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# EARTH MOVEMENT CLAIMS UNDER ALL RISK INSURANCE: THE RULES HAVE CHANGED IN CALIFORNIA

Brian Mattis\*

## I. INTRODUCTION

Under most "all risk" building insurance policies written in California prior to 1983, losses caused by a combination of earth movement<sup>1</sup> and defective design or improper construction would have been covered. This result arose from the application of well settled principles of insurance law which had been applied in other states and accepted by California courts.<sup>2</sup> Those principles provide that when a loss is caused by a combination of an insured cause and an uninsured (or excluded) cause, the loss is covered under the policy.<sup>3</sup> Commentators have labeled the basic problem as one of "concurrent causation,"<sup>4</sup> and it is said to have caused havoc in the handling of insurance claims.<sup>5</sup>

Problems of concurrent causation can arise with regard to almost any form of insurance, whether first party or third party coverage.<sup>6</sup> The problem has been particularly trouble-

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1. As used herein, the term "earth movement" includes any form of earth movement, natural or otherwise, including earthquake.

2. See *infra* note 14 and accompanying text.

3. See *infra* notes 13-17 and accompanying text.

4. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 THE FORUM 385 (1985) [hereinafter Bragg]; Brewer, *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141 (1961) [hereinafter Brewer]; Houser & Kent, *Concurrent Causation in First-Party Insurance Claims: Consumers Cannot Afford Concurrent Causation*, 21 TORT & INS. L. J. 573 (1986)[hereinafter Houser & Kent].

5. Bragg, *supra* note 4, at 385, 388-91.

6. First party insurance usually covers risks to the insured's own person or

some for the insurance industry in California with regard to claims involving earth movement exclusions on all risk insurance policies providing first party coverage on buildings.

As a result of language changes in many policy forms since 1983,<sup>7</sup> the passage of Section 10088 of the California Insurance Code,<sup>8</sup> and the California Supreme Court's holding in *Garvey v. State Farm Fire and Casualty Company*,<sup>9</sup> the scope of coverage for loss caused by earth movement under most "all risk" insurance policies in California has been significantly reduced. However, before concluding that an earth movement claim is not covered under a building insurance policy, several factors should be carefully considered.

First, it is apparent that some companies did not give adequate notice to their customers when they reduced the scope of coverage under their new policies. Therefore, under well settled principles of insurance law, those customers should be allowed to rely on the old policy forms to determine the scope of coverage available.<sup>10</sup>

Second, Section 10088 of the Insurance Code only applies to earthquake losses and has no application to other types of earth movement claims. Moreover, it is possible that the statute is unconstitutional if it is applied to claims made under coverage that went into effect prior to the passage of the policy. This would include claims made under the principle discussed in the preceding paragraph.

Third, even under the restricted parameters of the

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property. Third party coverage, such as automobile liability insurance, usually covers the insured's potential liability for harm done to the person or property of another.

7. Gordon & Crowley, *Earth Movement and Water Damage Exposure: A Landslide in Coverage*, 50 INS. COUNS. J. 418 (1983) [hereinafter Gordon & Crowley]; Bragg, *supra* note 4, at 385.

8. CAL. INS. CODE § 10088 (West 1984 & Supp. 1990) provides:

Notwithstanding the provisions of Section 530, 532, or any other provision of law, and in the absence of an endorsement or an additional policy provision specifically covering the peril of earthquake, no policy which by its terms does not cover the peril of earthquake shall provide or shall be held to provide coverage for any loss or damage when earthquake is a proximate cause regardless of whether the loss or damage also directly or indirectly results from or is contributed to, concurrently or in any sequence by any other proximate or remote cause, whether or not covered by the policy . . . .

9. 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989).

10. See *infra* notes 53-58 and accompanying text.

*Garvey* opinion, when a loss is caused by a combination of an excluded form of earth movement plus an insured peril, the burden is still on the insurance company to prove that the excluded cause was the "efficient proximate cause" of the loss.<sup>11</sup> This might be a difficult burden for the insurer to overcome before a properly educated finder of fact. Moreover, the *Garvey* opinion is so illogical that it may not be able to withstand an attack on its basic reasoning.<sup>12</sup>

Before discussing these issues some basic principles of insurance law will be examined. In addition, the history of first party insurance coverage for building structures will be reviewed. Many of the problems associated with earth movement losses have been the result of poor policy draftsmanship coupled with a failure of the insurance industry to pay attention to long-standing fundamental rules of policy interpretation. Moreover, the problem is likely to have been exacerbated by the failure of many companies in the insurance industry to properly inform their customers of the reduced scope of coverage that was inherent in the new policy forms that were introduced beginning in 1983.

