Concurrent Proximate Causes in Insurance Disputes: After Garvey, What Will Policyholders Expect?

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I. INTRODUCTION

Insurance serves an increasingly important function in society. The type and amount of insurance one obtains for protection of property and person will substantially affect one’s ability to compensate adequately for unexpected loss. When losses do occur, the policyholder expects to be compensated by the insurer when the type of loss incurred falls within the scope of the provisions of his or her policy.

Difficulties in settling cases arise where concurrent or joint proximate causes contribute to the insured’s damage, but where one of the causes of the damage is specifically “excluded” under the insured’s policy and another is “covered” under the insured’s policy. The insurer often refuses to compensate for any of the loss because one of the causes of the damage is specifically excluded. Conversely, the insured insists on coverage because one of the causes of the loss was covered under the policy.

The problem is further exacerbated when the insured holds an
“all-risk” policy, a policy written to cover all risks, although none are explicitly mentioned. A risk is covered as long as it is not specifically excluded by the policy. In other words, theoretically, any risk not specifically excluded will be covered by the insurer.

Consider this scenario: A family pays premiums on an “all-risk” insurance policy that specifically excludes coverage for damage done by floods. Heavy rains cause a flooding of the community and destroy the family’s home. Clearly, at this point, the family has no coverage because the cause of the damage is specifically excluded. However, suppose the community rests at the end of a massive tributary system. These waterways culminate at the edge of this community, where the water ultimately flows into the ocean through floodgates that allow the water to escape during low tides. Suppose, further, that the municipality responsible for maintaining the floodgates has disregarded its duty of maintenance. On a particular occasion, the floodgates were not opened to release the water flowing toward the community. If the municipality’s negligence was factually proven by a separate action against that municipality, the injured family could request coverage on the grounds that third-party negligence was included in their policy because it was not specifically excluded. The question to be resolved is whether the insured should be covered.

The California Legislature has not addressed this problem, so

5. For the purposes of insurance law, a “risk” is defined as:
the danger or hazard of a loss of the property insured; the casualty contemplated in a contract of insurance; the degree of hazard; a specified contingency or peril; and, colloquially, the specific house, factory, ship, etc., covered by the policy.
Hazard, danger, peril, exposure to loss, injury, disadvantage or destruction, comprise all elements of danger.
7. Id. Some policyholders have had increasing difficulty dealing with insurance companies, who are often perceived as wealthy corporations that simply raise their premiums to make more money. Indeed, the public perceives insurance premiums as unreasonably excessive, evidenced by the numerous insurance initiatives designed to reduce insurance premiums for good driving, to eliminate the antitrust exemption previously possessed by the insurance industry, and to increase funding to monitor the insurance industry’s claims practices. These perceptions culminated in the passage of Proposition 103, which eliminated the antitrust exemption and could eventually reduce premiums for all policyholders.

Whether Proposition 103 is conducive to the well-being of the insurance industry remains to be seen. Many insurance companies have stated that they will not survive if the new Proposition applies to them. Furthermore, several of the larger insurers, such as State Farm, have stated that they will not underwrite new auto policies in California because of the excessive cost created by Proposition 103. San Francisco Chronicle, Nov. 10, 1988, at 1, col. 1, and 24, col. 5.
insurance companies and policyholders have relied on case law to resolve disputes.\(^8\)

In 1986, the California Court of Appeals for the First District attempted to answer this question in *Garvey v. State Farm Fire & Casualty Co.*\(^9\) The test handed down in that case is a unique and perhaps troubling one for future insurance cases, and its impact may be far-reaching. The *Garvey* court assembled a collection of insurance law doctrines and shaped them into a test to be used in determining whether a policy covers loss in this multiple cause situation.\(^10\) The *Garvey* court ruled that when a covered risk and an excluded risk are both proven to be causes in fact of an injury, and the two risks are independent of one another, the loss is covered only if the covered risk was a concurring proximate cause of the loss.\(^11\) However, if the two risks depended upon one another in causing the damage, then the insured would only be covered fully if the jury decided that the covered risk was the moving or primary cause of the dam-

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8. The California Insurance Code contains no such provisions at this time. Present code sections provide for either excluded risks or covered risks. No specific code section provides for situations in which concurrent or joint causes of damage are present. For example, California Insurance Code § 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). In like manner, California Insurance Code § 532 provides:

   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.

   Id. § 532.

9. 181 Cal. App. 3d 929, 227 Cal. Rptr. 209, rev. granted, reprinted for tracking pending review, 190 Cal. App. 3d 1248, reprinted for tracking pending review, 201 Cal. App. 3d 1174 (1986). After over two years of pending review, the California Supreme Court has finally ruled on the court of appeals decision in *Garvey.* *Garvey,* 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989). The supreme court affirmed the court of appeals decision, but made some modifications to the newly-formed *Garvey* test. It held that *Partridge* should only be used in liability cases, in which true concurrent causes, each originating from an independent act of negligence, simultaneously join together to produce injury, thus, taking away the first prong of the court of appeals test. *Id.* at 412, 770 P.2d at 714, 257 Cal. Rptr. at 302.

   Justice Mosk’s dissent argued that although the policy under consideration in *Partridge* happened to provide liability insurance, the court’s discussion did not suggest that the analysis is or should be limited to such policies because the court cited both first and third party decisions and that no reported decision has ever been found to limit *Partridge’s* application. He also argued that there could not be different analysis of concurrent causation because some policies are first party and some are third party. *Id.* at 416, 770 P.2d at 717, 257 Cal. Rptr. at 305.

10. *Id.*

11. *Id.* at 935-37, 227 Cal. Rptr. at 215-18.
Garvey marks a new trend in insurance contract causation analysis. Therefore, the case should be examined for its social impact and rationale.

This comment will discuss the history of concurrent proximate causes in the realm of insurance law and the tests traditionally used in determining coverage. Also, this comment will discuss whether deference should be given to the insured by virtue of the contractual nature of the insurance policy and whether a tort proximate cause analysis should be used in an insurance contract analysis. Further, this comment will analyze the Garvey case specifically and determine its validity and impact on insurance law. Finally, the recommended proposal will address how a court might make a determination as to whether full, zero, or partial coverage should be given to the insured in these situations.

II. BACKGROUND

The realm of insurance law is difficult and complex. This complexity is due, in part, to the nature and structure of insurance policies and the substance of legal actions brought when a dispute arises between an insurer and an insured.

A. Adhesion Contracts

Insurance contracts are not ordinary contracts. They are considered adhesion contracts. An adhesion contract is normally a printed form contract used for numerous insureds who are unable to alter its terms and whose bargaining position is inferior to that of the drafter.

12. *Id.* at 939-40, 227 Cal. Rptr. at 219-20.

13. A "contract" is defined as "an agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essential elements include competent parties, subject matter, a legal consideration, mutuality of agreement and mutuality of obligation."BLACK'S, supra note 1, at 291-92. For a further discussion of the definition of a contract, see also 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1 (3d ed. 1957) ("A contract is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."); RESTATEMENT (SECOND) OF CONTRACTS § 3 (Tent. Draft 1980) ("An agreement is a manifestation of mutual assent on the part of two or more persons."); 1 A. CORBIN, CORBIN ON CONTRACTS § 3 (1963) ("a contract is a promise enforceable at law directly or indirectly").


15. See supra note 14 and accompanying text. Note that although some insurance companies demand that one "adhere" to their set provisions, other companies allow negotiation concerning policy terms. However, the potential insured has no knowledge that such negotia-
tween two parties with equal bargaining power that results in an agreement with beneficial provisions for both parties. In essence, the important element in an ordinary contract is the ability to bargain freely and to choose the provisions to be included and those to be excluded. Of course, some desired benefits will not be realized through the contract by either party, since the bargaining process implies an adequate amount of compromise. Ultimately, both parties have the option to refuse to enter into the contract if the provisions are not well suited to their needs.

However, in areas such as insurance law, where numerous contracts must be signed and implemented, the general practice has been to develop "standard form" contracts. This effort by insurance companies to standardize insurance contracts follows three lines of rationale.

First, in order to meet the demand for insurance coverage, insurance companies have had to standardize their policies. Consequently, the bargaining process between a particular insurer and a potential insured remains minimal or nonexistent. Otherwise, potential insureds would bargain for every desired protection, while the insurer would seek to exclude as much as possible. Individual bargaining would be costly and time consuming for both parties.

Second, by standardizing policies, coverage becomes more predictable to both parties. To the insurer, predictable coverage means that risk situations will be easily distinguishable in determining coverage. Since the insurer drafted the policy and standardized the policy provisions, he will be better able to measure and allocate risk. For the insured, predictable coverage allows a determination of precisely those situations protected under each policy so that the insured can purchase additional insurance to fill any gaps in the present coverage. Standardized policies, in effect, enable the insured to decide which insurance policies to purchase, without spending needless time.

Thus, it can be argued that this is also a form of "adhesion."

