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## Farmers Insurance Exchange v. Adams: Concurrent Causation and the All-Risk Homeowner's Policy

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# FARMERS INSURANCE EXCHANGE V. ADAMS: CONCURRENT CAUSATION AND THE ALL-RISK HOMEOWNER'S POLICY

## I. INTRODUCTION

The "all-risk" homeowner's policy protects the policyholder against all fortuitous losses to covered property except as specifically excluded in the insurance contract.<sup>1</sup> The "all-risk" policy is the most comprehensive coverage available to the homeowner,<sup>2</sup> and represents a significant source of insurance company revenues.<sup>3</sup> This Note examines two conflicting standards for determining coverage under an all-risk policy where several causes—some included and some excluded—combine to produce a loss. Specifically, it examines the confusion created by these two standards of coverage, the resulting economic effects and the need for judicial clarification.

The first standard, the efficient proximate cause theory promulgated by the California Supreme Court in *Sabella v. Wisler*<sup>4</sup> prescribes insurer liability whenever an included peril is the moving or efficient cause of the insured's loss.<sup>5</sup> The second standard, the concurrent cause theory enunciated by the same court in *State Farm Mutual Automobile Insurance Co. v. Partridge*,<sup>6</sup> provides coverage for the insured whenever an included peril is a concurrent proximate cause of the loss.<sup>7</sup> The application of the concurrent cause standard was extended by the court of appeal in *Premier Insurance Co. v. Welch*<sup>8</sup> and recently seconded by the same court in

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1. H. DENENBERG, *RISK AND INSURANCE* 456 (2d ed. 1974). A fortuitous loss is one which occurs unexpectedly or by chance. Thus, the intentional destruction or normal deterioration of property due to every day wear and tear are not covered losses under an "all-risk" policy. *Id.*

2. *Id.* The basic policy provides coverage against damage to the insured's dwelling and its contents, loss due to theft, and protection against personal liability arising out of or related to the insured property. *Id.* at 462.

3. *Id.*

4. 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963). See *infra* notes 36-50 and accompanying text for a discussion of *Sabella*.

5. *Sabella*, 59 Cal. 2d at 31-32, 377 P.2d at 895, 27 Cal. Rptr. at 695.

6. 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973). See *infra* notes 51-61 and accompanying text for a discussion of *Partridge*.

7. *Partridge*, 10 Cal. 3d at 104-05, 514 P.2d at 130, 109 Cal. Rptr. at 818.

8. 140 Cal. App. 3d 720, 189 Cal. Rptr. 657 (1983). See *infra* notes 73-80 and accompanying text for a discussion of *Welch*.

*Farmers Insurance Exchange Co. v. Adams.*<sup>9</sup>

## II. HISTORICAL DEVELOPMENT

### A. The "All-Risk" Homeowner's Policy

The homeowner's policy with multiple lines of coverage is a relatively recent development in the insurance field.<sup>10</sup> Prior to 1950, state legislation and industry custom prevented insurance companies from issuing casualty and fire insurance in a single policy.<sup>11</sup> By the early 1950's most states had enacted legislation enabling a single company to provide all types of coverage, and "all-risk" policies quickly became a primary form of property insurance.<sup>12</sup>

The popularity of all-risk property insurance lies in its blanket coverage. Unless a loss is specifically excluded,<sup>13</sup> the policy will cover it. This is attractive to homeowners who have little ability to identify and specify individual perils to their property, particularly as society grows more complex.<sup>14</sup>

Insurers have typically excluded coverage for only a small class of perils—earthquakes, earth movement, floods, nuclear accidents and wars—which present the potential for catastrophic loss and total depletion of insurance funds. The insurance industry has determined that coverage against these disasters cannot be provided at premiums which the average homeowner would be able to afford.<sup>15</sup> Thus, under a typical "all-risk" policy, a home destroyed by an earthquake, an excluded peril, is not an insured loss. However, coverage determinations are not always so clear, particularly where multiple perils contribute to the harm.

### B. Multiple Causation: Dual Standards

Determining coverage under an all-risk policy becomes difficult where both included and excluded perils combine to produce the homeowner's loss. The California Supreme Court has articulated two different

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9. 170 Cal. App. 3d 712, 216 Cal. Rptr. 287 (1985). See *infra* notes 82-92 and accompanying text for a discussion of *Adams*.

