants argue, moreover, that this creates a question of fact as to whether, under the policy, the limitations period should be tolled, based on equitable considerations. The Court does not address this issue because summary judgment is hereby granted against the counterclaims based on the unambiguous language of the contract, irrespective of whether the counterclaims were timely.

For the foregoing reasons, summary judgment is GRANTED in favor of plaintiff and against defendants.



Terry Dean ROGAN, Plaintiff,

v.

CITY OF LOS ANGELES, a municipal corporation; Richard Crotsley and Lester Slack, individually and in their official capacities as detectives of the L.A. P.D., Defendants.

No. CV 85-0989 RJK (Mcx).

United States District Court,  
C.D. California.

July 20, 1987.

Arrestee brought action against city and two police officers, after being arrested five separate times on basis of information contained in record entered in national computer arrest warrant notification system by officers, concerning robbery-murder arrest warrant issued in arrestee's name. Suspect in robbery-murders had been using arrestee's name after obtaining arrestee's birth certificate. On cross motions for summary judgment on issue of liability, the District Court, Kelleher, Senior District Judge, held that: (1) arrestee was unconstitutionally deprived of his liberty during four arrests and detentions due to lack of particular description in record and maintenance and multiple reentry of record without amendment after arrestee's initial misidentification as suspect; (2) city's failure to adopt policy or train and supervise its officers concerning particular description requirement and necessity of amendment of record involved pattern of gross negligence; and (3) officers were entitled to qualified immunity.

Ordered accordingly.

### 1. Civil Rights ¶13.7

Plaintiff must show, in order to state civil rights deprivation claim against municipality, that he suffered deprivation of constitutionally protected interest and that

FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

STATE FARM FIRE AND CASUALTY  
COMPANY,

*Plaintiff-Appellee,*

v.

STEVEN M. MARTIN; PEGGY D.  
MARTIN,

*Defendants-Appellants.*

No. 87-6109

D.C. No.

CV-86-6672-CBM

OPINION

Appeal from the United States District Court  
for the Central District of California  
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted  
January 12, 1989—Pasadena, California

Filed April 10, 1989

Before: J. Clifford Wallace, William C. Canby, Jr. and  
Stephen S. Trott, Circuit Judges.

Per Curiam

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**SUMMARY**

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**Insurance**

Affirming a summary judgment for an insurer, the court held that the Insurance Code does not prohibit inclusion of a concurrent causation provision that excludes coverage.

A provision of a policy issued by appellee State Farm Fire and Casualty excluded from coverage losses occurring as a result of earth movement, whether or not other causes acted concurrently to produce the loss. Appellants Steven and Peggy Martin argued that such a provision in their policy violated Insurance Code § 530, which provides that an insurer is liable for losses caused concurrently by proximate and remote causes.

[1] An insurance company has the right to limit the coverage in a policy it issues. Insurance Code section 530 provides guidance when a policy is silent on concurrent causation; it does not prohibit inclusion of a provision similar to the concurrent causation provision in the State Farm policy.

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### COUNSEL

Paul B. Witmer, Santa Ana, California, for the defendants-appellants.

Peter Abrahams, Horvitz, Levy & Amerian, Encino, California, for the plaintiff-appellee.

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### OPINION

#### PER CURIAM:

Steven and Peggy Martin (the Martins) appeal the entry of summary judgment in favor of State Farm Fire & Casualty Co. (State Farm) in its action for declaratory relief. State Farm sought and obtained a declaration that certain damage to the Martins' home was excluded from coverage under a State Farm homeowner's insurance policy issued to the Martins. On appeal, the Martins argue that (1) the exclusions in their policy are ambiguous and a genuine issue of material

fact existed over whether the damage to their home was covered; (2) the district court erred in crediting a concurrent causation provision in the policy since that provision was contrary to California law; and (3) the district court improperly granted summary judgment to State Farm on various counterclaims of the Martins. The district court had jurisdiction of this diversity action under 28 U.S.C. § 1332. We have jurisdiction of this timely appeal pursuant to 28 U.S.C. § 1291.

The district court set forth the undisputed facts. *State Farm Fire & Casualty Co. v. Martin*, 668 F. Supp. 1379, 1380-81 (C.D. Cal. 1987). We review a summary judgment independently. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). The district court's interpretation and application of state law is entitled to no special deference but is reviewed independently. *Matter of McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc).

The Martins first argue that the district court erred in granting summary judgment because the policy's exclusions are ambiguous and there existed a genuine issue of fact whether the policy covered the damage to their home. We agree with the district court that the policy exclusions are unambiguous and the Martins failed to raise a genuine issue of material fact regarding coverage. 668 F. Supp. at 1381-83. However, one part of the district court opinion requires clarification.

Because the insurer bears the burden of proving an excepted risk or the applicability of an exclusion, *see Searle v. Allstate Life Insurance Co.*, 38 Cal. 3d 425, 437-38 (1985), the district court erroneously relied on *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), in holding that the Martins failed to make a sufficient showing on this element. 668 F. Supp. at

1383. In fact, State Farm and not the Martins bore the burden on this element. Nonetheless, this does not require reversal. Viewing the evidence in the record in the light most favorable to the Martins, we do not believe that “a fair-minded jury could return a verdict for [the Martins] on the evidence presented.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The Martins next argue that the district court erred in enforcing a concurrent causation provision in State Farm’s homeowner’s policies. Paragraph Two of the State Farm policy excluded from coverage

loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: a) the cause of the excluded event; or b) other causes of the loss; or c) *whether other causes acted concurrently or in any sequence with the excluded event to produce the loss.*

.....

- b. Earth Movement, whether combined with water or not, including but not limited to earthquake, volcanic eruption, landslide, subsidence, mud-flow, sinkhole, erosion, or the sinking, rising, shifting, expanding, or contracting of earth.

(Emphasis added.) The Martins argue that State Farm may not exclude concurrent causation from policy coverage because such exclusion violates California Insurance Code § 530. Section 530 provides:

An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss

of which the peril insured against was only a remote cause.

Cal. Ins. Code § 530 (West 1972 & Supp. 1989).

[1] We agree with the district court that “[a]n insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected.” *Continental Casualty Co. v. Phoenix Construction Co.*, 46 Cal. 2d 423, 432, 296 P.2d 801, 806 (1956); *State Farm Mutual Auto Insurance Co. v. MacKenzie*, 85 Cal. App. 3d 727, 732, 149 Cal. Rptr. 747, 750 (1978). California Insurance Code § 530 provides guidance when a policy is silent on concurrent causation; it does not prohibit inclusion of a provision similar to the concurrent causation provision in the State Farm policy. See *National Insurance Underwriters v. Carter*, 17 Cal. 3d 380, 388, 551 P.2d 362, 367, 131 Cal. Rptr. 42, 47 (1976) (“[I]n the absence of any general declaration of public policy mandating coverage . . . [the court will not] interfere with the parties’ full freedom to contract for coverage on any terms not specifically prohibited by statute.”).