16. See supra note 14 and accompanying text.
17. See supra note 14 and accompanying text.
18. Restatement (Second) of Contracts § 211 (Tent. Draft 1980). Indeed, "Standard-Form" contracts result in less cost to both insurer and insured, assuming that no disputes arise from those contracts.
20. This author notes that it is an insurer's refusal to negotiate terms that could constitute "adhesion" because both parties want the process to be as expedient as possible.
21. This author feels that the "adhesive" nature of the contract has less of an impact if one feels there is an optimum policy in the vast realm of insurance policies from which to choose.
negotiating each provision.\textsuperscript{22}

Third, although standardized insurance contracts can benefit both parties, the insurer gains considerable advantages over the insured. The mere fact that the insurer drafts the policy, without negotiation, gives the insurer the power to control the types of provisions available and to offer the policy on a “take it or leave it” basis. Many insureds, who lack the time to negotiate, will be forced to choose the “best” policy available.\textsuperscript{23}

Consequently, insureds are left with some provisions in their policy that are undesirable or even detrimental to their interests, but they must “adhere” to these terms because this policy is the “best” they can find. Ordinarily, parties who voluntarily sign agreements without full knowledge of their terms are considered to have assumed the risk that they have entered into a one-sided bargain. However, the insured with little or no bargaining power is not held to the same rules as one who is bound by a non-adhesionary contract.\textsuperscript{24} This is the nature of an adhesion contract.

True assent does not exist in adhesion contracts unless there is a genuine opportunity to accept or reject any particular clause.\textsuperscript{25} This, in reality, never occurs. To assert that an insured is bound by provisions not agreed to gives a powerful advantage to an insurance company that includes certain undesirable provisions without losing the general appeal of the policy. Moreover, to treat insureds as alert, informed parties, mindful of their self-interest and able to defend it, is to ignore the reality of insurance transactions.\textsuperscript{26} Indeed, exclusions in insurance contracts, which insurers apply unilaterally and which insureds are often unaware of, give the clearest example of the dangers inherent in adhesion contracts,\textsuperscript{27} and courts increasingly require the party seeking to enforce the adhesion contract to carry the burden of showing that its provisions were explained to the other and

\textsuperscript{22} Ultimately, it could be less costly overall to negotiate one large policy, so an insured would not require separate policies for home, auto, fire, theft, and the like.

\textsuperscript{23} Bolgar, \textit{supra} note 19, at 55.

\textsuperscript{24} This author strongly suggests that the word “voluntary” is crucial, for if the contract is not signed voluntarily, it is not binding. There is a fine line here, however, for rarely will a contract be signed in which both parties actually have equal bargaining power and the terms are fair as to each party. One party always has at least a slight advantage.

\textsuperscript{25} J. CALAMARI & J. PERILLO, \textit{supra} note 14, at 346.

\textsuperscript{26} J. CALAMARI & J. PERILLO, \textit{supra} note 14, at 346. Insureds want to find the “best” policy, but are often fearful that insurance companies will refuse to pay, forcing the insured into a costly legal battle with a major corporation.

that there was a real and voluntary meeting of the minds.\(^{28}\)

The Restatement (Second) of Contracts, now recognized and accepted in most definitions of adhesion contracts, urges that an adhesion contract is unconscionable if a reasonable person would not have expected to find such a clause in the contract.\(^{29}\) Such a clause is considered to be oppressive, unfair, or indecent. This determination is made by the courts, who must consider the essential fairness of the printed terms, both from the viewpoint of surprise to the insured and an inherent, one-sidedness for the insurer. Thus, because of unequal bargaining power in adhesion contracts, insurance law has given deference to the insured, requiring that any and all ambiguities be construed in favor of the reasonable expectations of the insured.\(^{30}\)

B. "All-Risk" Policies

An "all-risk" policy is essentially a term of art.\(^{31}\) Its usage does not imply that every potential risk will be covered, regardless of the circumstances.\(^{32}\) This type of policy usually states that it will cover all risks, with exceptions clearly specified; that is, no risks included within coverage are specified, only those risks that are excluded.\(^{33}\) Presumably, this type of policy is designed by insurers to give insureds blanket coverage, so that insureds can attempt to avoid gaps in coverage otherwise present in separately purchased, individual policies.\(^{34}\) The policy is also a reflection of the insurer's ability to draft a policy that boldly clarifies the risks to be excluded.\(^{35}\) This is

\(^{28}\) J. Calamari & J. Perillo, supra note 14, at 336-40. See also, Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971). But see Lawrence v. Western Mutual Ins. Co., 204 Cal. App. 3d 565, 251 Cal. Rptr. 319 (1988) holding that an insurer is under no obligation to explain to the insured all possible legal theories of recovery under an insurance policy although the terms of a policy must fairly and accurately explain the covered risks.

In Lawrence, the insured was unaware that third party negligence was covered under his policy, although earth movement damage was excluded. These facts are substantially similar to those of Garvey.

\(^{29}\) J. Calamari & J. Perillo, supra note 14, at 344-45.

\(^{30}\) See infra notes 42-54 and accompanying text.

\(^{31}\) W. Keeton, supra note 6, at 269-70.

\(^{32}\) W. Keeton, supra note 6, at 270-71. The term "all-risk" encompasses miscellaneous risks in addition to the traditionally insured risks such as fire, explosion, theft, and glass breakage.

\(^{33}\) W. Keeton, supra note 6, at 270-71.

\(^{34}\) W. Keeton, supra note 6, at 270. This type of policy can be deceptive since the definition of a "risk" is vague. Likewise, when an insurer claims to cover "all" risks, which risks does the company really intend to cover, and will this notion of risks be identical, or even substantially similar, to the insured's notion of risks? (Of course, this assumes that the insured wants the notion to be identical.).

\(^{35}\) W. Keeton, supra note 6, at 270.
contrary to other policies that specify risks covered.

When a dispute arises involving a policy in which the covered risks are specified, courts tend to give the insured the benefit of the doubt. Therefore, by specifically denying certain risks, an insurer can give a clearer message to the insured and the courts of those risks intended to be covered and excluded.

An "all-risk" policy also implies that coverage will be relatively more broad than most individual policies since insurers writing the latter policy have a more difficult time arguing an implied exception to coverage. Indeed, in order to establish coverage under an "all-risk" policy, the insured does not carry the burden of proving that the peril proximately causing his loss was covered by the policy. The insurer, since it is denying liability under the policy, must prove that the insured's loss was proximately caused by a peril specifically excluded from policy coverage. When filing a valid claim, the in-

36. See also Continental Casualty Co. v. City of Richmond, 763 F.2d 1076 (9th Cir. 1985) (insurer cannot avoid primary duty to provide coverage by incorporating ambiguous exclusionary clause into insurance contract); Fireman's Fund Ins. Co. v. Hanley, 252 F.2d 780 (6th Cir. 1958) (ambiguous provision should be read against insurer who writes policy); Cal-Farm Ins. Co. v. TAC Exterminators, Inc., 172 Cal. App. 3d 564, 218 Cal. Rptr. 407 (1985) (courts must both evaluate provisions of policy and construe them to give the insured their reasonably expected right of protection); Atlas Assurance Co. v. McCombs Corp., 146 Cal. App. 3d 135, 194 Cal. Rptr. 66 (1985) (doubts as to meaning of insurance policy must be resolved against insurer and any exception to the performance of the basic obligation must clearly be stated so as to apprise the insured of its effect).

37. W. KEETON, supra note 6, at 270. Justice Broussard, dissenting in the supreme court's decision in Garvey argued:

This principle, which has long been applied to policies that specify the risk . . . should be generally applied to all-risk policies where the risks insured are not specified individually but only as the risks not excluded. To adopt a rule less favorable to the insured would render the "all-risk" policy misleading . . . It is all the more reasonable for the insured to conclude that the purpose of the exclusion is to exclude losses caused solely by one or more of the excluded causes rather than a purpose to exclude cases of multiple causation when an insured cause occurs.

38. W. KEETON, supra note 6, at 270. In other words, implied exceptions are manifested only in ambiguous language set forth in the exceptions that would specifically exclude coverage. For an insurer to imply an exception, the insurer faces a heavy burden of proof, since the nature of the policy is to set forth the basis for exclusion in clear terms from the beginning.

39. W. KEETON, supra note 6, at 272-73.

40. W. KEETON, supra note 6, at 272 n.15. See British & Foreign Marine Ins. Co. v. Gaunt, 2 A.C. 41, 47 (1921), in which Lord Birkenhead remarked:

[Where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression, and he is
sured need not prove that his loss was caused by an included risk, nor the exact nature of his loss, since all risks are covered, absent any exclusions.\footnote{41}

However, in some instances, comprehensive policies do contain gaps in coverage, which ultimately cause disputes between insureds and insurers. This often occurs when a covered risk and an excluded risk overlap to contribute to one particular loss.