## II. CONCURRENT CAUSATION AND ALL RISK INSURANCE COVERAGE

Under most "all risk" insurance policies written before 1983, any loss that was not specifically and expressly excluded was covered under the policy.<sup>13</sup> Thus, if the policy in-

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11. The burden is on the insured initially to prove that the event is within the scope of the basic coverage. *Royal Globe Ins. Co. v. Whitaker*, 181 Cal. App. 3d 537, 226 Cal. Rptr. 435, 437 (1986). When the policy insures against "all risks of physical damage", this is done by simply showing that the property suffered physical damage. It is not necessary to show the cause of the damage. The burden then shifts to the insurer to prove that the loss was caused by a peril that was specifically excluded from the coverage of the policy. *Strubble v. United Services Automobile Ass'n.*, 35 Cal. App. 3d 498, 504, 110 Cal. Rptr. 828, 831-32 (1973). In *Garvey*, the California Supreme Court cited these two opinions in support of its dicta regarding the burden of proof. 48 Cal. 3d 395, 406, 770 P.2d 704, 710, 257 Cal. Rptr. 292, 298 (1989).

12. See *infra* note 51

13. Many in the insurance industry would quarrel with this statement and some commentators have insisted that even under all risk policies there are certain implied exceptions. See, e.g., Cozen & Bennett, *Fortuity: The Unnamed Exclusion*, 20 THE FORUM 222 (1985); Gorman, *All Risks of Loss v. All Loss: An Examination of Broad Form Insurance Coverage*, 34 NOTRE DAME LAW. 346 (1959). However, few cases support the contention that there are implied exclusions, and

sured property against all risks of physical damage and the insured could show that the property suffered physical damage, the loss was covered. If the insurer could prove that the sole cause of the loss was excluded under the policy, the loss would not be covered. However, if the loss was proximately caused by a *combination* of an excluded cause and a cause that was not excluded, the loss was covered. This is because of the widely accepted rule that when a policy of insurance expressly insures against direct loss or damage by one element, but excludes loss or damage caused by another element, the coverage extends to the loss even though the excluded element is a contributory cause. This basic rule has been expressed in several different forms, but it was accepted by courts in California<sup>14</sup> and in many other jurisdictions.<sup>15</sup>

Since most "all risk" building policies written prior to 1983 did not exclude loss caused by defective design or improper construction, it follows that a loss caused by a combination of earth movement and defective design,<sup>16</sup> or earth

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the proposition contradicts the basic rule that insurance policies are to be construed strictly against the insurance company. In any event, for purposes of the present discussion the so called "unnamed exclusions" will have no bearing.

14. Prior to the case of *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989), the California courts did not confine the rule to first party property insurance claims, and treated the rule as being general. *State Farm 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); *Zimmerman v. Continental Life Ins. Co.*, 99 Cal. App. 723, 279 P. 464 (1929). See also *Safeco Ins. Co. v. Guyton*, 692 F.2d 551 (9th Cir. 1982) (applying California law).

15. *Fireman's Fund Ins. Co. v. Hanley*, 252 F.2d 780 (6th Cir. 1958); *Essex House v. St. Paul Fire & Marine Ins. Co.*, 404 F. Supp. 978, 985 (S.D. Ohio 1975); *General American Transp. Corp. v. Sun Ins. Office, Ltd.*, 239 F. Supp. 844 (E.D. Tenn. 1965), *aff'd per curiam*, 369 F.2d 906 (6th Cir. 1966); *Mattis v. State Farm Fire & Cas. Co.*, 118 Ill. App. 3d 612, 454 N.E.2d 1156 (1983); *Vormelker v. Oleksinski*, 40 Mich. App. 618, 199 N.W.2d 287 (1972); *Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 195 S.E.2d 545 (1973); *Kracmer Bros. 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 (1976).

16. Cf. *Essex House v. St. Paul Fire & Marine Ins. Co.*, 404 F. Supp. 978 (S.D. Ohio 1975); *Plaza Equities Corp. v. Aetna Cas. & Surety Co.*, 372 F. Supp. 1325 (S.D.N.Y. 1974); *General American Transp. Corp. v. Sun Ins. Office, Ltd.*, 239 F. Supp. 844 (E.D. Tenn. 1965), *aff'd per curiam*, 369 F.2d 906 (6th Cir. 1966); *Mattis v. State Farm Fire & Cas. Co.*, 118 Ill. App. 3d 612, 73 Ill. Dec. 907, 454 N.E.2d 1156 (1983). These cases did not involve earthquake damage, but each involved defective design combined with an excluded peril, and in each case the losses were held to be covered under the policy.

movement and improper construction,<sup>17</sup> would be covered under the policy.