The Martins lastly challenge the summary judgment based on their counterclaims for (1) breach of an implied covenant of good faith and fair dealing, and (2) bad faith investigation of their claim in violation of California Insurance Code § 790.03(h). 668 F. Supp. at 1381. We agree with the district court that the Martins presented “no evidence” to support these counterclaims. *Id.* at 1379; see also *Kopczynski v. Prudential Insurance Co.*, 164 Cal. App. 3d 846, 849, 211 Cal. Rptr. 12, 14-15 (1985) (since insurance company’s interpretation of policy was correct, there clearly was no bad faith).

AFFIRMED.

**STATE FARM FIRE AND CASUALTY  
COMPANY, Appellant (Defendant),**

**v.**

**Herb J. PAULSON, Appellee (Plaintiff).**

**Herb J. PAULSON, Appellant  
(Plaintiff),**

**v.**

**STATE FARM FIRE AND CASUALTY  
COMPANY, Appellee (Defendant).**

**Nos. 87-259, 87-260.**

**Supreme Court of Wyoming.**

**June 3, 1988.**

Insured sought to recover for damage to his home which resulted from entrance of water and hail into basement of house after severe storm. The District Court, Laramie County, Edward L. Grant, J., entered judgment for insured, and insured appealed. The Supreme Court, Rooney, J., Retired, held that loss sustained was excluded from coverage under exclusion for water damage resulting from surface water.

Reversed.

Cardine, J., filed dissenting opinion.

**1. Insurance §146.7(1)**

Only exception to construing insurance contracts as other contracts are construed is requirement that ambiguous language in insurance contract be liberally construed in favor of insured.

**2. Insurance §417.5(1)**

Damage resulting from entrance of water and hail into basement of insured's house after severe storm was excluded from coverage under exclusion for loss from water damage resulting from surface water.

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John A. Sundahl of Godfrey, Sundahl & Jorgenson, Cheyenne, for State Farm Fire and Cas. Co.

Stanley K. Hathaway and Blair J. Trautwein of Hathaway, Speight & Kunz, Cheyenne, for Herb J. Paulson.

Before BROWN, C.J., THOMAS, CARDINE and MACY, JJ., and ROONEY, Retired Justice.

ROONEY, Retired Justice.

This appeal in Case No. 87-259, by State Farm Fire and Casualty company (hereafter referred to as "appellant") is from a judgment entered against appellant after a non-jury trial declaring that an insurance policy issued to Herb J. Paulson (hereafter referred to as "appellee") covered damage resulting from the entrance of water and hail into the basement of appellee's house after a severe storm. The basic issue presented on appeal is whether or not the trial court erred in declaring the existence of such coverage.

We reverse.

Uncontroverted are the facts that hail, followed by hail and rain, fell in Cheyenne on August 1, 1985; that the storm was severe; that hail broke sections of three basement windows on the east side of appellee's residence in Cheyenne; that water and hail, which were generated within a few blocks of the residence (a 62-acre drainage area), entered the basement through the windows; that the high water line was several inches above the basement and water completely filled the basement; that less water would have entered had the windows not been broken; and that the policy in question was in force at the time and provided in pertinent part:

**"SECTION 1—LOSSES INSURED**

**"COVERAGE A—DWELLING**

"We insure for accidental direct physical loss to the property described in Coverage A except as provided in SECTION I—LOSSES NOT INSURED.

**"COVERAGE B—PERSONAL  
PROPERTY**

"We insure for accidental direct physical loss to property described in Coverage B



caused by the following perils except as provided in SECTION I—LOSSES NOT INSURED:

“2. Windstorm or hail. This peril does not include loss to property contained in a building caused by rain, snow, sleet, sand or dust. This limitation does not apply when the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

“11. Weight of ice, snow or sleet which causes damage to property contained in a building.

#### “SECTION I—LOSSES NOT INSURED

“2. We do not insure under any coverage for loss (including collapse of an insured building or part of a building) which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: a) the cause of the excluded event; or b) other causes of the loss; or c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss:

“c. Water Damage, meaning:

“(1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind.”

[1] An insurance policy is a contract (§ 26-15-101 et seq., W.S.1977).

“A policy of insurance is a contract between the insurer and the insured and construed in the same way. *Worthington v. State*, Wyo., 598 P.2d 796 (1979); *State Farm Mutual Automobile Insurance Co. v. Farmer's Insurance Group*, Wyo., 569 P.2d 1260 (1977). When terms of a contract are shown without any conflict of evidence, interpretation of a contract becomes a question of law for the court. *Engle v. First National Bank of*

*Chugwater*, Wyo., 590 P.2d 826 (1979). Paraphrased, and as said approvingly from a quote in *Horvath v. Sheridan-Wyoming Coal Co.*, 58 Wyo. 211, 131 P.2d 315 (1942), the interpretation of a written contract is a question of law for the court; but where the terms of a contract are conflicting or doubtful, it is for the jury to ascertain the intention of the parties and determine what the contract was under proper instructions. The interpretation and construction of a contract are done by the court as a matter of law. *Amoco Production Co. v. Stauffer Chemical Company of Wyoming*, Wyo., 612 P.2d 463 (1980). See also, *Goodman v. Kelly*, Wyo., 390 P.2d 244 (1964).” *Hursh Agency, Inc. v. Wigwam Homes, Inc.*, Wyo., 664 P.2d 27, 31 (1983).

The only exception to construing insurance contracts as other contracts are construed is the requirement that ambiguous language in an insurance contract is to be liberally construed in favor of the insured.

“When there are any ambiguities or uncertainties in the meaning of the language used in a policy, they must be strictly construed against the insurer who drafted the contract. *Wilson v. Hawkeye Casualty Co.*, 67 Wyo. 141, 215 P.2d 867, 874-875 (1950). However, if the language is clear and unambiguous, there is no room for the court to resort to a strict construction against the insurer, and the insurance policy must be interpreted according to the ordinary and the usual meaning of its terms. *McKay v. Equitable Assurance Society of U.S.*, [Wyo., 421 P.2d 166,] 168 [(1966)]; *Addison v. Aetna Life Insurance Company*, Wyo., 358 P.2d 948, 950 (1961); *Coit v. Jefferson Standard Life Ins. Co.*, 28 Cal.2d 1, 168 P.2d 163, 169-170 (1946); *Ostendorf v. Arrow Insurance Company*, [288 Minn. 491], 182 N.W.2d [190,] 192 [(1970)].” *Worthington v. State*, Wyo., 598 P.2d 796, 806 (1979).