10. H. DENENBERG, *supra* note 1, at 462.

11. *Id.* at 461. For a detailed history of the development of "all-risk" property coverage, see H. DENENBERG, *supra* note 1, at 455-67.

12. *Id.* at 461.

13. *Id.* at 455. The "specified perils" contract explicitly sets forth the causes of a loss for which coverage is provided. If a peril is not enumerated in the policy, the resulting loss is not insured. *Id.* at 448.

14. *Id.* at 455.

15. In some instances, such as a nuclear accident, it may be financially impossible for the insurance industry to provide coverage at any premium, so large is the potential for disaster.

coverage standards applicable to harms caused by multiple perils: the efficient proximate cause theory; and the concurrent cause theory.<sup>16</sup>

### 1. The "efficient proximate cause" standard

The efficient proximate cause theory, adopted by the California Supreme Court in 1963,<sup>17</sup> has its origins in the California Insurance Code enacted in 1935.<sup>18</sup> With respect to proximate and remote causes, section 530 of the Insurance Code states that:

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.<sup>19</sup>

Section 532, regarding specially excluded perils states that "if a peril is specially excepted in a contract of insurance and there is a loss which would not have occurred but for such a peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted."<sup>20</sup> Unfortunately, these sections were enacted without legislative comment as to their purpose and application. Early case law, however, provides insight into their interpretation.

In *Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Insurance Co. of Brooklyn*,<sup>21</sup> the insured's property was destroyed by a fire which resulted from the 1906 San Francisco earthquake.<sup>22</sup> The policy in question contained an exclusion for "loss or damage occasioned by or through any volcano, earthquake, or hurricane, or other eruption, convulsion, or disturbance."<sup>23</sup> The insurer claimed that the fire and the resulting loss would not have occurred but for the earthquake and, thus,

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16. See *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973) (the concurrent cause standard); *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963) (the efficient proximate cause standard).

17. *Sabella*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689. See *infra* notes 36-50 and accompanying text for discussion of this case.

18. See O. Becker, P. Levin & C. Holland, *Concurrent Causation: Garvey v. State Farm and Where It Will Lead* 14 (unpublished manuscript) (copy on file at *Loyola of Los Angeles Law Review*). The California Insurance Code was derived from the 1872 California Civil Code. The Civil Code was adopted from the New York Civil Code, whose origins can be found in British and American common law. *Id.*

19. CAL. INS. CODE § 530 (West 1972).

20. *Id.* § 532 (emphasis added).

21. 158 Cal. 367, 111 P. 4 (1910).

22. *Id.* at 369, 111 P. at 4.

23. *Id.*

that the exclusionary clause operated to deny coverage.<sup>24</sup> The California Supreme Court rejected the insurer's strict "but for" interpretation of California Insurance Code section 532,<sup>25</sup> holding that Code sections 530 and 532 must be read together.<sup>26</sup> The court explained that under section 530, the included peril and proximate cause of the loss was fire, and concluded that coverage was available even though the earthquake was a remote cause of the harm.<sup>27</sup> With regard to the excluded peril (section 2628), the court stated:

According to the theory of appellant, if a very slight shock of earthquake had upset a lamp and thus set fire to a building, and this building should communicate the fire to an adjoining building, and thence from building to building until the whole city had burned, not a dollar of insurance could be recovered if the policies each contained the clause under discussion. We do not think that either the plaintiff or the defendant ever contemplated making any such contract.<sup>28</sup>

The court found for the insured and refused to broaden the scope of the exclusion through the use of section 532.<sup>29</sup>

In *Brooks v. Metropolitan Life Insurance Co.*,<sup>30</sup> the plaintiff's indemnity policy provided coverage for accidental death, but not for death contributed to or caused by incurable illness.<sup>31</sup> The insured was killed in a fire after having been diagnosed as suffering from terminal cancer.<sup>32</sup> The insurance company attempted to deny coverage claiming that the insured had failed to prove, as required by the policy, that his death was not caused or contributed to by his infirmity.<sup>33</sup> The *Brooks* court refused to embrace the insurance company's construction of the policy stating that "the presence of preexisting disease or infirmity will not relieve the in-

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24. *Id.*

25. *Id.* at 372-73, 111 P. at 6. The court was actually interpreting California Civil Code sections 2628 and 2626, which were later adopted in their entirety as Insurance Code sections 532 and 530, respectively.