C. Deference to the Insured

Traditionally, insurance law has maintained an important underlying concept: absent fraud on the insured's part, deference is always given to the insured when disputes arise out of coverage questions.\footnote{42} This assertion has continually been made in insurance cases regardless of the facts, issues, or conclusions.\footnote{43} This deference is applied by the courts in two ways. First, in the interpretation of insurance contracts, exclusions are always narrowly construed and uncertainties are resolved in favor of the insured.\footnote{44} Second, all specifically provided protections are construed liberally, so as to afford the broadest possible coverage.\footnote{45}

The leading case in this area is \textit{State Farm Mutual Automobile Insurance Co. v. Partridge}.\footnote{46} This case involved a homeowner's "all-risk" policy containing an exclusion of liability for injuries arising out of the use of a motor vehicle.\footnote{47} While driving in the insured's

\begin{itemize}
\item \textit{Id. See also} Southern Ins. Co. v. Domino of Cal., Inc., 173 Cal. App. 3d 619, 219 Cal. Rptr. 112 (1985).
\item \textit{Gaunt, 2 A.C. at 47.}
\item \textit{See supra} note 42 and accompanying text.
\item \textit{See infra} notes 46-51 and accompanying text.
\item \textit{See infra} notes 46-51 and accompanying text.
\item 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973).
\item \textit{Id. at} 96-97, 514 P.2d at 123-24, 109 Cal. Rptr. at 813.
\end{itemize}
car, a passenger was injured by the insured’s gun, which was negligently modified to give it a “hair-trigger action.”

The trial court ruled that the insured was negligent in both modifying the gun and maintaining control of his vehicle. As he drove off the paved road, the insured’s gun accidentally discharged, injuring the passenger. The court determined the accident to be covered by the policy. The Supreme court affirmed, holding that coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured, while exclusionary clauses are interpreted narrowly against the insurer. Here, the insured’s use of the car was a joint cause of the accident, and the other cause, the insured’s modification of the gun, was a risk covered by the homeowner’s policy, thus affording full coverage for the damage.

Countless other cases have reflected the same notion of deference to the insured in every area of insurance law. Moreover, since the burden of proof is on the insurer to prove that the damage is caused by an excluded risk, the insured is relieved of proving the exact cause and merely has to prove the loss.

D. Proximate Cause and Cause in Fact

Causation is an essential element in any action because it proves that there is some reasonable connection between the defendant’s ac-

48. Id. at 97, 514 P.2d at 124, 109 Cal. Rptr. at 813. A “hair-trigger” action means that the gun is modified so that it will fire when minimal pressure is applied to the trigger.

49. Id.

50. Id. at 101-02. Justice Kaufman’s separate concurring opinion in the supreme court’s decision of Garvey felt that Partridge should be expressly overruled. Justice Kaufman felt Partridge was flawed in two ways. First, it incorporated concepts of tort law inapplicable to the contractual question of the coverage, and based on them, adopted the tort rule of concurrent causation to determine coverage. Therefore, the majority’s distinction between property and liability cases was irrelevant, for only contract principles should be applied. Second, it mischaracterized the causes of the injury as “independent” and therefore misapplied the rule it was attempting to announce. Garvey v. State Farm Fire & Casualty Co., 48 Cal. 3d 395, 414, 770 P.2d 704, 714, 257 Cal. Rptr. 292, 304 (1989).


52. See supra note 36.

53. See generally Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971); Sincoff v. Liberty Mut. Fire Ins. Co., 11 N.Y.2d 386, 183 N.E.2d 899 (1962). See also 12 G. COUCH, COUCH ON INSURANCE § 44A:3 (2d ed. 1981) (“The burden is upon the insurer to establish the applicability of an exception, and it is necessarily inoperative when the factual situation to which it applies does not exist.” (citations omitted)); Id. § 44A:10 (“The burden of proof is upon the insurer to plead and prove that the loss sustained was within the policy exception.” (citations omitted)).

54. W. KEETON, supra note 6 and accompanying text.
As a result, a major issue in insurance contract analysis is the question of causation.

Historically, causation has been one of the most heavily disputed and controversial areas of the law. Many opinions have attempted to explain causation, yet none have truly clarified the subject or even reached general agreement on its principles. In tort law, there are two types of causes: cause in fact and proximate cause. Each type of causation must be satisfied in order for liability to exist.

Causes in fact have traditionally been proven by two tests: the "but-for" test and the "substantial-factor" test.

Once cause in fact is proven, proximate cause must be shown. Proximate cause addresses the question of whether the defendant should be held legally responsible for the damages. It must be proven in addition to cause in fact. This question is primarily one of law. Legal policy determines whether the conduct has been such a significant and important cause that the defendant should be liable. Thus, the defendant cannot be held liable on the mere basis that the defendant's conduct was a cause in fact of the event.

56. Id. § 41, at 264. See also Vinson, Proximate Cause Fog Spreads, 69 A.B.A.J. 1042 (1983).
57. PROSSER & KEETON, supra note 55, § 41, at 264.
58. PROSSER & KEETON, supra note 55, § 41, at 265-68. The "but-for" test asks whether the event would not have occurred but for the defendant's conduct, or, that the defendant's conduct is not a cause of the event, if the event would have occurred without it.

The "substantial-factor" test is used more frequently when two causes concur to bring about an event and either one of them, operating alone, would have been sufficient to cause the identical result. This test concludes that the defendant's conduct was a cause of the event if it was a material element and a substantial factor in bringing about the event. The "substantial-factor" test reflects the law of joint tortfeasors, which recognizes the possibility that each of two or more causes may be charged with a single result, and that both causes will be held liable.

61. PROSSER & KEETON, supra note 55, § 41. In most cases, the "cause-in-fact" is the proximate cause. In cases of multiple causes, the question is more tenuous because there may be several "causes-in-fact" but only one proximate cause that will determine the liability for the plaintiff's damages.
Many theories of proximate cause have been advocated. One holds that the scope of liability should not extend beyond reasonable risks. Another theory would limit the scope of liability to, but not beyond, all "direct" consequences and only those indirect consequences that are foreseeable. Most theories, however, limit their scope of liability to the defendant's duty to the plaintiff. This limitation directs attention to the original obligation of the defendant, his conduct, and the consequences related to his conduct, rather than to the philosophical or mechanical sequence of events that underlie the cause in fact determination. Thus, proximate cause analysis could involve an examination of unforeseeable consequences, unforeseeable plaintiffs, and foreseeable risks, in an effort to limit liability to those acts for which the defendant should be considered legally liable.

The key distinction implied is that cause in fact is a factual question to be decided by the jury and proximate cause is essentially a legal question to be decided by the court. Unfortunately, this distinction is unclear as both causes must be analyzed by the "facts" of the case. A distinction must be drawn between legal and factual questions in order to prevent questions of law from being decided by the jury and factual questions from being decided by the court when it is not sitting in a fact finding capacity.

E. Proximate Cause in Insurance Contracts

The use of proximate cause analysis can greatly complicate an insurance contract action, an action brought in tort for the bad

63. Prosser & Keeton, supra note 55, § 42, at 274-75.
64. Prosser & Keeton, supra note 55, § 42, at 274-75.
65. Prosser & Keeton, supra note 55, § 43, at 280.
66. Prosser & Keeton, supra note 55, at 284.
68. Prosser & Keeton, supra note 55, § 42, at 273.
69. Prosser & Keeton, supra note 55, § 45, at 319.
70. See supra notes 55-62 and accompanying text. However, in a recent development, the California Supreme Court ruled that California Insurance Code § 790.03(h) (prohibiting unfair or deceptive claims settlement practices) does not create a private cause of action against insurers who commit the unfair practices enumerated in that provision. Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988). The Unfair Practices Act prohibits insurers from engaging in unfair claim settlement practices, including a refusal to attempt a prompt, fair, and equitable settlement of a claim, or a failure to affirm or deny coverage.

The Shalal decision specifically overruled the case of Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979), which held that a private
faith of the insurer, and in contract for the specific compensatory coverage promised by the insurer. This fact was recognized by Justice Cardozo, who remarked in one case that there is a tendency [in tort law] to go farther back in the search for causes than there is in the law of contracts. Especially in the law of insurance. In fact, insurance law has traditionally concerned itself only with the immediate, not the more distant causes, and often only the efficient or predominant, not other more remote causes.

In California, the Insurance Code has followed similar guidelines, providing that an insurer is liable for damages proximately caused by a peril that is insured, even though an additional peril, not contemplated by the contract, may have been a remote cause of the loss. However, the insurer is “not liable for a loss . . . [where the] . . . peril insured against was only a remote cause.” An accompanying statute provides that “[i]f 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.” Unfortunately, the California Insurance Code does not resolve the situation in which two proximate causes are responsible for the damage; where one cause is covered under an insurance contract and the other is specifically excluded.

F. A History of Concurrent Proximate Cause Cases

Traditionally, in California, insurance laws have attempted to give deference to the insured when two proximate causes are deter-
mined to have caused the insured’s loss. Early cases illustrated this point.