#### A. *History of Concurrent Causation*

The problem of concurrent causation is not new to the insurance industry. Phillips' 1840 treatise on insurance law discusses concurrent causation in connection with marine insurance.<sup>18</sup>

Prior to World War II, problems of concurrent causation seldom arose with regard to insurance on buildings because the types of coverage available were very narrow. Insurance on buildings in the early days of the industry was confined to the perils of fire and lightning.<sup>19</sup> Extended Coverage Endorsements were subsequently added to the fire coverage. For an additional premium charge above the cost of the fire insurance, these endorsements provided coverage against the perils of windstorm, hail, explosion, riot, aircraft, vehicles and smoke. For a small additional premium, coverage against vandalism and malicious mischief could be added.

Eventually insurance coverage for buildings was broadened still further with the addition of a long list of specifically named perils.<sup>20</sup> These "named perils" policies did not contain many exclusions from coverage for the simple reason that there was no coverage for any peril that was not expressly named. When a loss occurred under this type of

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17. *Cf. Essex House v. St. Paul Fire & Marine Ins. Co.*, 404 F. Supp. 978 (S.D. Ohio 1975) (negligent workmanship); *Vormelker v. Oleksinski*, 40 Mich. App. 618, 199 N.W.2d 287 (1972) (improper construction, taking into consideration the type of soil, the geography of the area, etc.). These cases held that there was coverage when improper construction combined with an excluded cause to cause a loss.

18. W. PHILLIPS, *LAW OF INSURANCE*, 13, 16 (2d ed. 1840).

19. Hedges, *Improving Property and Casualty Insurance Coverage*, 15 *LAW & CONTEMP. PROBS.* 353, 374, nn.31-33 (1950) [hereinafter Hedges].

20. The typical "broad form" dwelling policy would insure against loss caused by: fire or lightning; windstorm or hail; explosion; riot or civil commotion; aircraft; vehicles; smoke; vandalism or malicious mischief; theft; falling objects; weight of ice, snow or sleet; collapse of a building or any part of a building; sudden and accidental discharge or overflow of water or steam from within a plumbing, heating or air conditioning system or from within a household appliance; sudden and accidental tearing asunder, cracking burning or bulging of a steam or hot water heating system, air conditioning system, or an appliance for heating water; freezing of a plumbing, heating or air conditioning system; sudden and accidental damage from artificially generated electrical current; breakage of glass.

building insurance, the burden was on the insured to prove that the loss was caused by one of the named perils. With the exception of losses caused by a combination of earthquake and fire,<sup>21</sup> or war risk and fire,<sup>22</sup> problems of concurrent causation seldom arose with regard to insurance on buildings, although they did arise with regard to other first party insurance coverage.<sup>23</sup>

During the 1940's and 1950's many insurance companies began to write insurance on buildings that provided for coverage against all risks of physical damage to the structure.<sup>24</sup> Under these policies, if the insured could show that the property had suffered physical damage, the loss was covered unless the insurer could prove that the loss was caused by a specifically excluded peril.<sup>25</sup> In effect, the burden of proof

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21. In most states, fire insurance policies did not exclude losses caused by earthquake. See E. PATTERSON, *CASES AND MATERIALS ON THE LAW OF INSURANCE* 765-68 (2d ed. 1947). However, cases arising out of the great San Francisco earthquake of 1906 show that fire insurance policies issued in California excluded loss "occasioned by" earthquake. This clause was given effect only in cases where it was found that earthquake was the immediate, direct, and proximate cause of the fire which damaged the insured property. If a fire started in a distant building and communicated from building to building until it reached the insured property, it was held that the fire was caused indirectly by an earthquake, and not directly; and therefore, the loss would be covered. *Baker & Hamilton v. Williamsburgh City Fire Ins. Co.*, 157 F. 280 (N.D. Cal. 1907). See also *Williamsburgh City Fire Ins. Co. v. Willard*, 164 F. 404 (9th Cir. 1908). But see *Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co.*, 157 F. 285 (N.D. Cal. 1907) (loss not covered).

22. It was common for policies to insure buildings against the peril of fire, but with an exclusion for any loss or damage by fire which took place by means of invasion, insurrection, riot, or civil commotion, or of any military or usurped power. See, e.g., *Insurance Co. v. Boon*, 95 U.S. 117 (1877).

23. The problem did arise in connection with other forms of first party insurance coverage. See, e.g., *Zimmerman v. Continental Life Ins. Co.*, 99 Cal. App. 723, 726, 279 P. 464, 467 (1929), where the court held "when two causes join in causing an injury, one of which is insured against, the insured is covered by the policy . . . ."