[2] The basic considerations for construing a contract are summarized in *Amoco Production Company v. Stauffer*

*Chemical Company of Wyoming, Wyo.*, 612 P.2d 463, 465 (1980):

"Our basic purpose in construing or interpreting a contract is to determine the intention and understanding of the parties. *Fuchs v. Goe*, 62 Wyo. 134, 163 P.2d 783 (1945); *Shellhart v. Axford*, Wyo., 485 P.2d 1031 (1971); *Oregon Short Line Railroad Company v. Idaho Stockyards Company*, 12 Utah 2d 205, 364 P.2d 826 (1961). If the contract is in writing and the language is clear and unambiguous, the intention is to be secured from the words of the contract. *Pilcher v. Hamm*, Wyo., 351 P.2d 1041 (1960); *Fuchs v. Goe*, supra; *Hollabaugh v. Kolbet*, Wyo., 604 P.2d 1359 (1980); *Wyoming Bank and Trust Company v. Waugh*, Wyo., 606 P.2d 725 (1980). And the contract as a whole should be considered, with each part being read in light of all other parts. *Shepard v. Top Hat Land & Cattle Co.*, Wyo., 560 P.2d 730 (1977); *Rossi v. Percifield*, Wyo., 527 P.2d 819 (1974); *Shellhart v. Axford*, supra; *Quin Blair Enterprises, Inc. v. Julien Construction Company*, Wyo., 597 P.2d 945 (1979). The interpretation and construction is done by the court as a matter of law. *Hollabaugh v. Kolbet*, supra; *Bulis v. Wells*, Wyo., 565 P.2d 487 (1977); *Shepard v. Top Hat Land & Cattle Co.*, supra.

"If the contract is ambiguous, resort may be had to extrinsic evidence. *J.W. Denio Milling Co. v. Malin*, 25 Wyo. 143, 165 P. 1113 (1917); *Kilbourne-Park Corporation v. Buckingham*, Wyo., 404 P.2d 244 (1965). An ambiguous contract 'is an agreement which is obscure in its meaning, because of indefiniteness of expression, or because a double meaning is present.' *Bulis v. Wells*, supra, 565 P.2d at 490. Ambiguity justifying extraneous evidence is not generated by the subsequent disagreement of the parties con-

cerning its meaning. *Homestake-Sapin Partners v. United States*, 10th Cir.1967, 375 F.2d 507."

The language of the contract quoted supra is not ambiguous.<sup>1</sup> It is plain and clear. It does not have a double meaning, nor is it indefinite or obscure in its meaning. It is definite in expression and can be understood in only one way. It has but a single meaning, and that meaning is not uncertain. It provides that there is no coverage for loss due to "water damage" as "water damage" is defined in the contract, i.e., that resulting from "flood, surface water, waves, tidal water, \* \* \* or spray from any of these, whether or not driven by the wind." Appellee argues that the loss was caused by "rain"—which is not listed under the contract definition of "water damage"—and therefore coverage existed. Appellant argues that the loss was caused by "surface water" and therefore is within the contract exclusion. This resulting issue was accepted by the trial court as the crux of the case. It said, in the Declaratory Judgment, Findings of Fact and Conclusions of Law:

"The Court views the coverage issue in this case as follows: if the water which fell with and after the hail and [d]id the damage is considered 'rain', then there is coverage. If such water is considered 'flood' or 'surface water', there is no coverage \* \* \*."

The trial court also recognized that contract language to be unambiguous—but it inconsistently concluded that the words "rain," "flood," and "surface water" were latently ambiguous. It said, in its second Conclusions of Law:

"While the policy language is not inherently ambiguous, it is ambiguous as applied to the extraordinary facts in this case because the terms 'rain', 'flood', and 'surface water', are not defined in the insurance policy. An examination of the

1. See definition of ambiguous contract in quotation from *Amoco Production Company v. Stauffer Chemical Company of Wyoming*, 612 P.2d 465, and in *McArtor v. State*, Wyo., 699 P.2d 288 (1985); *Antlerweidt v. State*, Wyo., 684 P.2d 812 (1984); *Matter of Estate of Reed*, Wyo., 672 P.2d 829 (1983); *Busch Development, Inc. v. City of*

*Cheyenne*, Wyo., 645 P.2d 65 (1982); *State ex rel. Albany County Weed and Pest District v. Board of County Commissioners of County of Albany*, Wyo., 592 P.2d 1154 (1979); *DeHerrera v. Herrera*, Wyo., 565 P.2d 479 (1977); *County of Natrona v. Casper Air Service*, Wyo., 536 P.2d 142 (1975).

cases referred to in the February 2, 1987 letter decision reveal that the Courts have not necessarily agreed upon the 'plain' meaning to be given to 'flood', 'surface water' or 'rain'. Because the terms are not defined, the Court concludes that rain does not become surface water immediately after it hits the ground; rather it remains 'rain' (a non-excluded peril)."

We cannot accept this conclusion. A policy must be construed according to its plain language, giving to the words their common and ordinary meaning.

"[W]ords used will be given their common and ordinary meaning. 13 Appleman, Insurance Law and Practice, § 7402 (1943). \* \* \* Absent ambiguity, there is no room for construction and the policy will be enforced according to its terms. *Addison v. Aetna Life Insurance Company*, Wyo., 358 P.2d 948, 950 [(1961)]. Neither will the language be 'tortured' in order to create an ambiguity. *Malanga v. Royal Indemnity Company*, 4 Ariz. App. 150, 418 P.2d 396, 399 [(1966)]; Appleman, Insurance Law and Practice, § 7384 (1943)." *McKay v. Equitable Life Assurance Society of the United States*, Wyo., 421 P.2d 166, 168 (1966).

It is true that "rain," "flood" and "surface water" are not further defined in the policy. But neither does it define "fire," "theft," "freezing" or other perils with common and ordinary meanings. "Rain" is ordinarily and commonly thought of as water falling from the sky. After it stops falling, one does not say that it is "raining" although there may still be wet sidewalks and streets, puddles of water resulting from the rain, or water running through gutters and elsewhere as a result of the rain. It is not common or usual to say in such instances that it is still raining.

This common and usual meaning is the same as that legally determined and used in the science of hydrology. In *Al Berman, Inc. v. Aetna Casualty & Surety Co.*, 216 F.2d 626, 628 (3rd Cir.1954), the court defined "rain" as:

"The condensed vapor of the atmosphere falling to the earth in drops large

enough to attain sensible velocity.' New Standard Dictionary." (Emphasis added.)

Expert witness Rechard testified at the trial:

"Q. Is there a distinction as a hydrologist, sir, and based upon your expertise in hydrology between rain and surface water?

"A. Yes, there is.

"Q. What is that distinction?

"A. Rain is the water falling from the atmosphere striking the surface of the earth, and surface water is water on the surface of the earth.

"Q. What happens after rain falls to the ground? Does it retain its characteristic as rain or does it become something else?

"A. It becomes either surface water or if it infiltrates it becomes underground water.

"Q. Is that a commonly accepted definition, as far as you know?

"A. As far as hydrology is concerned, yes.

"Q. That's one that is used—has been used for how many years? For as long as you can remember?

"A. As long as there has been the science of hydrology."

If, by definition, "rain" remains "rain" after it stops falling, then the water in streams and lakes, coming from household faucets, etc. is "rain" since it originated, partly at least, from water that fell from the sky.