One case, Zimmerman v. Continental Life Insurance,77 involved a policy insuring against death or disability resulting from a collision with any vehicle propelled by electricity while in or on a public highway. The insurer denied coverage because the insured failed to ride his motorcycle at a proper speed, a peril excepted under the policy. The court held that “when two causes join in causing an injury, one of which is insured against [under an accident policy], the insured is covered by the policy.”78

Forty years later, in Sabella v. Wisler,79 the California Supreme Court reiterated this position, holding that an insurer that had insured a house “against all risks of physical loss except as hereinafter excluded”80 was liable where the negligence of a third party, not the acknowledged settling, was the efficient proximate cause of the loss, even though the policy excluded “loss . . . by . . . settling.”81

In interpreting the two relevant Insurance Code provisions, the Sabella court determined that it was incorrect to allow the defendant insurer to assert that where an excepted peril operated to any extent in the chain of causation and where the resulting harm would not have occurred “but-for” the excepted peril’s operation, the insurer would be exempt even though an insured peril was also a proximate cause of the loss. This erroneous conclusion, the court stated, contradicted the general rule of liability of the insurer where the loss proximately resulted from the insured peril.82 This test was subsequently modified and used by the Garvey court.

In a related case also involving earth movement, Hughes v. Potomac Insurance Co.,83 the court held that, in an action for coverage of a loss sustained when a landslide caused the insured’s house to slip into a creek, the exclusionary provision denying coverage for floods or high waters was not applicable. Here, evidence could not prove that the erosion of the insured’s soil by the higher level of the

78. Id. at 726, 279 P. at 465.
80. Id. at 26, 377 P.2d at 891, 27 Cal. Rptr. at 691.
81. Id. at 31-32, 377 P.2d at 895, 27 Cal. Rptr. at 695.
creek was the principle cause of the slide. The court's conclusion was based on the fact that the higher level of the creek, which eroded the land around the house and the house's foundation, might have been a contributing factor in the damage, but could not be proven to be anything more than a remote cause of the landslide. Heavy rains were shown to be the principal cause of the damage, a cause not excluded by the insurer. Thus, the court, in its analysis of the relevant Insurance Code provisions, determined that coverage was established since one of the causes of the damage was covered, regardless of the remote presence of an excluded cause.

A different analysis was used in Sauer v. General Insurance Co. This case involved leaking water pipes underneath the insured's residence, which caused the foundation of the house to settle, thus damaging the house. The policy provided coverage for the discharge of water, but excluded coverage for damage caused by earth movement. The court held that "in determining whether a loss falls 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. . . ." This rule would apply even though the other causes would follow it and operate more immediately in producing the damage. In other words, the court must determine which cause started the other causes in motion, and that cause will determine liability. In that determination, California courts have found coverage where an included peril sets in motion a "chain of events" that includes an excluded peril and ultimately results in the loss.

In more recent cases, courts have varied in their responses to concurrent proximate causes. In Safeco Insurance Co. of America v.
Guyton, a federal circuit court of appeals, applied its interpretation of California law to a policy that excluded the flood losses of an insured under an “all-risk” policy, but that covered losses attributable to the negligence of a third-party. The court concluded that coverage under a liability policy is equally available to an insured whenever an insured risk simply constitutes a concurrent proximate cause of the injuries. However, a year later, in Premier Insurance Co. v. Welch, the California Court of Appeals reiterated its traditional approach of determining which cause, an excluded or covered cause, was the “efficient” cause of the damage. In this case, a landslide and a negligently maintained subdrain were the respective concurrent causes of the damage. The court held that the negligently maintained drain was the primary cause of the damage, and that the causal sequence began with the installation of a sewer line that damaged the subdrain by impeding its capacity to release subsurface waters. Furthermore, since no problems occurred until six years after the installation of the sewer line, the court reasoned that the heavy rains were merely a significant contributing factor, and the subsequent landslide resulted only because the subdrain could not accommodate the unusually large amount of rain water. The Premier court, in holding for the insured using the “efficient” cause test, conceded that the Partridge and Safeco cases applied a more deferential test for the insured’s benefit. The court refused to apply the more deferential test, though they noted that under Partridge and Safeco, a similar result would probably be reached.

G. The Independence of Concurrent Causes

In drafting an insurance contract, the insurer has free reign to stipulate whatever provisions or exclusions it chooses. Consequently, insurance disputes often arise from the interpretations of those provisions. In many instances, “all-risk” insurance contracts are drafted in such a way that the specific exclusions become overwhelmingly broad in their scope. Hence, one area of insurance contract interpre-

92. 692 F.2d 551 (9th Cir. 1982). Guyton involved a federal case applying California law.
95. Id. at 725, 189 Cal. Rptr. at 660.
96. Id. at 728, 189 Cal. Rptr. at 662.
tation has conveyed a different message to insureds. In some situations involving concurrent proximate causes, the exclusions preclude recovery for the insured merely by virtue of its wording.

These situations occur when an insured has an "all-risk" homeowner's policy that excludes from coverage, for example, damage resulting from the ownership or use of an automobile while away from the homeowners' premises.

*Herzog v. National American Insurance Co.* is a good example of such a situation. *Herzog* involved a man who was killed in an automobile accident due to the negligence of the other driver. His heirs brought an action against the insurer under the decedent's "all-risk" policy. The court ruled that the coverage asked for was not within the reasonable expectation of the insured, that neither the insurer nor the insured contemplated coverage for an automobile accident occurring away from the immediate vicinity of the insured's residence, and neither contemplated coverage for the negligence of a third party.

In the *Herzog* court's analysis, the two causes of the loss were so independent of one another that an examination of each cause easily could have revealed that either cause acting alone could have caused the damage. On this basis, the *Herzog* court ruled that the automobile accident was so independent of the homeowner's policy protection that coverage was justifiably denied.

Similarly, in *National Indemnity Co. v. Farmers Home Mutual Insurance Co.*, the court refused to grant coverage under a homeowner's "all-risk" policy that specifically excluded "bodily injury . . . arising out of the ownership, maintenance, operation, use, loading or unloading of any motor vehicle owned or operated by . . .

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98. A "tort feasor" is defined as "[a] wrong-doer; one who commits or is guilty of a tort." *Black's* supra note 1, at 1335.
100. *Id.* See also *Allstate Ins. Co. v. Jones*, 139 Cal. App. 3d 271, 188 Cal. Rptr. 557 (1983). The insured, a construction worker, owned a truck which transported steel reinforcing rods. The pickup truck collided with another truck, killing the other driver, due to the insured's negligent failure in properly fastening the steel rods. The court ruled that there was no independent, non-auto related act of negligence that could bring the accident within the general provisions of the insured's general liability policy. The insured argued that his failure to load, secure, fasten, supervise, and inspect the steel rods to prevent them from falling out was a negligent act by the insured and should be covered. However, the court ruled that it would not have been negligent unless the truck was being used in its capacity as a truck. Since injuries did occur, the truck must have been in operation. Moreover, the court emphasized that the reasonable expectations of both parties could not have reasonably contemplated when they entered initially into the insurance contract that overlapping coverage would be available. *Id.*
the insured . . . }102 The facts indicated that a minor passenger was injured as a result of the insured’s negligent failure to supervise and control the child while passengers of his car were unloading at a place far removed from the insured’s premises.103 The court held that unless the breach of duty on the part of the insured was independent of and unrelated to the use of the vehicle, the exclusion will take effect, thus barring coverage. In other words, to afford coverage, negligence on the insured’s part must have existed independently of the “ownership, use, or maintenance” of the vehicle.104

This rationale has had similar application in cases such as State Farm Fire & Casualty Co. v. Keenan,105 which involved a contract for aircraft insurance, specifically excluding coverage during the use or operation of an aircraft “in flight by or for the account of the Insured.” The court held that this clause did not cover the insured’s potential liability for negligent training of a pilot to whom the insured had rented an aircraft. The aircraft crashed during takeoff while under the operation of the renting pilot.106 The court’s inquiry focused on the independence of the negligent pilot’s conduct from the specific exclusion, and concluded that the pilot’s preflight planning, representations of experience, and his alcohol consumption before takeoff were not so independent of the exclusion to warrant coverage.107

Another example of the independence requirement occurred in

102. Id. at 106, 157 Cal. Rptr. at 100.
103. This occurred at a location far from the home, which allegedly was covered under a homeowner’s policy. The accident’s distance from the house merely exemplifies the independence of the causes.

The 1968 amendment to section 11580.1 of the Insurance Code . . . manifests legislative agreement with the conclusion here stated: “(g) Nothing in this section nor in Section 16057 or 16450 of the Vehicle Code shall be construed to constitute a homeowner’s policy as an ‘automobile liability policy’ within the meaning of Section 16057 of said code nor as a ‘motor vehicle liability policy’ within the meaning of Section 16450 of said code, notwithstanding that such homeowner’s policy may provide automobile or motor vehicle liability coverage on insured premises or the ways immediately adjoining . . . .”