24. Hedges, *supra* note 19, at 374, nn. 31-33.

25. Because the named peril—all risk of physical damage—was so broad, it became necessary to exclude or except from coverage a very long list of perils. Typical exclusions under an all risk policy covering a building will be loss caused by: earth movement; water damage; neglect; war; nuclear hazard; enforcement of ordinance or law; wear and tear; marring; deterioration; inherent vice; latent defect; mechanical breakdown; rust; mold; wet or dry rot; contamination; smog; smoke from agricultural smudging or industrial operations; settling cracking, shrinking, bulging, or expansion of pavements, patios foundations, walls, floors, roofs or ceilings; birds; vermin; rodents; insects or domestic animals. The list of exclusions or exceptions under the typical all risk personal property floater policy was much

was shifted to the insurer to show the *cause* of the loss.<sup>26</sup> Applying ordinary principles of insurance to these new policies meant that if a risk or peril was not specifically excepted or excluded, a loss from such risk or peril was covered under the policy even if it was very unusual.<sup>27</sup>

If a loss was caused by a combination of two perils, one covered and one excluded, the old problem of concurrent causation arose. Insurers should have expected that in such situations a court would naturally apply the rule that says that if the policy is ambiguous, it will be construed against the insurer because the insurer drafted the policy. Insurers could avoid ambiguity by careful drafting.

Application of the doctrine of concurrent causation to the modern all risk policy on building structures is simply the result of applying old principles of insurance to new forms of policies. Commentators working for the insurance industry believe the doctrine of concurrent causation constitutes a conspiracy by the courts against the industry. This simply is not true.

With regard to earthquake and other forms of earth movement, insurers attempted to avoid having to pay for losses involving concurrent causation by drafting policies that denied coverage when a loss was "caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting."<sup>28</sup>

The problem was that all of the named causes of "earth movement" were natural rather than man-made. Therefore,

shorter.

26. Under the older named perils policy the burden would be on the insured to show what caused the loss because he was required to show that the loss was caused by one of the named perils. Under the new all risk policies, once the insured proved that the property had suffered physical damage, he had brought himself within the scope of coverage. If the insurer wished to escape liability, it would have to show that the loss was caused by something that was excepted or excluded from coverage under the policy.

27. When I owned an insurance agency, I once had a customer submit a claim under an all risk policy when a wild duck somehow got down his chimney while he was on vacation. The duck did considerable damage, but since the policy insured against all risks, and there was no exclusion for wild ducks, the loss was covered under the policy.

28. State Farm Fire & Cas. Co. Homeowners Policy Special Form 3, p. 5, Form # FP-3953 (ed. 1/73).

the courts applied the familiar rule of *ejusdem generis*<sup>29</sup> to the phrase "any earth movement" and held that because all of the specifically named forms of earth movement were natural, the general phrase also applied only to natural forms of earth movement. This meant that losses caused by man-made or man caused forms of earth movement were covered under the policy simply because they were risks of physical damage, and they were not specifically excepted or excluded under the policy terms.<sup>30</sup>

### B. *Modern All Risk Insurance Policies*

During the 1970's several states passed legislation which attempted to assure that insurance policies would be written in simple and understandable language.<sup>31</sup> In response, many insurance companies began to issue "easy to read" policies even in states where such policies were not required.<sup>32</sup> The policy language for the earth movement exclusion was changed so that the policy excluded losses "resulting directly or indirectly from: earth movement."<sup>33</sup> The obvious hope was that this would exclude from coverage all loss caused by

29. BLACK'S LAW DICTIONARY 464 (5th ed. 1979).

30. *Peach State Uniform Service, Inc. v. American Ins. Co.*, 507 F.2d 996 (5th Cir. 1975); *Gullett v. St. Paul Fire & Marine Ins. Co.*, 446 F.2d 1100 (7th Cir. 1971); *Wyatt v. Northwestern Mut. Ins. Co.*, 304 F. Supp. 781 (D. Minn. 1969); *Mattis v. State Farm Fire & Cas. Co.*, 118 Ill. App. 3d 612, 454 N.E.2d 1156 (1983); *Broome v. Allstate Ins. Co.*, 144 Ga. App. 318, 241 S.E.2d 34 (1977); *Government Employees Ins. Co. v. DeJames*, 256 Md. 717, 261 A.2d 747 (1970); *Wisconsin Builders, Inc. v. General Ins. Co. of America*, 65 Wis. 2d 91, 221 N.W.2d 832 (1974). *Contra Stewart v. Preferred Fire Ins. Co.*, 206 Kan. 247, 477 P.2d 966 (1970).

31. 1 G. COUCH, COUCH ENCYCLOPEDIA OF INSURANCE LAW § 1:16 (2d ed. 1984).

32. State Farm Fire and Casualty Company sent its customers new policy forms which included the following notice:

Overview of changes: Here is your new, improved, State Farm Homeowners form which replaces your current form and endorsements. The most noticeable improvement in the new form is the wording. We've made it easier for you to read and understand. And following are a few of the coverage changes provided by your new form . . . .