In any event, the important determination to be made in this case is whether or not the damage was caused in whole or in part by "surface water." If the water which accumulated on the ground and entered the basement window was still "rain," then there is either no such thing as "surface water," or "rain" and "surface water" are synonymous. Obviously, there is such a thing as "surface water"—at least in the minds of the parties to the contract in which they used the term. And if the two terms are synonymous, then the exclusion provision of the policy for "sur-

face water" also applies to "rain," and there is no coverage.

Justice Blume, speaking for this court, defined "surface water" in *State v. Hiber*, 48 Wyo. 172, 44 P.2d 1005, 1008 (1935):

" 'Surface water,' it has been said, is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such, and may be impounded by the owner of the land, until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters; or until it reaches some permanent lake or pond, and it then ceases to be surface water and becomes the water of the water course, or a lake or a pond, as the case may be. *Kinney on Irrigation*, [(2d Ed.)] § 318; *Crawford v. Rambo*, 44 Ohio St. 279, 7 N.E. 429 [(1886)]; *King v. Chamberlin*, 20 Idaho[] 504, 118 P. 1099 [(1911)]."

At least some of the water which entered appellee's basement had diffused over the surface of the ground, was derived from falling rains, and had not reached a well-defined channel, lake or pond. It fit other plain meanings of surface water as reflected ante. The evidence established the fact that this kind of water entered the basement and caused the damage. There was no evidence to the contrary. Thus, a contrary finding could not be made. *M & M Welding, Inc. v. Pavlicek*, Wyo., 713 P.2d 236 (1986); *Alco of Wyoming v. Baker*, Wyo., 651 P.2d 266 (1982); *Clausen v. Boland*, Wyo., 601 P.2d 541 (1979); *Douglas Reservoirs Water Users Association v. Cross*, Wyo., 569 P.2d 1280 (1977).

Appellee, himself, testified:

"And then later on I had a city dump truck pick me up and leave me off a block away from my house over there. And I swam the rest of the way.

"Q. You mean swam? That you were flat with both your legs and your arms kicking?

"A. Right, right.

....

"Q. How deep was the water at your—in the street right by your house?

"A. By the house?

"Q. Yes, right by the house?

"A. Oh, I would say maybe like oh, two and a half, three feet, something like that. Two and a half feet.

"Q. Can you describe it for me by reason of how tall you are or where it came up to you on your waist?

"A. Oh, up to about the beltline.

"Q. Came up to the beltline?

"A. A little bit, yes.

"Q. That's at the street by your house?

"A. At the street by my house.

"Q. Let's move up to the area around the house.

"A. Okay.

"Q. How deep was the water level at the house?

"A. Oh, I would say approximately maybe like oh, six inches above the, you know, where it went into the basement, you know, the side of the basement, that wall, six inches above. The whole area in there could have been maybe like 20 inches, something like that, 17.

. . . . .

"Q. Okay. And do I understand correctly that when you went in the house the water was not only from the basement but all the way through the joists and ceiling?

"A. Right.

"Q. And up onto the first floor?

"A. First floor about half an inch, maybe three-quarters.

"Q. Now, was that—As you came to the house that evening, as you swam to the house that evening, was the water moving at all?

"A. Yes.

"Q. In which direction was it moving?

"A. I'd say it was coming in from the north. Coming in from the north.

. . . . .

"Q. Now, Mr. Paulson, I would like to now ask you whether or not had it not been for the flood and the surface water you would have had the loss to your basement and its contents?

"A. Maybe a minimum amount maybe.

"Q. Just a minimum?

"A. Minimum."

Mr. Rechard testified:

"Q. So if we wouldn't have had the flood or surface water there is nominal if any damage to the basement and its contents, correct?"

"A. That is my opinion."

There is testimony that some "rain" may have fallen directly into the basement through the broken windows without first hitting the ground and becoming "surface water." But there was no contradictory evidence to the fact that some of the water which entered the basement and contributed to the damage was "surface water" as defined in *State v. Hiber*, supra, and as such is commonly considered (see additional definitions ante).

Accordingly, the specific policy exclusions prevent coverage in this instance. That quoted supra from "SECTION I—LOSSES NOT INSURED" of the policy specifies that there is no coverage for loss caused by "surface water" or "flood," and (1) "We do not insure for such loss regardless of: a) the cause of the excluded event"; e.g., hail breaking a window and allowing the "surface water" or "flood" to enter; (2) "We do not insure for such loss regardless of: \* \* \* b) other causes of the loss"; e.g., if the loss was also caused by "rain" falling into the basement through

the broken window, or if it was also caused by "hail"; and (3) "We do not insure for such loss regardless of: \* \* \* c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss"; e.g., the loss was a result of the window being broken, "hail" and "rain" entering, together with "surface water" or "flood" entering—either at the same time or in sequence.<sup>2</sup>

Although the foregoing may be sufficient for a reversal of this matter, the second Conclusion of Law, supra, of the learned trial judge deserves additional comment.

Contrary to his statement therein that the cases referred to in his letter opinion "reveal that the Courts have not necessarily agreed upon the 'plain' meaning to be given to 'flood', 'surface water' or 'rain'," (emphasis added) a review of such cases reflects that they are in substantial agreement as to the meaning of these words. Of the sixteen cases there considered, three do not address those meanings;<sup>3</sup> five define "flood";<sup>4</sup> three of those defining flood also define "surface water,"<sup>5</sup> as do an additional seven;<sup>6</sup> and one considers the meaning of "rain."<sup>7</sup> Of course, the fact situation is not the same in all of these cases.

2. If a policy did not contain a sequential exclusion, as did this one, coverage would exist if an otherwise excluded peril resulted in the occurrence of a covered peril, such as non-covered peril of vandalism resulting in breakage of water pipes which caused covered peril of water damage.

3. *Franklin Packaging Company v. California Union Insurance Company*, 171 N.J.Super. 188, 408 A.2d 448 (1979), cert. denied 84 N.J. 434, 420 A.2d 340 (1980); *Fawcett House, Inc. v. Great Central Insurance Company*, 280 Minn. 325, 159 N.W.2d 268 (1968); *Unobskey v. Continental Ins. Co.*, 147 Me. 249, 86 A.2d 160 (1952).

4. *Bartlett v. Continental Divide Insurance Company*, Colo.App., 697 P.2d 412 (1984); *Ferndale Development Co., Inc. v. Great American Insurance Company*, 34 Colo.App. 258, 527 P.2d 939 (1974); *Mateer v. Reliance Insurance Co.*, 247 Md. 643, 233 A.2d 797 (1967); *Everett v. Davis*, 18 Cal.2d 389, 115 P.2d 821 (1941); *Poole v. Sun Underwriters Ins. Co. of New York*, 65 S.D. 422, 274 N.W. 658 (1937).

5. *Ferndale Development Co., Inc. v. Great American Ins. Co.*, supra; *Everett v. Davis*, supra; *Poole v. Sun Underwriters Ins. Co. of New York*, supra.