Id.

106. Id. at 22-25, 216 Cal. Rptr. at 330-32.

107. “If the events giving rise to the insured’s liability are solely and indivisibly related to the use of an excluded instrumentality, coverage is precluded.” Id. at 22, 216 Cal. Rptr. at 330 (emphasis in original). This would imply that, in other instances where events were not solely and indivisibly related to the use of an excluded instrumentality, this court’s rationale would allow coverage.
Safeco Insurance Co. v. Gilstrap,\textsuperscript{108} which involved a comprehensive homeowner’s policy excluding coverage for injuries arising out of the use of a motor vehicle. The insured requested indemnification for the negligent use of his motorcycle by their minor son, causing injuries to the passenger of the motorcycle. Negligent entrustment of the motorcycle fell under the insured’s general policy, but the court held that the parent’s negligent entrustment was not independent or disassociated from the use of the motorcycle itself. Accordingly, coverage was denied.\textsuperscript{109}

Other jurisdictions have taken a similar position regarding the independence requirement. For example, in Sekel v. Aetna Life Insurance Co.,\textsuperscript{110} the United States Court of Appeals for the Fifth Circuit decided a case in which an insured died as a result of a severe blow to the head, sustained when he fell to the floor in his own home. However, the autopsy report stated that the insured’s fall was “probably” due to the insured’s heart condition. The court held that the insured’s beneficiaries could not collect under the insured’s accidental death policy.\textsuperscript{111}

First, the Sekel court determined that the insured’s heart condition could properly be classified under the policy’s exclusion for “death caused or contributed by, or was a consequence of, a bodily infirmity or disease.”\textsuperscript{112} Second, the court reasoned that, even though the proximate cause of the death was accidental bodily injury, an included cause, coverage could properly be precluded if the bodily injury was caused or contributed to by an excluded cause, namely, the heart condition which the court chose to label a bodily infirmity or disease.\textsuperscript{113}

On very similar facts, some cases have held that a covered cause was in fact wholly independent of the excluded cause, thus affording indemnification for the insured. For instance, in Gonzalez v. St. Paul Mercury Insurance Co.,\textsuperscript{114} an “all-risk” homeowners policy protected the insureds against liability arising from accidents that re-

\begin{itemize}
  \item \textsuperscript{108} 141 Cal. App. 3d 524, 190 Cal. Rptr. 425 (1983).
  \item \textsuperscript{110} 704 F.2d 1335 (5th Cir. 1983).
  \item \textsuperscript{111} Id. at 1336-37, 1343-44.
  \item \textsuperscript{112} Id. at 1336-37.
  \item \textsuperscript{113} Id. at 1338-41.
  \item \textsuperscript{114} 60 Cal. App. 3d 675, 131 Cal. Rptr. 626 (1976).
\end{itemize}
sulted in injury or death, but specifically excluded damage arising out of "the ownership, maintenance, operation, use, loading or unloading of automobiles while away from the premises." The insured wished to recover on his homeowner's policy for his negligent repair of his vehicle's brakes, which caused his vehicle to hit a pedestrian five weeks later. The insurer refused coverage.

The court, in holding for the insured, stated that, although the accident occurred away from the premises in the operation of his vehicle, the proximate result of the death was the insured's negligent conduct in the repair of his vehicle's brakes. Since this repair work was actually done by the insured on his premises, the court awarded coverage. Here, the independence of the insured's conduct was highly ascertainable by the court, despite the fact that the insured's operation of the car was the immediate cause of the accident. If, in fact, the brakes had not been repaired negligently, the court concluded the operation of the vehicle itself would not have caused any harm. In a related case, State Farm Fire & Casualty Co. v. Kohl, a truck driver covered by an insurance contract with provisions similar to the Gonzalez contract sued to recover from his insurance company. The insured collided with a motorcycle, throwing the driver of the motorcycle to the pavement. The truck driver then carried the motorcycle driver away from her position on the street in such a negligent fashion that the conduct caused the motorcycle driver additional injury. The insurer contended that the insured's conduct was not independent of the exclusionary clause and denied liability in the operation of a motor vehicle. However, the court agreed with the insured, holding that the truck driver's post-accident conduct, of negligently helping an injured victim, was nonvehicular conduct, independent of his operation of his own vehicle. Further, it ruled that the insured's conduct was not so intimately involved with the use of his truck, nor was it so uninterrupted or connected to the home should be deemed independent.

115. Id. at 677, 131 Cal. Rptr. at 627.
116. Id. at 677-78, 131 Cal. Rptr. at 627.
117. Id. at 680, 131 Cal. Rptr. at 629.
118. Id. at 678, 131 Cal. Rptr. at 628. The negligence occurred on the premises, not when the driver drove the car off the premises. The accident, therefore, although not in the vicinity of the home, was caused by negligence done in the home. This analysis somewhat blurs any distinction between non-auto-related and auto-related accidents.
120. Id. at 1033-36, 182 Cal. Rptr. at 720-22.
121. Id. at 1035-36, 182 Cal. Rptr. at 721-22. See also Spargur v. Park, 128 Cal. App. 3d 469, 180 Cal. Rptr. 257 (1982).
the operation of his vehicle as to require the finding that his conduct arose out of such use. Therefore, coverage was not excluded.\textsuperscript{122}

As these cases illustrate, courts have occasionally chosen to analyze questions of coverage by determining whether the covered cause acted independently of the excluded cause. If so, they will allow coverage for the insured solely under the covered cause of the loss, regardless of the presence of an excluded risk.

H. The Garvey Decision

Prior to Garvey, State Farm Mutual Automobile Insurance Co. v. Partridge\textsuperscript{123} marked the last development in the law of concurrent proximate cause cases in which one cause is covered under a policy and one cause is excluded.\textsuperscript{124} Partridge, an auto-related accident case, examined the independence of the two causes. The California Supreme Court held that where at least one covered cause is deemed to be the proximate cause of the loss, coverage will be afforded, regardless of the presence of any excluded proximate causes.\textsuperscript{125} This

\begin{footnotes}
\item[122] Kohl, 131 Cal. App. 3d at 1038-39, 182 Cal. Rptr. at 723-24. The court focuses on the characterization of whether "post-accident" conduct is the same as "non-vehicular" conduct.

The court also applied "general tort principles" to this situation, \textit{Id.} at 1035, 182 Cal. Rptr. at 721, but the language of "substantial factor," \textit{Id.} at 1038, 182 Cal. Rptr. at 723, sounds more like a "cause-in-fact" analysis only, lacking any further tort proximate cause analysis.

\textit{See contra} dissenting opinion in Kohl, arguing (for purposes of exclusion) any injury which arises out of the use of a motor vehicle is excluded. \textit{Id.} at 1040, 182 Cal. Rptr. at 724-25. This is a much broader interpretation of the exclusion, implying that coverage would be denied under the homeowner's policy for every accident that occurred after an insured had first been transported by automobile.

\item[124] \textit{Id.}
\item[125] \textit{Id.} This rationale was followed in Glens Falls Ins. Co. v. Rich, 49 Cal. App. 3d 390, 122 Cal. Rptr. 696 (1975), where an injury occurred when a shotgun went off in a truck while the insured and his passenger were on a hunting trip. The \textit{Glens Falls} court, following the \textit{Partridge} rationale, ruled that the homeowner's comprehensive liability protection covered negligent acts. The court reiterated the position that where an accident arises "out of the use" of a vehicle for purposes of an exclusionary clause, it is not determinative of the question of whether that same accident falls within another covered clause of a homeowner's policy. \textit{Id.} at 395, 122 Cal. Rptr. at 699. Moreover, the court confirmed the notion that because of the adhesive nature of insurance contracts, the fundamental principle that all ambiguities in an insurance policy are construed against the insurer-draftsman must be followed. \textit{Id.} at 394, 122 Cal. Rptr. at 699.

Thus, the insured may recover if the accident arose from a cause not involving the use of the vehicle or from a cause concurrent with any cause arising from the use of the vehicle. In other words, if the damage was caused by a covered cause which was independent of the excluded cause, liability would exist, and, if the damage resulted from concurrent causes, coverage would exist if at least one of those causes was covered. This would afford the most
case set the standard for situations in which multiple causes were deemed to be the proximate cause of the damage, holding that one covered cause alone would allow full coverage for the insured.

The Garvey decision sought to clarify a narrow area of insurance law that previously had been ignored. By incorporating the rationales of other insurance law cases, the Garvey court sought to give some guidance to situations in which excluded risks and covered risks were joint proximate causes of a loss.