State Farm Fire & Cas. Co. Form # FP-7103 R/ILLO. The only change in the coverage applicable to buildings was an announcement that coverage relating to damage by vehicles had been expanded. There was no indication that any coverage on the building had been reduced.

33. State Farm Fire & Cas. Co. Homeowners Policy Special Form 3, p. 7, Form FP-7103.

any type of earth movement, whether natural or man made.<sup>34</sup>

Alas, it was not to be. The change in the policy form avoided the rule of *ejusdem generis*, but lack of care in drafting gave the insurers a new problem. The new policy form did not contain the words "contributed to or aggravated by" earth movement, nor did it specifically exclude loss "caused by" or "contributed to" by defective design or inadequate construction. This meant that if a loss was caused by a combination of earth movement and defective design, or a combination of earth movement and inadequate construction, there was an ambiguity in the policy coverage that would be construed against the insurer. Thus, if both earth movement and defective design were causes in fact, the loss was covered under the policy.<sup>35</sup>

When dealing with problems of concurrent causation, most courts did not require the fact finder to determine which of the two causes of the loss was the single efficient proximate cause, provided that both were causes in fact.<sup>36</sup> Moreover, most of the courts that applied the doctrine of concurrent causation applied it with regard to first party insurance coverage as well as third party coverage.<sup>37</sup>

It is virtually certain that the insurers did not intend to cover losses caused by a combination of earth movement and defective design or construction. However, under established principles of contract law, the undisclosed subjective intention of the insurer cannot control the meaning of the contract.<sup>38</sup> Only that intent which is expressed in the policy may be applied.

Beginning in 1983, many companies began to modify

34. However, by failing to indicate that the effective coverage had been reduced, the industry left itself open to the claim that the new earth movement exclusion was meant to be of the same scope as the old exclusion. It applied only to natural forms of earth movement.

35. Under earlier policies the earth movement exclusion was read very narrowly. See, e.g., *Mattis v. State Farm Fire & Cas. Co.*, 118 Ill. App. 3d 612, 617, 454 N.E.2d 1156, 1160 (1983). However, often cases suggest that this would be the rule in those jurisdictions if a loss was caused by a combination of earth movement and defective design. See cases cited *supra* notes 15 and 16.

36. See cases cited *supra* note 15 and 16.

37. See cases cited *supra* note 14. See also R. KEETON & A. WIDISS, *INSURANCE LAW* § 5.5(d) (1988).

38. A. FARNSWORTH, *CONTRACTS* § 3.6 (1982).

their policies so that a loss caused by a combination of earth movement and defective design would no longer be covered.<sup>39</sup> This was usually done without granting any reduction in premium and, more importantly, without giving the insured adequate notice that a reduction in coverage had occurred.<sup>40</sup> In many cases the insurer's failure to give adequate notice meant that customers were unaware of the reduction in coverage. Thus, the uninformed consumer would rarely switch to a company that had not decreased the scope of coverage.<sup>41</sup>

In the case of one leading company, the reduction in the scope of coverage was accomplished by making three basic changes in the policy form.<sup>42</sup> First, the basic insurance clause was changed so that instead of insuring the building against "all risks of physical loss to the property," the policy insured against "accidental direct physical loss to the property."<sup>43</sup>

Second, the "earth movement" exclusion was modified to read as follows:

We do not insure for 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.

a. Ordinance or Law, meaning enforcement of ordinance or law regulating the construction, repair or demolition of a building or other structure, unless specifically provided under this policy.

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39. Gordon and Crowley, *supra* note 7, at 426-27; Bragg, *supra* note 4, at 391-96.

40. This was my own experience in Illinois, as well as that of several of my acquaintances who showed me their new homeowners policies at the time.

41. Although many companies were changing their policies to broaden the scope of exclusions, apparently other companies remained with the old policy forms, fearing that a change might be interpreted as an admission of coverage under the older policy form. Gordon and Crowley, *supra* note 7, at 427. Thus a well informed customer could have been expected to change companies if that customer had been adequately informed of the decrease in policy coverage.

42. Bragg, *supra* note 4, at 392-94.

43. State Farm Fire & Cas. Co. Homeowners Policy Special Form 3, p. 5, Form # FP-7103 and State Farm Fire & Cas. Co. Homeowners Policy Special Form 3, p. 6, Form # FP-7173 (1/83).

b. 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.<sup>44</sup>

Finally, the provisions described above were reinforced to assure that coverage would be denied if earth movement combined with defective design or defective construction to cause a loss. This was done through a clause that provided:

We do not insure for loss consisting of one or more of the items below. Further, we do not insure for loss 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. conduct, act, failure to act, or decision of any person, group, organization or governmental 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; or (4) maintenance; of any property (including land, structures, or improvements of any kind) whether on or off the residence premises. However, we do insure for ensuing loss from items a. and b. unless the ensuing loss is itself a Loss Not Insured by this Section.<sup>45</sup>

The expectation of the companies that adopted the new language was that changes in the policy form would "extricate the property insurance industry from the most significant and perplexing problems it has faced in decades."<sup>46</sup> Certainly the elimination of the phrase "all risk" from the basic insurance clause should go a long way in reducing the expectations of policy holders. It was common practice of insurance agents and brokers to recommend the purchase of

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44. State Farm Fire & Cas. Co. Homeowners Policy Special Form 3, p. 8, Form # FP-7173 (1/83).