6. *Transamerica Insurance Company v. Raffkind*, Tex.Civ.App., 521 S.W.2d 935 (1975); *Aetna Fire Underwriters Insurance Company v. Crawley*, 132 Ga.App. 181, 207 S.E.2d 666 (1974); *Hatley v. Truck Insurance Exchange*, 261 Or. 606, 495 P.2d 1196 on reh. from 261 Or. 606, 494 P.2d 426 (1972); *Sherwood Real Estate & Investment Company v. Old Colony Insurance Company*, La. App., 234 So.2d 445 (1970); *Richman v. Home Ins. Co. of N.Y.*, 172 Pa.Super. 383, 94 A.2d 164 (1953); *Urse v. Maryland Casualty Co.*, 58 F.Supp. 897 (D.C.N.D.1945); *Fenmode v. Aetna Casualty & Surety Co. of Hartford, Conn.*, 303 Mich. 188, 6 N.W.2d 479 (1942).

7. *Goldfarb v. Maryland Casualty Co.*, 311 Ill. App. 568, 37 N.E.2d 376 (1941).

The policy exclusion prevented coverage if the damage resulted from a "flood." With reference to the five cases considered by the trial court which defined "flood," *Bartlett v. Continental Divide Insurance Company*, Colo.App., 697 P.2d 412 (1984); *Ferndale Development Co., Inc. v. Great American Insurance Company*, 34 Colo. App. 258, 527 P.2d 939 (1974); *Mateer v. Reliance Insurance Co.*, 247 Md. 643, 233 A.2d 797 (1967); *Everett v. Davis*, 18 Cal. 2d 389, 115 P.2d 821 (1941); *Poole v. Sun Underwriters Ins. Co. of New York*, 65 S.D. 422, 274 N.W. 658 (1937), only *Mateer v. Reliance Ins. Co.* has language which could make "flood" a consideration in this case. It states:

"Today we commonly speak of a cellar or basement being 'flooded' without regard to whether the water comes from the overflow of a stream, from a hard downpour, or from the bursting of pipes." (Emphasis added.) *Id.* at 799.

In each of the other four cases, "flood" is defined in a similar fashion: *Bartlett v. Continental Divide Insurance Company*, 697 P.2d at 413 states:

"Ordinarily, 'flood' means 'a body of water (including moving water) ... overflowing or inundating land not usually covered.' 36A C.J.S. Flood \* \* \*."

And it notes that no distinction is made between natural and artificial causes.

*Everett v. Davis*, 115 P.2d at 823, and *Poole v. Sun Underwriters Ins. Co. of New York*, 274 N.W. at 600, define flood waters as

"those which escape from a stream or other body of water and overflow the adjacent territory."

*Ferndale Development Co., Inc. v. Great American Insurance Company*, 527 P.2d at 940, adopts the definition from 5 Appleman, Insurance Law and Practice § 3145 at 462 (1970):

"'Flood waters' are those waters above the highest line of the ordinary flow of a stream, and generally speaking they have overflowed a river, stream, or natural water course and have formed a continuous body with the water flowing in the ordinary channel \* \* \*."

These cases do not indicate material disagreement as to the plain meaning of the word "flood."

The meaning of "surface water" is of much more importance to this case since, as noted, if it caused the damage—even in part—there was no coverage under the policy. A review of the cases defining "surface water" and referred to or quoted from in the trial judge's opinion letter (see notes 5 and 6, *supra*) attribute the meaning to "surface water" substantially as it is defined by this court in *State v. Hiber*, *supra*.

*Transamerica Insurance Company v. Raffkind*, Tex.Civ.App., 521 S.W.2d 935, 939 (1975), defines "surface water" as

"natural precipitation coming on and passing over the surface of the ground until it either evaporates, or is absorbed by the land, or reaches channels where water naturally flows."

In *Richman v. Home Ins. Co. of N.Y.*, 172 Pa.Super. 383, 94 A.2d 164, 166 (1953), quoting *Fenmode v. Aetna Casualty & Surety Co. of Hartford, Conn.*, 303 Mich. 188, 6 N.W.2d 479, 481 (1942), it states:

"[S]urface waters are commonly understood to be waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence."

*Urse v. Maryland Casualty Co.*, 58 F.Supp. 897, 899 (D.C.N.D.1945) accepted two definitions of surface water, one from the Supreme Court of Appeals of West Virginia:

"'Surface water is water of casual, vagrant character, oozing through the soil, or diffusing and squandering over or under the surface, which, though usually and naturally flowing in known direction, has no banks or channel cut in the soil; coming from rain and snow, and occasional outbursts in time of freshet, descending from mountains and hills, and inundating the country; and the moisture of wet, spongy, springy, or boggy land. For obstructing or diverting surface water, though damaging another,

the party is not liable.' *Neal v. Ohio River R. Co.*, 47 W.Va. 316, 34 S.E. 914, Pt. 2 Syl."

The other definition was from Kinney on *Irrigation and Water Rights*, § 318 at 516 (1912):

"“Surface” water may be defined ‘as water on the surface of the ground, the source of which is so temporary or limited as not to be able to maintain for any considerable time a stream or body of water having a well-defined and substantial existence.’” 58 F.Supp. at 899.

*Poole v. Sun Underwriters Ins. Co. of New York*, 274 N.W. at 660 also used this definition from Kinney, together with that set forth supra by *Richman v. Home Ins. Co. of N.Y.*, 94 A.2d at 164, and *Fenmode v. Aetna Casualty & Surety Co. of Hartford, Conn.*, 6 N.W. at 479.

*Sherwood Real Estate & Investment Company v. Old Colony Insurance Company*, La.App., 234 So.2d 445, 447 (1970) states:

"In 56 Am.Jur., verbo water, Sec. 65, it is stated:

"The term “surface water” is used in the law of waters in reference to a distinct form or class of water which is generally defined as that which is derived from falling rain or melting snow, or which rises to the surface in springs, and is defused over the surface of the ground, while it remains in such defused state or condition \* \* \*.”

*Everett v. Davis*, 115 P.2d at 823 states:

"Surface waters are those falling upon, arising from, and naturally spreading over lands produced by rainfall, melting snow, or springs. They continued to be surface waters until, in obedience to the laws of gravity, they percolate through the ground or flow vagrantly over the surface of the land into well defined watercourses or streams."

*Ferndale Development Co., Inc. v. Great American Insurance Company*, 527 P.2d at 940, again adopts the definition of "surface water" from 5 Appleman, *Insurance Law and Practice*, supra at 463, as:

"water which is derived from falling rain or melting snow, or which rises to

the surface in springs, and is diffused over the surface of the ground, while it remains in such a diffused state, and which follows no defined course or channel, which does not gather into or form a natural body of water, and which is lost by evaporation, percolation, or natural drainage."

*Aetna Fire Underwriters Insurance Company v. Crawley*, 132 Ga.App. 181, 207 S.E.2d 666, 668 (1974) states that "surface water"

"is used as a part of a series of contingencies all of which have in common the property that they comprise water flowing on the surface of the ground at the time they enter the home of the insured."