26. *Id.* at 372, 111 P. at 6.

27. *Id.* at 373, 111 P. at 6.

28. *Id.* at 372, 111 P. at 6.

29. *Id.* at 373, 111 P. at 6.

30. 27 Cal. 2d 305, 163 P.2d 689 (1945).

31. *Id.* at 306, 163 P.2d at 689-90.

32. *Id.* at 307, 163 P.2d at 690.

33. *Id.* at 309, 163 P.2d at 691. The insurance company apparently relied on a line of federal cases which precluded recovery if death would not have occurred as a result of the accident but for the insured's preexisting disease. *Id.*; *Ryan v. Continental Casualty Co.*, 47 F.2d 472 (5th Cir. 1931); *Commercial Travelers' Mut. Accident Ass'n v. Fulton*, 79 F. 423 (2d Cir. 1897).

surer from liability if the accident is the proximate cause of death . . . ”<sup>34</sup>  
The court defined proximate cause as the “prime or moving cause.”<sup>35</sup>

In 1967, in *Sabella v. Wisler*,<sup>36</sup> the California Supreme Court first enunciated the efficient proximate cause standard. There, the plaintiffs’ home was severely damaged due to the subsidence of the earth beneath it.<sup>37</sup> The defendant, National Union Fire Insurance Company, had issued the plaintiffs an “all physical loss” policy which excluded coverage for loss due to “settling, cracking, shrinkage, or expansion of pavements, foundations, walls, floors, or ceilings, unless loss by . . . collapse of buildings ensues.”<sup>38</sup> The plaintiffs’ home had been constructed on improperly filled and compacted soil due to the negligence of the defendant contractor Wisler.<sup>39</sup> Shortly thereafter, a sewer line ruptured near the home’s foundation causing water to escape and saturate the fill.<sup>40</sup> The trial court held that the cause of the ruptured sewer was either the settling of the earth upon which the sewer line was placed, the improper construction of the sewer line itself, or a combination of these two causes.<sup>41</sup> The trial court expressly held that the settling of the surrounding earth was due to the infiltration of water from the leaky sewer pipe,<sup>42</sup> but that the resulting damage to the insured home was caused by “settling” and was thus exempt from coverage under the policy.<sup>43</sup>

On appeal, the insurer denied liability based upon section 532 of the California Insurance Code.<sup>44</sup> The insurer argued that but for the operation of the excluded peril—settling—plaintiffs’ loss would not have occurred, and accordingly, the loss was exempt from coverage. The court rejected this argument stating that “section 532 must be read in conjunction with related section 530 of the Insurance Code.”<sup>45</sup>

The court maintained that the insurer’s construction of section 532—that loss proximately caused by an insured peril is exempt from coverage if the loss would not have occurred “but for” the operation of an excepted peril—is directly contrary to section 530 and would render

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34. *Brooks*, 27 Cal. 2d at 309, 163 P.2d at 691.

35. *Id.* at 310, 163 P.2d at 691.

36. 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

37. *Id.* at 24, 377 P.2d at 890, 27 Cal. Rptr. at 690.

38. *Id.* at 26, 377 P.2d at 891-92, 27 Cal. Rptr. at 691-92.

39. *Id.* at 24-25, 377 P.2d at 890-91, 27 Cal. Rptr. at 690-91.

40. *Id.* at 26, 377 P.2d at 892, 27 Cal. Rptr. at 692.

41. *Id.*

42. *Id.* at 26-27, 377 P.2d at 892, 27 Cal. Rptr. at 692.

43. *Id.* at 24, 377 P.2d at 890, 27 Cal. Rptr. at 690.

44. *Id.* at 33, 377 P.2d at 896, 27 Cal. Rptr. at 696.