45. *Id.* at 9. The changes in the policy form also changed the scope of coverage with regard to other causes of loss, but the discussion here will be confined to the effect of policy changes on earth movement claims. For a discussion of the other changes, see Bragg, *supra* note 4.

46. Bragg, *supra* note 4, at 399.

"all risk" coverage without providing a detailed explanation of what that phrase meant. Seldom would a salesperson go through the many exclusions and exceptions contained in the "all risk" policy. No doubt many consumers took the term "all risk" literally.

### III. MODERN ALL RISK POLICIES PROVIDE LESS COVERAGE

These changes in policy forms will significantly reduce the scope of coverage as compared to former "all risk" building insurance policies. Moreover those companies that did not adopt the new policy language are likely to benefit from the passage of Section 10088 of the California Insurance Code.<sup>47</sup> This statute provides:

[N]o policy which by its terms does not cover the peril of earthquake shall provide or shall be held to provide coverage for any loss or damage when earthquake is a proximate cause regardless of whether the loss or damage also directly or indirectly results from or is contributed to, concurrently or in any sequence by any other proximate or remote cause, whether or not covered by the policy . . . <sup>48</sup>

Furthermore, the majority opinion in the case of *Garvey v. State Farm Fire and Casualty Company*<sup>49</sup> seems to require fact-finders to choose which cause was "the efficient proximate cause" when an excluded cause and a covered cause combine to cause a resulting loss to insured property.<sup>50</sup> Courts will no longer be able to do as the trial court did in *Garvey* and hold for the insured by finding that a covered cause was at least one cause of the loss. If there are two causes, and one is covered and the other excluded, the finder of fact must determine which of the two was the efficient proximate cause.

The changes in policy language, the new statute, and the *Garvey* holding are certain to cause a reduction in the number of earth movement claims that will be covered under building insurance policies. However, before concluding that a potential earth movement claim is not covered, some ame-

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47. See *supra* note 8.

48. CAL. INS. CODE § 10088 (West 1984 & Supp. 1990).

49. 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989).

50. *Id.* at 409, 770 P.2d at 712, 257 Cal. Rptr. at 302-03.

liorating factors must be considered.

Because many companies did not inform their customers that the scope of coverage was reduced, those customers may be able to rely on their previous policy forms. If an insured has remained with the same company since before 1983, the insured might be able to estop the insurer from relying on the new policy language. The pre-1983 policies provided broader coverage because they did not exclude losses caused by earth movement combined with defective design or defective construction.

Moreover, Section 10088 of the Insurance Code applies only to earthquakes and therefore does not apply to many other forms of earth movement losses which were covered before the change in policy forms. Customers who can rely on the old policy forms may be able to recover when defective design has combined with earth movement to cause a loss. Moreover, Section 10088 may be unconstitutional when applied to contractual rights that arose prior to the passage of the statute.<sup>51</sup>

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51. On its face the statute restricts the court's ability to apply the doctrine of concurrent causation to policies that exclude loss caused in part by earthquake. However, it is not clear how this statute will be applied to policy obligations that arose prior to the statute's enactment in 1984. If the insured relies on policy rights that arose prior to the enactment of the statute, the courts may choose not to apply the statute. Such a situation could arise in connection with policyholders who were not adequately informed of the reduction in coverage in policies issued subsequent to 1983. Those policyholders should be able to rely on the scope of coverage provided under their earlier policies.

Even if the California courts should choose to apply the statute to policy rights that accrued prior to the enactment of the statute, such application might violate Article I, section 10 of the Constitution of the United States which specifically prohibits a state legislature from impairing the obligation of contracts. U.S. CONST. art. I, § 10, cl. 1: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . ." See J. NOWAK, R. ROTUNDA, AND J. YOUNG, CONSTITUTIONAL LAW 411 n.1, 412 n.3, 461-71 (2d ed. 1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 615-28 (2d ed. 1988).