And finally, in *Hatley v. Truck Insurance Exchange*, 261 Or. 606, 495 P.2d 1196, 1197 (1972), the court said:

"The term 'surface water,' particularly when used in conjunction with flood, waves, and tidal water, was intended to mean water 'diffused over the surface of the ground, derived from falling rains or melting snows.' *Price v. Oregon Railroad Co.*, 47 Or. 350, 358, 83 P. 843, 846 (1906)."

The case of *Goldfarb v. Maryland Casualty Co.*, 311 Ill.App. 568, 37 N.E.2d 376, 377 (1941) referred to in the opinion letter of the trial court did not define "rain," but did comment that "[i]t is difficult to say where the line of demarcation lies between rain and surface water." In finding that there was coverage under a policy providing coverage for the peril of rain, the court said that "[t]here is no evidence that there was any water lying on the ground, in the area \* \* \* of the defective door," and that the plaintiffs' theory "is that the rain coming between the two buildings, and through the fire escape, fell directly before and through the defective door of plaintiffs' premises."

These cases do not indicate a disagreement among the courts as to the meaning of the word "flood," "surface water" and "rain" sufficient to cloud the plain and ordinary meaning of them. Particularly with reference to "surface water," it is

difficult to understand how an item can be more plainly labeled. It is water on the surface, other than in streams, lakes and ponds. The parties, as reasonable people, must have attached this plain meaning to the words in the policy. The words "surface water" have the common meaning attributed to them by this court in *State v. Hiber*, supra.

Accordingly, and mindful of the following admonishment in *Worthington v. State*, 598 P.2d at 807, we hold that appellee's damages were not covered by his policy with appellant:

"[A] court [is restrained] from liberally and unreasonably construing an insurance contract to permit a strained or unnatural interpretation in order to find coverage for innocent victims who are subjects of enormous sympathy. Otherwise, the effect would be to bind an insurer to a risk that was not contemplated and for which it was not paid. *D'Angelo v. Cornell Paperboard Products, Co.*, 59 Wis.2d 46, 207 N.W.2d 846, 848 (1973)."

Case No. 87-259 is reversed. Since such reversal makes moot the issue in the cross-appeal of Herb J. Paulson in Case No. 87-260,<sup>8</sup> the trial court's holding in that case is affirmed.

CARDINE, J., filed a dissenting opinion.

CARDINE, Justice, dissenting.

I dissent.

I would find appellant's insurance policy ambiguous. In Coverage B, it affords insurance against loss or damage caused by hail and rain that enter through an opening caused by the direct force of hail. Then § 1 of the policy voids that coverage completely by providing that a loss is not covered if caused partly by rain entering directly and partly by rain which has become surface water. It would be a rare occurrence in which some rain did not, as appellant claims, become surface water and enter the

opening. It would seem that the parties must have intended to provide insurance coverage for something, otherwise why write into the policy all of the provisions concerning loss from windstorm, hail, rain, snow, sleet, sand or dust.

Coverage B provides as follows:

"We insure for accidental direct physical loss \* \* \*."

\* \* \*

"2. \* \* \* when the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening."

The policy then provides, under SECTION 1—LOSSES NOT INSURED:

"We do not insure under any coverage for loss \* \* \* which would not have occurred in the absence of one or more of the following excluded events. \* \* \* (1) flood, surface water \* \* \*."

"We do not insure for such loss regardless of: \* \* \* (c) whether other causes acted concurrently or in any sequence with the excluded \* \* \* loss."

The undisputed evidence in this case was that hail broke out basement windows and that hail and rain entered directly through the window opening causing some damage to the property. At this point in the occurrence, the damage was clearly covered by the policy, for it was hail damage that caused "an opening in a \* \* \* wall" of the building and the rain and hail entered through the opening. Appellant even concedes that the broken windows are covered damage under the insurance policy, although at the time of argument such damage was unpaid.

The insurance coverage seemingly provided by Coverage B of the insurance policy then is claimed excluded by SECTION 1—LOSSES NOT INSURED. The effect of a literal interpretation of the exclusionary clause in § 1 is that the policy provides no coverage at all for damage caused by rain, for appellant contends that as soon as the rain settles upon some surface, it be-

8. The issue argued by Mr. Paulson in Case No. 87-260 is: "Under the circumstances of this case, State Farm's denial of coverage was unrea-

sonable or without cause, thus entitling Mr. Paulson to interest and attorney fees pursuant to W.S. § 26-15-124."



comes surface water. And if any of that surface water enters through an opening caused by hail or wind and it, in combination with rain or hail entering directly, causes damage, it is not covered. For example, assume that hail damage caused an opening in a roof, rain entered directly through the opening causing damage, but some of the rain which fell on the roof collected, ran down the roof and into the opening causing additional damage. Under the literal language of the policy, there would be no coverage for the loss and damage that occurred, for the rain that had collected on the roof would be surface water, and it, in combination with rain entering directly and causing the total damage, is excluded under § 1. I cannot accept that as the intent of the parties in writing this policy.

Appellant argued that rain did not become surface water until it fell to the ground. I do not find that interpretation in the policy. At least we must agree that what is surface water and when it becomes surface water was ambiguous insofar as such term was used in this insurance policy. I would hold it was the intent of the parties to provide some kind of coverage for damage caused by hail and rain. An ambiguous contract must be most strongly construed against the drafter of the instrument, in this case appellant. For this reason I would affirm the decision of the district judge. And, in any event, I would hold that the insurance policy at least covered the damage caused by the hail and by the rain that entered, not as surface water, but directly through the opening itself. Appellant contends that the major damage was caused by surface water. That at least is a concession that lesser damage was caused by rain and by hail entering directly. Without doubt, this damage was covered under the policy.



**STATE FARM FIRE AND CASUALTY  
COMPANY, Appellant (Plaintiff),**

v.

**Gareth H. BOWEN and Dorothy  
Bowen, Appellees (Defendants).**

No. 87-223.

Supreme Court of Wyoming.

June 3, 1988.

Appeal from the District Court of Laramie County; Edward L. Grant, Judge.

John A. Sundahl of Godfrey, Sundahl & Jorgenson, Cheyenne, for appellant.

George Zunker, Cheyenne, for appellees.

Before BROWN, C.J., THOMAS,  
CARDINE and MACY, JJ., and  
ROONEY, J., Retired.

ROONEY, Retired Justice.

This is a companion case to *State Farm Fire and Casualty Company v. Paulson*, Wyo., 756 P.2d 764 (1988). The damage to appellant's residence was caused by the same storm which damaged the Paulson residence. The insurance policies involved were the same. The trial court incorporated the opinion letter in the Paulson case into its Declaratory Judgment, Findings of Fact and Conclusions of Law in this case. In a short opinion letter in this case, the trial court stated:

"The principal difference in the evidence between Paulson and Bowen was that in Paulson, falling hail directly broke the window and in Bowen, large masses of hail born by water broke the window, but the outside glass or plexiglass 'bubble' coverings over the window wells that Mr. Bowen had installed were broken by hail's direct impact."