45. *Id.* (citing *Pacific Heating & Ventilating Co. v. Williamsburg City Fire Ins. Co.*, 158 Cal. 367, 372, 111 P. 4, 6 (1910)); see *supra* notes 21-29.

that section meaningless.<sup>46</sup> Further, it reasoned that "the specially excepted peril alluded to in section 532 as that 'but for' which the loss would not have occurred, is the peril proximately causing the loss."<sup>47</sup>

The California Supreme Court found that "the rupture of the sewer line [was] attributable to the negligence of a third party, rather than settling, [and] was the efficient proximate cause of the loss."<sup>48</sup> The court held that:

[I]n determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.<sup>49</sup>

Following the *Sabella* decision, the efficient proximate cause analysis appeared to be the appropriate method for determining coverage under an "all-risk" policy.<sup>50</sup> No other standard was promulgated until ten years later.

46. *Sabella*, 59 Cal. 2d at 33, 377 P.2d at 896, 27 Cal. Rptr. at 696. Section 530 allows the insured to recover for losses proximately caused by an included peril even though an excluded peril may have been a remote cause of the loss. Thus, a "but for" construction of § 532 would negate the affordance of coverage under § 530. For example, in *Pacific Heating*, had the court applied a strict interpretation of § 532, the insured would not have been able to recover for the destruction of the insured property by fire (an included peril) because the fire was initially caused by an earthquake (an excluded peril). *Pacific Heating*, 158 Cal. at 369, 111 P. at 4. The loss was proximately caused by fire and only remotely caused by the earthquake; however, the damage to the insured property would not have occurred "but for" the earthquake. *Id.* at 371, 111 P. at 5. The court rejected a "but for" interpretation of § 532 stating that § 532 must be read in conjunction with § 530. *Id.* at 372, 111 P. at 6. The court held that the insured's loss was covered under the policy because it was proximately caused by the included peril fire, even though the excluded peril earthquake remotely contributed to the harm. *Id.* at 371, 111 P. at 5. Under the court's construction of §§ 530 and 532 the loss would *not* have been covered if the earthquake, rather than the fire, was the proximate cause of the loss. *Id.* See *supra* notes 21-29 and accompanying text for a discussion of the *Pacific Heating* case.

47. *Sabella*, 59 Cal. 2d at 33-34, 377 P.2d at 896, 27 Cal. Rptr. at 696. The *Sabella* court cited the *Brooks* rule as compelling the use of the efficient proximate cause standard for determining property insurance coverage, as well as life insurance coverage. *Id.* at 32, 377 P.2d at 896, 27 Cal. Rptr. at 696. See *supra* notes 30-35 and accompanying text for a discussion of *Brooks*.

48. *Id.* at 31, 377 P.2d at 895, 27 Cal. Rptr. at 695.

49. *Id.* at 31-32, 377 P.2d at 895, 27 Cal. Rptr. at 695.

50. See, e.g., *Gillis v. Sun Ins. Office, Ltd.*, 238 Cal. App. 2d 408, 47 Cal. Rptr. 868 (1965) (windstorm (included peril) rather than wave action (excluded peril) found to be dominant or efficient cause of insured's damaged dock); *Sauer v. General Ins. Co.*, 225 Cal. App. 2d 275, 37 Cal. Rptr. 303 (1964) (leaky waterpipe (included peril) rather than settling of the earth (excluded peril) efficient proximate cause of insured's loss).

## 2. The "concurrent cause" standard

In *State Farm Mutual Automobile Insurance Co. v. Partridge*,<sup>51</sup> State Farm Insurance Company (State Farm) issued the insured an automobile liability policy and a homeowner's policy.<sup>52</sup> The insured, Mr. Partridge, was subsequently held liable for the accidental shooting of a passenger in his vehicle which occurred while on a hunting trip.<sup>53</sup> Prior to the shooting Mr. Partridge had "modified" his .357 Magnum by filing down the trigger mechanism to produce a "hair trigger."<sup>54</sup> The accident occurred when the vehicle hit a bump in the road causing Partridge's gun to discharge within the automobile, injuring one of the passengers.<sup>55</sup>

State Farm admitted coverage under the automobile liability policy, but claimed the accident was not covered by the homeowner's liability policy because it excluded coverage for injuries arising out of the use of motor vehicles.<sup>56</sup> Partridge, on the other hand, contended that the exclusionary clause was inapplicable because both the negligent driving and the filing of the trigger mechanism were independent concurrent causes of the victim's injury.<sup>57</sup> The California Supreme Court agreed with the insured, holding that when an insured risk and an excluded risk "constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy."<sup>58</sup> The court stated that:

Although the accident occurred in a vehicle, the insured's negligent modification of the gun suffices, in itself, to render him fully liable for the resulting injuries. . . . [I]nasmuch as the liability of the insured arises from his non-auto-related conduct, and exists independently of any 'use' of his car, we believe the homeowner's policy covers that liability.<sup>59</sup>

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51. 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973).