For example, in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the Supreme Court held that a Minnesota law violated the Contract Clause of the Constitution because it increased the monetary obligations of companies with pre-existing pension plans if the company either terminated the plan or closed their business facility in Minnesota. The court recognized the general principle that states can enact legislation which limits contractual rights provided the state uses reasonable and narrow means to protect a basic societal interest. *Id.* at 242. The majority found the Minnesota law clearly violated the contract clause because the law was a substantial impairment of contract rights. *Id.* at 245. The plaintiff company had reasonably relied on prior rights only to incur unexpected

The California Supreme Court's *Garvey* opinion substantially reduces the likelihood of recovery on any insurance claim involving concurrent causation by requiring the finder of fact to choose which cause was the single efficient proximate cause. However, when there are two possible causes, the insurer still has the burden of proving by a preponderance of the evidence that the *excluded* cause was the efficient proximate cause. In addition, the logic of the majority opinion in *Garvey* is so inherently flawed, it seems possible that the court might be persuaded to reconsider its position.<sup>52</sup>

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additional obligations as a result of the law, *id.* at 247, and the law did not remedy an important and general social problem because it focused on a narrow group of employers. *Id.* at 248.

The factors articulated in the *Allied* opinion support an insured plaintiff who relies on insurance policy rights that arose prior to the enactment of Section 10088, and that now provide reduced coverage as a result of the enactment of Section 10088. The basic societal interest that Section 10088 benefits is not readily apparent, and in fact the statute appears to benefit solely the insurance industry. The dissent in *Allied* argued that the contract clause can be read only to reach legislative acts that impair or abrogate existing contractual rights, and may not be used to reach laws which merely increase existing contractual obligations. *Id.* at 251. This argument also supports an insured who argues that Section 10088 impairs their existing contractual rights under a previous policy.

The *Allied* decision appears to be tied closely to its facts and is limited by the qualifying factors the court used in holding the law unconstitutional. However, the opinion represents an enlargement of the scope of the contract clause as it had been used by the court in recent years. J. NOWAK, R. ROTUNDA, AND J. YOUNG, *CONSTITUTIONAL LAW* 470 (2d ed. 1983).

52. A detailed criticism of the *Garvey* opinion is beyond the scope of this article. However, anyone familiar with basic principles of insurance should be able to show that the majority of the court was misled by biased insurance industry "scholarship" that will not withstand close scrutiny. The basic premise in *Garvey* is that first party coverage must be distinguished from third party coverage in cases involving concurrent causation. There is no sound reason for making this distinction and leading authorities in insurance law have rejected such reasoning. *See, e.g.,* R. KEETON & A. WIDISS, *INSURANCE LAW* § 5.5(d) (1988) (comparing tort and contract law on the issue of proximate cause). The vast majority of courts that have considered concurrent causation in recent years have refused to apply such a distinction. *See, e.g.,* cases cited *supra* notes 16-17.

When a loss is caused by two or more actual causes, asking the finder of fact to determine which of them was the "efficient proximate cause" is like asking the fact finder to decide whether the chicken came before the egg, or *visa versa*. Surely there will be many instances where a loss is caused by two causes where neither of them, acting alone, would have caused a loss. For example the pressure of underground water may cause a loss to a retaining wall that is improperly designed, where it would be no problem with regard to a properly designed wall. If the policy excludes loss caused by pressure of underground water, but does not exclude loss caused by defective design, it is difficult to understand why a jury should be forced to choose which was the efficient proximate cause when neither

## IV. PRINCIPLES OF RENEWAL OF INSURANCE POLICIES

It is a generally accepted principal of insurance law that when an insurance policy renewal is made, the terms of the original policy become a part of the renewal contract of insurance unless notice of any changes is provided and called to the attention of the insured.<sup>53</sup> The insured has a right to expect that the new protection will be essentially similar to that afforded by the former contract.<sup>54</sup> Upon renewal of a policy, the insurer is required to provide adequate notice of any change in terms, and if it does not, such change does not become part of the contract.<sup>55</sup> Merely instructing the insured to carefully read the new contract has been found insufficient to notify the insured of any changes in coverage,<sup>56</sup> and this should be particularly true when the scope of coverage has been substantially reduced under the new policy. In attempting to reach a synthesis of cases from California and New Jersey, the Supreme Court of Minnesota adopted the following rule:

[W]hen an insurer by renewal of a policy or by an endorsement to an existing policy substantially reduces the prior insurance coverage provided the insured, the insurer has an affirmative duty to notify the insured in writing of the change in coverage. Failure to do so shall render the purported reduction in coverage void. Any question of an individual's insurance coverage shall then be determined in accordance with the terms of the original policy prior to the renewal or endorsement.<sup>57</sup>

It is likely that many companies switched to the new policy forms and reduced the scope of coverage without adequately informing the insured that there had been such a reduction. In such cases the insured should be able to rely

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cause, acting alone, would have resulted in a loss.