The Declaratory Judgment, Findings of Fact and Conclusions of Law in this case were identical to those in the Paulson case in all respects pertinent to this appeal.

Accordingly, and for the reasons stated in the Paulson case, the judgment against appellant in this case is reversed.

CARDINE, J., filed a dissenting opinion.

CARDINE, Justice, dissenting.

I dissent from the majority opinion for the reasons stated in my dissenting opinion filed in *State Farm Fire and Casualty Company v. Paulson*, Wyo., 756 P.2d 764 (1988).



WYOMING SAWMILLS, INC., a Wyoming corporation, Appellant  
(Plaintiff/Third-Party Defendant),

v.

Robert B. MORRIS; Raymond McCoy, Gerald McCoy; and Gary McCoy, d/b/a J & D Wood Products; Sheridan National Bank, and Edith I. Morris, Appellees (Defendants/Third-Party Defendants/Third-Party Plaintiffs).

No. 88-3.

Supreme Court of Wyoming.

June 10, 1988.

Action was brought to enforce alleged oral settlement agreement of dispute arising from parties' competing claims to 230,000 board feet of green saw logs. The District Court, Sheridan County, James N. Wolfe, J., entered judgment enforcing agreement, and appeal was taken. The Supreme Court, Rooney, J., Retired, held that finding that parties had entered into binding oral settlement agreement prior to date set for execution of written settlement document was sufficiently supported by testimony of parties.

Affirmed.

#### 1. Contracts ⚡15

Unconditional, timely acceptance of offer, properly communicated to offeror, constitutes "meeting of minds" and establishes contract.

See publication Words and Phrases for other judicial constructions and definitions.

#### 2. Contracts ⚡29

Whether contract has been entered into depends on intent of parties and is question of fact, both as to written and oral contracts.

#### 3. Compromise and Settlement ⚡23(3)

Finding that parties had entered into binding oral settlement agreement prior to date set for execution of written document was sufficiently supported by testimony of parties that agreement had been reached as to all material terms; execution of written document was not condition precedent to settlement.

#### 4. Compromise and Settlement ⚡23(2)

Unexecuted copy of written settlement document, which merely incorporated terms to which parties had agreed in four-way telephone conversation, was admissible in action to enforce alleged oral settlement agreement to give meaning to and support parties' testimony regarding conversation.

#### 5. Appeal and Error ⚡204(4)

Any error arising out of trial court's admission of unexecuted copy of written settlement document was not plain error, where information contained in document was already before court by virtue of testimony of parties suing to enforce oral agreement.

Darlene L. Reiter of Burgess & Davis, Sheridan, for appellant.

Dan B. Riggs and Haultain E. Corbett of Lonabaugh & Riggs, Sheridan, for appellees Robert B. Morris, Edith I. Morris, Raymond McCoy, Gerald McCoy, and Gary McCoy d/b/a J & D Wood Products, and Sheridan Nat. Bank.

[¶ 1101] LEE, Plaintiff, Appellant v. NATIONWIDE MUTUAL INSURANCE, Defendant, Appellee

Tennessee Court of Appeals, Middle Section at Nashville. No. 87-357-II. Filed April 29, 1988. Appeal from the Chancery Court, Davidson County, at Nashville. Affirmed and remanded.

**All-Risk Insurance—Exclusions of Earth Movement and Water Below Surface of Ground**

Damage to the walls of a house from a shift in the foundation caused by a leak in a sewer pipe inside the house resulting in liquid sewage flowing beneath the foundation was excluded from coverage under the owner's all-risk insurance policy. The policy exclusions for earth movement and for damage from water below the surface of the ground barred coverage.

James W. Price, Jr., 1st American Center, Nashville, Tenn. 37238, for Appellant. Stephen K. Heard, Michael J. Quinan, 3rd National Financial Center, Nashville, Tenn. 37219, for Appellee.

**OPINION**

**[All-Risk Insurance]**

Plaintiff sued to recover damages to a dwelling under terms of an "all risk" policy issued by defendant. The Trial Judge rendered summary judgment for the defendant, and plaintiff appealed.

**[Issue]**

The sole issue presented on appeal is whether, under the undisputed facts, the loss was excluded by policy provisions.

**[Facts]**

Plaintiff's complaint states that a leak in a sewer pipe inside the house caused liquid sewage to flow beneath the foundation, causing the foundation to shift thereby producing cracks in the walls of the house.

The policy upon which suit is brought provides:

The Company shall not be liable for loss:

....

7. due to any and all settling, shrinking, cracking, bulging or expansion of driveways, sidewalks, swimming pools, pavements, foundations, walls, floors, roofs or ceilings;

....

12. caused by, resulting from, contributed to, or aggravated by any of the following:

(a) earth movement, including but not limited to earthquake, landslide, mudflow, earth sinking, earth rising or shifting;

....

(d) water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors, or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors;

....

2. The following is added to the EXCLUSIONS section:

This policy does not insure under Section I for loss caused directly or indirectly by any of the following exclusions in this policy. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

....

c. Earth movement;

....

g. Water below the surface of the ground;

....

Plaintiff's deposition states that, in the spring of 1985, she saw a crack from the earth to the roof where the brick had pulled apart about an inch, windows separated from the house an inch or more, front door separated from the house an inch, roof sunk a couple of inches; on the inside she saw daylight through the wall of the front foyer, cracks in the bathroom, bedrooms; and none of this damage was present when she inspected the house 60 days before.

The affidavit of David C. Bourne, licensed engineer, states:

6. As is reflected in the report, the distress experienced by the structure was almost entirely in the form of cracking of the foundations, walls and floors. Said cracking was caused by settlement of the structure. Several possible explanations for such settlement are contained in the report, one of which being a reported sewer line leak under the foundation of the structure. Although the sewer line leak may have been responsible in part for the settlement which occurred, I observed no evidence, and it is my opinion that the sewer line leak caused no damage other than that resulting from such possible settlement, and erosion or loss of ground.

7. If the sewer line leak was in fact responsible for the settlement of the structure, such settlement occurred for the following reason: The leak caused an accumulation of water below the surface of the ground, which in turn caused the movement or shifting of the earth which supports the foundation of the structure.

The affidavit of Edwin A. McDougie, licensed engineer, states:

6. Based upon the observations made on September 19 and October 8, 1985, a report was issued to Nationwide (undated but sent with a cover letter dated October 22, 1985) signed by both myself and Mark Dunning. A copy of said report is attached hereto as Exhibit 2, and a copy of said cover letter is attached hereto as Exhibit 3. Said report concluded that the damage visible on the structure was the result of settlement in the structure foundation, apparently due to consolidation of soil, resulting from water penetration and not associated with blasting at the airport. In my professional opinion and in light of all information available, said report was and remains accurate and complete.

....