1. Facts

The plaintiffs, Jack and Rita Garvey, brought an action against the defendant, State Farm Insurance, to recover damages that resulted when an addition to their house began to pull away from the main structure. The addition to the house had been built in the early 1960's, and the plaintiffs bought this home in the mid-1970's. As the addition began to pull away, the plaintiffs contacted the defendant believing they would be compensated. After many months of investigation, State Farm denied coverage claiming the damage was caused by "earth movement," which was specifically excluded. The plaintiffs sued on the contract to recover compensatory damages and in tort for State Farm's bad faith refusal to provide compensation.

The plaintiffs argued that although their "all-risk" policy specifically excluded coverage for damage caused by earth movement, their policy did provide coverage for damage caused by negligence. The trial court agreed with plaintiff's argument and ruled, under Partridge, that the plaintiffs were covered because negligent construction, a covered risk, was a concurrent proximate cause of the damage. The court of appeals reversed, articulating a new test.

2. The Garvey Test

The Garvey court, in its analysis, turned to two tests from previous insurance cases for guidance in setting forth a new test to be

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129. Id.
used in determining coverage. The first test was from Sabella,\(^{131}\) which established that in the determination of coverage, a court should isolate the single, primary, moving cause that set in motion any "other" causes or "chain of events" that led directly to the damage. If that particular cause is covered, then coverage will be awarded, regardless of the presence of other causes specifically excluded.\(^{138}\) This test proved to be limited because in some cases it is virtually impossible to isolate the moving cause of the damage. Moreover, where a long, convoluted chain of events is present, the characterization of a single cause as the primary cause becomes difficult. This leads to an inequitable result when a long chain of covered risks causes a substantial proportion of the damage, yet, in reality, these causes were initiated by an excluded "primary" cause.\(^{139}\)

This problem was confronted in the Partridge case,\(^{134}\) which set forth the second test examined by the Garvey court. In the Partridge case, the two causes of the loss occurred independent of one another, so it was impossible to determine which cause came first or which one set the other in motion.\(^{135}\) The Partridge test asks only whether at least one proximate cause of the damage was covered. If this is true, then coverage under a liability insurance policy is available when a single insured risk constitutes a concurrent proximate cause of the injuries.\(^{136}\)

The Garvey court's ultimate conclusion was that neither test is correct. Instead, the court designed its own test, incorporating facets of both tests into one. This new test was based on the Garvey court's interpretation of the Partridge decision, concluding that the Partridge court's primary emphasis was on the independence of covered and excluded causes\(^{137}\) and that this inquiry was only a threshold matter. If a court determined that a covered cause of the damage was independent from an excluded cause, then the Partridge rationale leads to full coverage. However, if a court determined that the excluded cause and the covered cause were dependent on one another, then the Sabella primary cause analysis is utilized to determine full coverage or no coverage.

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132. Id. at 31-32, 377 P.2d at 895, 27 Cal. Rptr. at 695.
133. This would be inequitable to insurers as well if the "primary" cause which started a long chain of causes was covered when, in fact, many excluded causes contributed to the final resultant loss.
134. 10 Cal. 3d at 94, 514 P.2d at 123, 109 Cal. Rptr. at 811.
135. Id.
136. Id. at 103-05, 514 P.2d at 132-34, 109 Cal. Rptr. at 820-21.
In addition, the Garvey court addressed another issue in its newly formed test. Both the Partridge and Sabella tests assumed that each cause of the damage was a cause in fact of the damage. This is a major assumption since neither a “balancing” causation analysis nor an “independence” causation analysis can begin if neither cause is a cause in fact. This question of cause in fact must be determined, in and of itself, by the trier of fact before the Partridge or Sabella tests can be applied.\(^\text{138}\)

Thus, the Garvey court’s new test contained three separate levels of inquiry.\(^\text{139}\) These levels follow sequentially: first, a cause in fact analysis is applied to the factors contributing to the damage, then the Partridge test is applied, and finally the Sabella analysis is applied.\(^\text{140}\) Consequently, in determining coverage, the cause in fact test indicates, as a threshold matter, whether further inquiry is necessary, thus triggering the Partridge test. If still further inquiry is necessary, the Sabella test is triggered.\(^\text{141}\)

III. Analysis

A. Impact and Implications

The Garvey decision has serious implications for this area of insurance. An insurance policy is basically a contract for services. However, when a policy dispute arises, the plaintiff usually sues for tort damages resulting from the insurer’s bad faith refusal to pay the plaintiff’s claim, in addition to an action for compensatory damages under the policy.

In normal contract analysis, the crucial question is based on the reasonable expectations of each of the parties. However, because of an insurance contract’s adhesive nature, policyholders are usually forced to adhere to the terms drafted into the policy by the insurer. Traditionally, this adhesive nature results in deference to the insured when problems arise. Furthermore, any ambiguities in a policy are construed in favor of the insured. The Garvey decision removes this deference. By forcing a “balancing” between “primary” and “remote” causes, the deference is lost because the trier of fact will be

138. Id.
139. Id. at 481, 227 Cal. Rptr. at 219 (where this three-level analysis was explained in a diagram drawn up by the court).
140. Id.
forced merely to weigh the causes. Consequently, if the trier of fact weighs the causes and fifty-one percent of the loss is determined to be caused by an excluded risk, the "scale" will be tipped in favor of no coverage. Unfortunately for the insured, the remaining forty-nine percent of the loss, determined by the jury to be caused by the covered risk, is ignored. This result could not reasonably have been expected by the insured. Deference, even at the lowest level of the Garvey test, must be maintained to ensure fairness to the insured.

For example, an "all-risk" homeowner's policy, by definition, insures against all losses not specifically excluded. One reasonable interpretation an insured could make of this language is that any loss not specifically excluded is covered, regardless of the presence of other excluded causes. Indeed, this appears to be the most likely interpretation an insured could make, absent language to the contrary. Normally, when interpretations of the insured and insurer conflict, the insured will be awarded coverage because the deference given to the insured will construe any ambiguities in the insured's favor. Furthermore, deference towards the insured assures all insurance holders that the insurer will draft fair, comprehensive, unambiguous policies to prevent any policy disputes from being construed against them. This also allows both parties to interpret provisions in reasonably similar ways, thus clarifying coverage issues when losses occur.

In addition, because policyholders are really consumers paying premiums for a service, insurance companies should not be allowed to take advantage of contractual obligations. As a result of Garvey, large insurance companies will have distinct advantages in dispute resolution. With substantial resources to investigate and defend a case, in addition to the lack of deference to the insured, powerful insurance companies will be able to intimidate less powerful individual claimants from filing otherwise valid claims. This intimidation will be especially true of individuals with little money or time for filing actions, since these individuals would normally rather accept a lower immediate cash settlement than risk receiving nothing in a losing, and costly, trial. This risk is certainly high to begin with, but the Garvey decision makes the chances for an individual claimant to win against an insurance company even lower.

Ultimately, the presence of any ambiguities in insurance policies will be condoned by the Garvey decision. This allowance will encourage increased bad faith on the part of insurance companies. Any time a seemingly minor excluded risk is involved in a policy-

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142. W. Keeton, supra note 1.
holder’s damage, the insurance company will claim there was no coverage, or, at least, it will force the policyholder to settle for less in the event legal action is taken. Better resources will allow insurers to challenge claimants on trivial settlements in which the insured would otherwise be successful.\footnote{148}

B. Garvey and the Problem of Proximate Cause

Besides taking the deference away from the insured, the Garvey decision raises some serious problems in insurance causation analysis. As noted previously, insurance policies are essentially contracts. The failure of either party to perform the terms and duties of the contract results in a breach. This could be a failure by the insured to pay premiums or a failure by the insurer to compensate the insured for a legitimate claim.

A problem arises upon examination of an insurance claim suit. Assuming the insured files the complaint, the plaintiff will most likely sue for compensatory damages to recover under the provisions of the original policy. Such a suit would be an action in contract. In addition, the plaintiff will also be entitled to sue the insurer for its bad faith failure to pay the claim to the insured. This will be an action in tort. What causation analysis will the court use? Conceptually, does a court need to analyze proximate cause in a contract action? Arguably, this is not the issue in a contract case, as contract actions look to identify a breach, and if so, by whom. This is more of a characterization problem, not a causation problem.

Of course, the breach must be the “cause” of the damage done, but contract analysis, in essence, appears to be more of a cause in fact analysis, not a proximate cause analysis.\footnote{144} Hence, the Garvey decision creates a problem in its use of a proximate cause analysis in an action involving both tort and contract analyses. Granted, a proximate cause analysis could be used in the bad faith portion of the action, but not in the contractual portion.\footnote{145}

Next, even if the Garvey court was justified in using a proximate cause analysis in its decision, it is not clear whether it used this analysis on the contract issue or the tort issue. If the Garvey court

\footnote{143. However, “pure” comparative negligence could be harmful in that some plaintiffs could sue a defendant for damages only minimally caused by that defendant, or caused in most part by the plaintiff.}

\footnote{144. This view was also expressed in Justice Kaufman’s concurring opinion in the supreme court decision of Garvey. 48 Cal. 3d 395, 414, 770 P.2d 704, 715, 257 Cal. Rptr. 292, 303 (1989).}

\footnote{145. This approach would probably be tedious and conceptually difficult for most juries.}
used its new test to analyze the damage done to the plaintiff’s house, this implicates the problem mentioned above, the application of tort causation analysis to a situation involving both tort and contract. Clearly, the issue of whether to compensate the Garveys for the damage to their house was a contractual one, falling squarely under the determination of whether the damage should be “characterized” as covered or excluded. If the Garvey court was using this new test to analyze the causation question of the tort issue, this might seem more justifiable, but it would seem difficult in any circumstance to discover the “proximate cause” of damage done for failing to pay a claim, the relevant tort in question.