53. JOHN APPELMAN AND JEAN APPELMAN, 13A INSURANCE LAW AND PRACTICE § 7648 (1976) [hereinafter APPELMAN].

54. 18 G. COUCH, COUCH ENCYCLOPEDIA ON INSURANCE LAW § 68:61 (2d ed. 1983) [hereinafter COUCH].

55. APPELMAN, *supra* note 53, at § 7648.

56. *Government Employees Ins. Co. v. United States*, 400 F.2d 172 (10th Cir. 1968) (dictum).

57. *Canadian Universal Ins. Co. v. Fire Watch*, 258 N.W.2d 570, 575 (Minn. 1977). *But cf.*, *Mundy v. Lumberman's Mut. Cas. Co.*, 783 F.2d 21 (1st Cir. 1986).

on the coverage provided by their original policy terms. For example, one leading company sent a notice with its new policy forms indicating that the policy had been "changed . . . to underscore" that there were certain types of loss which are not covered. The notice indicated that "under no circumstances does this policy form insure for loss involving . . . earthquake . . . or various other forms of earth movement."<sup>58</sup> Even if we were to assume that the insured had read and understood every word of the previous policy, the renewal notice does not give any indication that there has been a reduction in coverage. A policyholder who remembered the terms of the previous policy would have understood that under no circumstances did the policy cover loss caused solely by earth movement. Moreover, most insureds would naturally presume earth movement to include earthquake. Nevertheless, the old policy form would have covered losses caused by a combination of earth movement and defective design. The new policy form substantially reduced the coverage being provided to the insured.

Counsel for the insurance company was capable of describing this reduction in coverage in fairly simple language for the benefit of his fellow defense counsel.<sup>59</sup> However, the

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58. The full text of the notice sent to insureds read as follows:

This is your new State Farm Homeowners policy form. Please place your current endorsements with your new policy form. We encourage you to read it and especially direct your attention to the new provisions of SECTION 1 - LOSS INSURED and SECTION 1 - LOSS NOT INSURED. We have changed your policy form to underscore that there are certain types of loss which are not covered. Your State Farm Homeowners policy form is one of the broadest policy forms available. We want you to understand, however, that every policy form contains limitations and exclusions. For instance, under no circumstances does this policy form insure for loss involving nuclear incident (except direct loss by fire), flood, earthquake (except by specific endorsement), or various other forms of earth movement or water damage. Similarly, certain home maintenance is not covered. Please carefully read SECTION 1 - LOSS NOT INSURED to acquaint yourself with other types of loss which are not covered. We want you to be fully informed about your coverages as well as exclusions to and limitations of those coverages. If you have any questions about these coverages, exclusions, or limitations, we urge that you contact your State Farm agent. Some of the Homeowner policy deductible options have been eliminated. Please notice the deductibles applicable to your policy on the Extension Certificate.

State Farm Fire & Cas. Co. Homeowners Policy Special Form # FP-7173 (1/83)R.

59. In an article published two years after issuance of the new policy forms,

company was apparently unwilling to share this explanation with its policy holders; perhaps fearing that a clear explanation would put the company at a competitive disadvantage. The policy holder is told that the new policy "is one of the broadest policy forms available," but is not informed that it is not as broad as the old form. This means that the insured is deprived of an opportunity to shop for a policy similar to his previous one that would not exclude loss due to defective design or construction. When an insurance company sends its customers a new policy form without explaining that the new policy does not provide them with as much protection as the old policy form, the wrong done is similar to the butcher who puts his thumb on the scale to make the customer think he is getting more meat than he is paying for. The remedy provided by the courts is to allow the insured to have his coverage determined in accordance with the terms of the original policy.

Before conceding that an earth movement claim is not covered under a policy, the insured and counsel should check to see what kind of notice of reduction in coverage was provided when the current policy form was issued. If the notice of reduction in coverage was inadequate, the insured should be able to rely on coverage the old policy. If an agent or broker switched the insured's coverage to a new company without informing the insured that the coverage had been reduced, it is possible that the agent or broker might be responsible for a loss that would have been covered under the old policy form. However, there are no cases deciding this issue.

## V. CONCLUSION

The California Supreme Court has certainly made it more difficult for a plaintiff to make a concurrent causation claim against his insurer, but it has not yet made success impossible. Changes in policy language have also added to the difficulty. However, it seems likely that many policyholders will be able to rely on the language of their old

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Michael E. Bragg, assistant counsel of State Farm Insurance Companies explained the coverage reduction with two hypothetical cases worthy of a Restatement reporter. See Bragg, *supra* note 4, at 393.

policy if they have stayed with the same company since the language changes took place.

Litigation of any damage claim against an insurer is an arduous task. Proper preparation and consultation with attorneys who have had both experience and success in litigating claims involving structural damage should allow many plaintiffs to prevail even under the standards set by *Garvey*.