8. After a subsequent inspection of the house by myself on April 30, 1986, a supplemental letter was issued to Nationwide Insurance Company, signed by myself and dated May 9, 1986. A copy of said letter is attached hereto as Exhibit 4. My conclusion, as reflected in said letter, was and is that the water coming from the plumbing leak saturated the soil under the structure and resulted in the settlement of the foundation, causing the damage shown in our original report.

9. As is reflected in the report and supplemental letter, the damages incurred by the structure were in the form of cracking of the foundations, walls, and floors. It was and is my opinion that such cracking was the result of settlement of the structure. Although settlement may have been caused by the plumbing leak discovered under the house, it is my opinion that the plumbing leak was responsible for damage only to the extent that it caused the settlement of the structure.

The affidavit of Gerald B. Kirksey, licensed engineer and attorney, states:

4. Prior to preparing this Affidavit, I reviewed an Affidavit of Edwin A. McDougie and an Affidavit of David C. Bourne. Mr. McDougie and I both reach the conclusion that a plumbing leak in the sewer system triggered the movement and subsequent damage to Ms. Lee's house. Mr. Bourne concluded that "[B]ased on the available information, the reported sewer line leak appears, in our opinion, to be the most probable immediate cause of the distress ..."

....

First, in my opinion, the earth movement exclusion referred to on Pages 5 and 6 of the Memorandum refers to earth movement caused by natural phenomena, including

earthquakes, landslides, mud flow as in the aftermath of the St. Helens volcano, earth sinking such as sinkholes, and earth rising or shifting due to geologic plate movement, volcanic action, or changes in underground soil structure.

Second, the water below the surface of the ground exclusion specifically refers to hydrostatic pressure caused by ground water and is particularly relevant to basement leaks and basement wall failures.

The effluent leaking from the sewer pipe was *not* water, but was sewage which is a mixture of liquids, including water, and solids. While the water content of the sewage was ultimately introduced into the ground water system, the immediate damage caused by the sewage was not contemplated by the ground water exclusion. In addition, there is no indication that the original house, which is approximately 25 years old, or the addition, which is approximately 15 years old, was ever adversely affected by earth movement or water below the surface of the ground prior to the 1985 sewage leak.

Finally, most of the damage to the structure was caused by lateral earth movement, not settlement. The north end of the two story portion of the house moved northward approximately two inches and westward approximately one inch. Parts of the house, particularly the brick veneering, were literally torn into two parts by this movement. Based on interviews with Ms. Lee and her tenants, the Logsdons, and based on observation of the damaged area, I found no indication that the house had exhibited significant settlement or movement prior to April, 1985.

(emphasis supplied)

It is seen that the only conflict in the opinions of the experts involves the following:

Mr. Kirksey undertakes to define the words, "earth movement", and "water below the surface of the ground" by his "opinion". His affidavit does not assert his personal knowledge of the accepted technical definition of the words in use among engineers; but, even if he did so, such an opinion is immaterial to the meaning of the words used in a contract between an insurance company and a property owner neither of whom is shown to be cognizant of technical engineering terms.

#### [Earth Movement Exclusion]

The terms of a contract of insurance are to be construed according to their plain, ordinary, and popular sense, unless the words have acquired a technical sense by commercial usage. *Purdy v. Tennessee Farmers Mutual Ins. Co.*, Tenn. App. 1979, 586 S.W.2d 128, or unless a contrary

intent is shown. *Williams v. Bankers Life Co.*, Tenn.App. 1971, 481 S.W.2d 386.

There is no showing that the quoted words have acquired a technical meaning by commercial usage or that the parties intended a special meaning when making the contract. Accordingly, the ordinary, popular meaning of the words will control.

The words, "earth movement", mean:  
differential movement of the earth's crust;  
elevation or subsidence of land.

Webster's Third New International Dictionary  
Unabridged.

Taken separately, the meaning of the word, "earth", includes:

fragmental material composing part of the surface of the globe; soil, ground, usually distinguished from bed rock.

*Ibid.*

The word, "movement", means:

The action or process of moving, change of place or position or posture.

*Ibid.*

It thus appears that, taken together or separately, the words, earth movement, mean any change of place, position or posture of the soil.

#### [Water Below Surface of Ground]

Likewise, the words, "water below the surface of the ground," have a clear popular meaning.

Water means:

the liquid that descends from the clouds as rain, forms streams, lakes and seas.

Webster's, *supra*. No distinction is made in the definition of water to exclude that which contains impurities or pollutants so long as it retains its predominant characteristic of liquidity. For example, river water is water no matter how muddy and sea water is water no matter how salty.

The word, "below", means:

downward from, at a lower level than, underneath.

Webster's, *supra*.

The word, "surface", means:

the exterior or outside of an object, the outermost or uppermost boundary.

Webster's, *supra*.

The word, "ground", means:

the surface on which man stands, moves and dwells and on which objects naturally rest, the surface of the earth.

Webster's, *supra*.

¶ 1102

Thus, the words, "water under the surface of the ground", mean any water below the extreme upper crust of the soil which retains its characteristic of liquidity.

#### [Conclusion]

The uncontradicted evidence shows that the damage was caused by water under the surface of the ground. Water flowing in a sewer pipe is still water, even though it is mixed with waste. The same water is still water when it leaks from the sewer pipe and moves below the surface of the ground. Although it may not be "ground water" in the sense of a subterranean stream, it is nevertheless "water under the surface of the ground", as described in the policy.

It is uncontroverted from the factual statements of the complaint, deposition and affidavits that plaintiff's damages resulted from:

(a) Earth movement, including ... mud flow, earth sinking, ... rising or shifting;

(d) Water below the surface of the ground.

Therefore, the loss is excluded by the provisions of the policy, quoted above.

When the undisputed facts entitle a party to a judgment as a matter of law, that party is entitled to a summary judgment. *Ferguson v. Tomerlin*, Tenn.App. 1983, 656 S.W.2d 378.

The judgment of the Trial Court is affirmed. Costs of this appeal are taxed against appellant. The cause is remanded for such further proceedings, if any, as may be necessary and proper.

Affirmed and remanded.

HENRY F. TODD

PRESIDING JUDGE

CONCUR:

SAMUEL L. LEWIS, JUDGE

BEN H. CANTRELL, JUDGE

#### [¶1102] CHICOLA d/b/a/ CENTRAL LOUISIANA FISHERIES v. SUN INSURANCE COMPANY OF NEW YORK

United States District Court, Western District of Louisiana, Alexandria Division, Civ. A. No. 85-1564, September 2, 1987, 677 F.Supp. 463.

#### Liability Insurance—Lack of Liability on Part of Insured

A carrier of fish, whose policy covered his "liability" as carrier of merchandise, was not entitled to coverage under such policy for the theft from his truck of fish being transported from the owner to the owner's customers. The

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing BRIEF OF RESPONDENT were mailed by United States mail, postage prepaid, on this 7th day of April, 1989, to:

Thomas J. Erbin, Esq.  
Prince, Yeates and Geldzahler  
Attorneys for Plaintiffs/Appellants  
City Centre I, Suite 900  
175 East 400 South  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Thomas J. Erbin", is written over a horizontal line.