52. *Id.* at 96, 514 P.2d at 124, 109 Cal. Rptr. at 812-13.

53. *Id.* at 98, 514 P.2d at 125-26, 109 Cal. Rptr. at 813-14.

54. *Id.* at 97, 514 P.2d at 125, 109 Cal. Rptr. at 813.

55. *Id.* at 98, 514 P.2d at 125, 109 Cal. Rptr. at 813.

56. *Id.* at 99, 514 P.2d at 126, 109 Cal. Rptr. at 814. The victim sought to recover \$500,000 in damages from Partridge and coverage under Partridge's automobile liability policy was limited to \$15,000. *Id.* at 98, 514 P.2d at 126, 109 Cal. Rptr. at 814.

57. *Id.* at 99, 514 P.2d at 126-27, 109 Cal. Rptr. at 814-15.

58. *Id.* at 102, 514 P.2d at 129, 109 Cal. Rptr. at 817.

59. *Id.* at 103, 514 P.2d at 129, 109 Cal. Rptr. at 817. The court used the following hypothetical to explain its conclusion:

If, after negligently modifying the gun, Partridge had lent it to a friend who had then driven his own insured car negligently, resulting in the firing of the gun and injuring of a passenger, both Partridge and his friend under traditional joint tortfeasor principles would be liable for the injury. In such circumstances, Partridge's personal liability would surely be covered by his homeowner's policy, and his friend's liability



The court briefly discussed the *Sabella* efficient proximate cause standard, but stated "that coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries."<sup>60</sup> The court emphasized that the concurrent cause analysis was an appropriate coverage determination standard under a *liability* policy, and did not speak to its applicability under any other type of policy.<sup>61</sup>

Approximately nine years after *Partridge*, the United States Court of Appeals for the Ninth Circuit, in dictum, appeared to sanction the use of the concurrent cause standard for determining coverage under a *first party* property insurance policy.<sup>62</sup> In *Safeco Insurance Co. of America v. Guyton*,<sup>63</sup> the insureds sustained property damage as a result of a flood caused by a hurricane.<sup>64</sup> The property owners held "all-risk" homeowner's policies that covered losses due to third party negligence, but excluded coverage for losses "CAUSED BY, RESULTING FROM, CONTRIBUTED TO OR AGGRAVATED BY" flood or flood waters.<sup>65</sup> The insurer denied the insureds' claims based on this exclusion and sought a declaratory judgment in federal district court that the language of the policies in question specifically excluded coverage for flood damage.<sup>66</sup> The insureds claimed that the negligence of the water district in maintaining the flood control system proximately caused the damage to the insureds' homes and was therefore covered under the policies as a loss resulting from third party negligence.<sup>67</sup>

The district court agreed with the insurer, holding that under the

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would be covered by automobile insurance. When viewed from this perspective, it can be seen that State Farm is presently attempting to escape liability under the homeowner's policy simply because, in the instant case, both negligent acts happened to have been committed by a single tortfeasor. In our view, this coincidence cannot defeat the insurer's obligation to indemnify the insured for liability arising from non-automobile risks.

*Id.*

60. *Id.* at 104-05, 514 P.2d at 130, 109 Cal. Rptr. at 818 (emphasis in original).

61. *Id.* at 102-05, 514 P.2d at 129-30, 109 Cal. Rptr. at 817-18. A liability policy is designed to cover damages awarded to third parties arising out of the negligence of the insured. The insurer becomes obligated to pay when a legally enforceable judgment has been rendered against the insured. See E. VAUGHN, *FUNDAMENTALS OF RISK AND INSURANCE* 445 (3d ed. 1982).

62. *Safeco Ins. Co. of Am. v. Guyton*, 692 F.2d 551 (9th Cir. 1982). A first party policy protects the holder against damage to the insured property caused by covered perils. Unlike the liability policy, which indemnifies the insured for injuries to third parties, the first party policy provides coverage for losses sustained by the insured himself.