Perhaps, the real question of proximate cause is whether the insurer’s failure to pay was a “proximate cause” of the insured’s damage. In other words, did the insurer’s failure to pay cause any damages to the insured that would not have been caused without such delay? In essence, the delay would cause additional damage to the insureds, and the proximate cause analysis would be an analysis of the relation between the failure to pay and the additional damage. Any other proximate cause analysis of the original damage would be inappropriate.

Thus, the problem of determining which part of the action is scrutinized under proximate cause analysis must be addressed in order to prevent the court from combining both tort and contract issues and applying the Garvey test to both. Indeed, the entire proximate cause analysis, including the Garvey test, forces the issue to be elastic and vague. One reason for the new Garvey test was to help answer causation questions in areas of uncertainty previously left unanswered. Supposedly, by weighing the “causes” of the damage, and determining the primary and remote causes, a finder of fact can determine whether compensation is mandated. However, in many of these cases, the damage is done by an excluded risk in the recent past, such as a flood, but the damage may not have occurred had third party negligence not been committed in the distant past. A more important question to ask would be which causes are the ones to be weighed, and how far back in time can the jury go to determine the causes that ultimately caused the loss.  

146. This author also perceives an additional problem for juries: because distant causes are often incorrectly perceived as less relevant, they are frequently accorded less weight. Even Justice Mosk’s dissenting opinion expressed similar views:

Nor can I agree that such a rule is “workable”: to my mind, it is so totally devoid of standards as to allow—indeed, encourage—insureds always to claim coverage, insurers always to deny coverage, and juries always to decide between
The Garvey test does not address this problem and without a proper clarification of the causes that may be used in the balancing, either party could, theoretically, drum up some ancient negligent act, somehow related to the damage, and force the balancing. Such an inappropriate usage of the test will lead to an increased number of claims, lawsuits, and frivolous actions. Claimants and insurers will bring more lawsuits if they believe they will have their conflicts decided by the finder of fact through balancing. This practice, over the long-term, will be more detrimental to the insured than the deep-pocket insurer, for the deep-pocket will be more willing to threaten legal action against the claimant. This would ultimately enable insurers to coerce claimants into out of court settlement.

If the Garvey test is accepted as the standard test applicable in this area, how is a jury to decide the issue as a matter of law? Even if the law assumes each jury member is “reasonably” intelligent, the ability of a juror to understand the complex concept of proximate cause is dubious at best, given that this particular concept is one of the most misunderstood areas of the law, even by lawyers and scholars. This problem is emphasized even more when one realizes that the Garvey test requires a juror to discover first the “cause in fact,” then to determine the “dependence” or “independence” of any “causes in fact,” and then to weigh any “dependent” causes to determine which of the “dependent” “causes in fact” is the “primary” cause and which is the “remote” cause, and the “primary” cause of the damage will determine, by itself, whether the insured will be fully compensated or not. In addition, this entire analysis must be used by the jury in determining among many joint or concurrent proximate causes which one is “the” proximate cause, under the Garvey test.

Garvey, 48 Cal. 3d at 427, 770 P.2d at 724, 257 Cal. Rptr. at 312 (Mosk, J., dissenting).

Vincent, Proximate Cause Fog Spreads, 69 A.B.A. J. 1042 (1983). For cases in which the jury incorrectly allocated liability to each party, and the appellate court overturned the jury’s determination, see Lawrence v. East Coast Ry. Co., 346 So. 2d 1012 (Fla. 1977) (Florida Supreme Court requiring that special verdicts were required in all jury trials involving comparative negligence); Florida E. Coast Ry. Co. v. Lawrence, 328 So. 2d 249 (Fla. App. 1976); Orwick v. Belshan, 304 Minn. 338, 231 N.W.2d 90 (1975); Steinhaus v. Adamson, 304 Minn. 14, 228 N.W.2d 865 (1975); Stapleman v. St. Joseph The Worker, 295 Minn. 406, 205 N.W.2d 677 (1973); Storey v. Madison, 276 Or. 181, 554 P.2d 500 (1976); Krauth v. Quinn, 69 Wis. 2d 280, 230 N.W.2d 839 (1975); Hands v. Arkon, 489 S.W.2d 633 (Tex. Civ. App. 1972).

This long, tedious, and purposely confusing explanation is merely an attempt to exemplify what a juror will be forced to understand and analyze when using the Garvey test. This assumes that a juror will be able to comprehend the concepts of each level of the test,
Thus, simply on the basis of practicality, it is unfair to force the jury to apply a test so complex itself, and which is applied in a particularly difficult area of the law. This problem must be addressed since uncertainty on the jury’s part will lead to unreliable conclusions. This will lead to inconsistent case law and weak precedents. In all likelihood, the inconsistency of each new case will not be a result of the variety of fact patterns, but of the varying degree of each jury’s understanding of proximate cause and the Garvey test.

Finally, the Garvey test raises a problem in the potential results of the proper use of the test. Assuming the jury applies the Garvey analysis properly, the final inquiry requires the jury to weigh the causes to determine liability. The jury is asked to determine which cause was the “primary” cause, and this is done by balancing. If it is clear that one cause was the “primary” one, then the liability question is simple to answer. This would be an instance where, for example, the facts indicate that the “primary” cause is ninety percent of the total loss. Apparently, the “primary” nature of that particular cause, when compared to any other contributing causes, is so substantial that the other causes become insignificant. In this instance, if the “primary” cause is an excluded risk under the claimant’s policy, the claimant gets absolutely no coverage and if the “primary” cause is a covered risk under the claimant’s policy, the claimant gets full coverage.

However, where the “primary” cause is more difficult to discover, inequity might result from the jury’s balancing. For instance, when inadequate expert testimony is offered to show any of the causes is the “primary” one, or when no cause appears to be any more accountable than any other cause, the jury’s balancing is difficult. The jury might establish a ratio approximating fifty percent for the excluded cause and fifty percent for the covered cause. Unfortunately, the Garvey test fails to specify the percentage of loss necessary to determine that a particular cause is the “primary” cause of the damage.

Under the Garvey test, a jury could conclude that fifty-one per-
percent of the total loss was caused by an excluded risk. Without any guidelines as to what constitutes a "primary" cause, under Garvey, this could mean that the insured recovers absolutely nothing. This conclusion is highly inequitable, considering that the jury, in its balancing, also concluded that forty-nine percent of the total loss was caused by a covered risk. The consequences for the insured are that the forty-nine percent of the total loss that the jury found to be caused by a covered risk are negated and become non-recoverable. It is equally inequitable where the jury finds fifty-one percent of the total loss to be caused by a covered risk, thus, affording full coverage for the insured. In this case, the insurer would be forced to pay for an incidental forty-nine percent of the total loss attributable to a risk the insurer believed to be excluded from coverage.

Thus, the potentially unfair results of the Garvey test's balancing must be examined. The all-or-nothing rationale conveys an unfair message to both insureds and insurers. The result will be that insureds will sometimes get more compensation than they deserve by receiving payment for losses attributable to partially excluded risks, while insurers will sometimes be allowed to deny all coverage to an insured who has incurred partial losses the insurer was contracted to compensate for.\textsuperscript{149}

The Garvey test has many problems. Its application may be inappropriate and its results may be inconsistent. Under the Garvey test, the "primary" causation analysis is designed to characterize one cause as the moving or substantial cause of the total damage, and to use this characterization to determine either full or no coverage. Granted, both parties entered into a contract believing that if damage were excluded or covered, the payment would be made in full or not at all. However, in cases where it has been proven that both the covered and excluded causes contributed to the total loss, it is questionable that either party expected to receive either full or no coverage in such a situation. The reasonable conclusion is that each party

\textsuperscript{149} The "all or nothing" rationale is similar to the traditional view of contributory negligence because weighing the plaintiff's negligence can be a negating factor in a judgment. The difference is that the contributory negligence rationale assumes that both parties contributed to the total damage, resulting in no coverage for a "contributing" plaintiff, but not the same result for a "contributing" defendant, since only the plaintiff has this inquiry.

Currently, California follows the comparative negligence standard which allows for a "balancing" of the negligence of both plaintiff and defendant. See generally Englard, Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code, 65 Calif. L. Rev. 4 (1977); Schwartz, Comparative Negligence in California—Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence, 7 Pac. L.J. 747 (1976).
expected to pay or receive the amount of compensation justified.

The Garvey test ignores this conclusion in favor of weighing the liability of each risk caused. However, the mere usage of terminology such as "primary" causes implies the presence of "secondary" causes, which, in reality, have also contributed to the damage. The Garvey test precludes consideration of "secondary" causes as mitigating factors by placing full or no coverage upon the risk that has primarily caused the damage. 100

IV. Proposal

In light of these problems, this comment proposes the recognition of "secondary" causes as mitigating factors. Indeed, the mere presence of such factors, concluded by the jury to be contributory, should be considered and should dictate at least partial coverage or exclusion for each respective party. This is only equitable since, by definition, if proximate causation analysis is used, multiple proximate causes are possible and, therefore, multiple liability should be possible as well. 101 Furthermore, standards should be promulgated by the Legislature or through case law clarifying the exact percentage of causation a "primary" cause must contribute in order to condone full or no coverage. Any percentage below that level should be

150. One ancillary problem to this comment is whether the Garvey analysis will require the jury to assume that the parties involved in the action are responsible for one-hundred percent of the damage. For example, if the jury concludes that the insured is forty percent liable and the insurer is thirty percent liable, what happens to the remaining thirty percent of the damage, which the jury has concluded was caused by some unknown cause or unascertainable defendant? On the other hand, will the jury be required to conclude liability by asserting the percentages based only on the parties present in the action? For example, will the jury have to conclude that the insured was sixty percent liable and the insurer was forty percent liable even though the jury believes that both parties actually contributed to the total damage by only seventy percent? This question cannot be adequately answered by this Comment, but it appears to this author that juries will perceive, unless by specific jury instruction to the contrary, that they must apportion one-hundred percent of the liability between only the parties in the named action.

151. See California Casualty Gen. Ins. Co. v. Superior Court, 173 Cal. App. 3d 274, 218 Cal. Rptr. 817 (1985), asserting that there can be comparative bad faith actions in insurance cases. This situation can only arise when the insured has performed some act which itself constitutes bad faith. In these instances, the claimant's bad faith can be a mitigating factor in the determination of damages, and thus result in only partial recovery for the claimant. See also Commercial Union Assurance Co. v. Safeway Stores, Inc., 26 Cal. 3d 912, 610 P.2d 1038, 164 Cal. Rptr. 709 (1980); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); Liberty Mut. Ins. Co. v. Altfillisch Constr. Co., 70 Cal. App. 3d 789, 139 Cal. Rptr. 91 (1977); Houser, Ashworth, & Francis, Comparative Bad Faith: The Two-Way Street Opens For Travel, 23 Idaho L. Rev. 367 (1986-87). Comparative bad faith claims most frequently occur when the insurer has accepted its responsibility for compensation but asserts that the insured has acted in bad faith.
considered a multiple liability situation in which the "secondary" cause mitigates either the coverage or the exclusion. These standards will allow for easier adjudication by the courts since juries will be required to work within predetermined percentages; their balancing will be less arbitrary and inconsistent.

This approach will produce more equitable results for both parties since a jury, finding that a "primary" cause is so substantial as to rest above the designated percentage will not have to consider the "secondary" cause. On the other hand, if the jury clearly recognizes that the "primariness" of the causes is impossible to determine, then the jury will merely weigh the causes and charge partial liability to the insurer in order to compensate the insured for that amount of the loss only. This two-phase method is the only equitable administration of the test because, if the insurer were responsible for every minute percentage, as it would be under a "pure" comparison, insureds would claim compensation for minuscule amounts of the total loss. For example, a claimant could claim that five percent of the

152. Proposed Statute § 532.1 provides:
Where concurrent or joint causes of damage have been proven by factual inquiry, and one or more of the causes is an excepted peril, and one or more of the causes is a covered peril:

(a) The jury will assume legal liability for both causes, but the jury will balance between the causes in regard to the damages, assuming that one of the conflicting causes is not "de minimis" in relation to the total amount of damage.

(b) "De Minimis" is defined as any cause, covered or excluded, which has been determined to be 10% or less, in relation to the total amount of the damage.

(c) If Subsection (b) determines that one of the conflicting causes is "de minimis", for purposes of this section, the jury will disregard that cause of the damage, and afford full or zero coverage, depending on the nature of the peril which remains as the legally liable cause.

153. This would not be similar to the comparative negligence principles that guide present California law. California follows "pure" comparative negligence principles, allowing for recovery even when the defendant is only minimally negligent. In a "pure" comparative negligence jurisdiction, a plaintiff could recover for one percent of the total damage, even though that same plaintiff was ninety-nine percent negligent for the total damage.


total loss was covered and ninety-five percent was excluded. The claimant would then claim that the insurer should compensate for five percent. In theory, this would be correct, but in practicality, this would probably initiate an onslaught of frivolous claims toward insurers, and also would motivate insurers to deny claims unreasonably in an effort to decrease the amount paid outright. Thus, by setting minimum balancing standards, the jury will be assisted in deciding issues that are extremely complex and difficult.184

This proposal would be similar to certain cases that have recently been decided, allowing for comparative bad-faith claims.185 These cases indicate a trend toward weighing the damages, not the liability, as these recent cases make the assumption that there is liability on both parties. Thus, because the Garvey test removes the historic deference to the insured when a claimant reaches the lowest level of the test, the jury should be allowed to weigh at least the damages, not the liability, when the probability of adequately determining the "primary" cause is low. This would remove the "all or nothing" character of the test because it would assume the multiple


155. See infra note 157 and accompanying text. For background on the principle of comparative negligence, see generally Li v. Yellow Cab Co., 13 Cal. 3d 804, 858, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); see also Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978); Daly v. General Motors Corp., 20 Cal. 3d 725, 579 P.2d 1162, 144 Cal. Rptr. 380 (1978).

liability of both parties, rather than weighing the causes in determining full or no coverage.¹⁵⁶

Finally, an alternative to the entire Garvey test is the elimination of proximate cause analysis altogether from the area of insurance. Although bad faith claims are actions brought in tort, thus warranting proximate cause analysis, the emphasis in insurance law is on the insurance policy as a contract. Of course, contract analysis does require some causation analysis. But, the causation question for the jury should be one of causation in its ordinary sense, not in the proximate sense. In other words, the jury should decide whether each risk, covered or excluded, was a cause in fact of the loss. If both risks are concluded to be causes in fact, liability will be presumed on both parties, then the jury will weigh the damages in determining the extent to which the insurer must compensate the insured.¹⁵⁷ This method will alleviate the problem of the jury determining proximate cause and liability, normally legal questions for the court, and allow the jury instead to decide the factual question of the extent to which the insurer will be liable to the insured.¹⁵⁸

V. CONCLUSION

The purpose of this comment is to clarify an area of the law that has serious implications for insureds and insurers alike. What is at stake is the welfare of the insurance industry, both to insurance companies and policyholders. What appears most important is the need for stability and consistency in insurance disputes. This holds especially true for policyholders, but uncertainties may also affect


¹⁵⁷. This author is aware that the solution proposed will not reduce insurance litigation. Instead, this proposal is an attempt merely to take away the harshness that an “all-or-nothing” inquiry could possibly hold for either party. See also Rudelson v. United States, 431 F. Supp. 1101 (C.D. Cal. 1977); Koehler v. New York, 102 Misc. 2d 398, 423 N.Y.S.2d 431 (1979). See Welch v. F.R. Stokes, Inc., 555 F. Supp. 1054 (D. Colo. 1983), holding that the jury should specifically weigh the damages, not the liability.

insurers adversely as well. Stability can only be achieved in this area of insurance law with clearly articulated standards, preferably promulgated by the Legislature.

The Garvey decision was an attempt to clarify this area, but its dismissal of deference to the insured promotes excessive litigation and unfair results. The reasonable intentions and expectations of both parties must be acknowledged, and the Garvey test only partially addresses this issue. Only by modifying the Garvey test will equity and fairness be maintained for both insurer and insured.

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159. The dissenting opinion in Garvey expressed similar views. Justice Poche, disagreeing with the independence requirement, commented:

In order to comply with its new independent cause requirement, the majority returns this case for retrial, directing the jury to follow what can only be characterized as a maze-like analytical pattern which may yield an answer as to coverage or then again may not. While this analysis has a certain pleasing intellectual symmetry to it, I suspect its utility is limited, to say the least . . . . A less clever, or more conscientious, panel may attempt to follow the analysis in the order in which it is set out. Assuming they can do so, and assuming the fact pattern doesn't lead them into the boggy trough of 'two dependent causes simultaneously contribut[ing] to creating [a] loss' . . . . then they may reach a result which defines coverage in the largely conclusory legal jargon of independent concurrent causation or dependent concurrent causation . . . . Indeed, under the rule set out by the majority, the writing of policy exclusions will become the most arcane of art forms. The policies so produced will only puzzle the insureds and engender more bad faith litigation.