63. *Id.*

64. *Id.* at 552.

65. *Id.* at 552-53.

66. *Id.* at 553. The suit was filed in federal court based on diversity. *Id.*

67. *Id.*

*Sabella* efficient proximate cause standard, even if the negligence of the water district was a proximate cause of the losses in question, the flood was the "efficient" proximate cause such that the exclusionary clause contained in the policy was fully operational.<sup>68</sup>

On appeal the circuit court found that the district court had "misinterpreted California law," and declined to use the *Sabella* standard stating that under the facts presented its application "appears forced and arbitrary."<sup>69</sup> The court instead applied *Partridge's* concurrent proximate cause standard, and found that it was dispositive in the policyholder's favor.<sup>70</sup> The court determined that the exclusionary clause would not apply if the Water District's negligence was a proximate cause of the loss.<sup>71</sup> The court failed to mention that in *Partridge* the concurrent proximate cause standard had been applied to a *liability* policy, not to a first party property insurance policy, such as that issued by the defendant insurer in *Guyton*.<sup>72</sup>

Only one year later the California court of appeal, in *Premier Insurance Co. v. Welch*,<sup>73</sup> embraced the *Guyton* court's use of the concurrent proximate cause standard for determining coverage under first party policies.<sup>74</sup> In *Premier*, a case factually similar to *Sabella*, the insured's home was destroyed in a landslide caused by the negligent installation of a subdrain beneath the home, in conjunction with particularly heavy rains.<sup>75</sup> The insured's policy contained the standard exclusion for damage caused by water movement of any kind.<sup>76</sup> The insurer denied coverage based

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68. *Id.*

69. *Id.* at 554 n.3.

70. *Id.* at 555.

71. *Id.*

72. *Partridge*, 10 Cal. 3d at 104-05, 514 P.2d at 130, 109 Cal. Rptr. at 818. See *infra* notes 128-45 and accompanying text for a discussion of the significance of extending the concurrent cause standard to first party policies.

73. 140 Cal. App. 3d 720, 189 Cal. Rptr. 657 (1983).

74. *Id.* at 727-28, 189 Cal. Rptr. at 661-62.

75. *Id.* at 722-23, 189 Cal. Rptr. at 658.

76. *Id.* at 723, 189 Cal. Rptr. at 659. The policy read as follows:

Exclusions:

THIS POLICY DOES NOT INSURE AGAINST LOSS:

1. CAUSED BY, RESULTING FROM, CONTRIBUTED TO OR AGGRAVATED BY ANY OF THE FOLLOWING:

(A) FLOOD, SURFACE WATER, WAVES, TIDAL WATER OR TIDAL WAVES, OVERFLOW OF STREAMS OR OTHER BODIES OF WATER, OR SPRAY FROM ANY OF THE FOREGOING, ALL WHETHER DRIVEN BY WIND OR NOT;

(B) WATER WHICH BACKS UP THROUGH SEWERS OR DRAINS; OR

(C) WATER BELOW THE SURFACE OR THE GROUND INCLUDING THAT WHICH EXERTS PRESSURE ON OR FLOWS, SEEPS OR LEAKS THROUGH SIDEWALKS, DRIVEWAYS, FOUNDATIONS, WALLS, BASEMENT OR OTHER FLOORS OR THROUGH DOORS, WINDOWS, OR ANY OTHER OPENINGS IN SUCH SIDEWALKS, DRIVEWAYS, FOUNDATIONS, WALLS, OR FLOORS; UNLESS LOSS BY FIRE OR EXPLOSION ENSUES,

upon this exclusion. The trial court agreed, finding the heavy rainfall to be the "efficient proximate cause" of the loss.<sup>77</sup> The court of appeal disagreed with the trial court's analysis under the efficient proximate cause theory and reversed, stating that "[w]hile it is true that the heavy rainfall was the first link in the causal sequence, the immediate or proximate cause of loss was the damage to the drain which set in motion the chain of events leading to the ultimate destruction of the dwelling."<sup>78</sup>

Although the court utilized the efficient proximate cause standard, in dictum, the court stated that, in the alternative,

the damaged subdrain was, at the very least, a concurrent proximate cause of the property loss incurred by appellants which ipso facto gave rise to respondent's liability in spite of the fact that the rainfall, an excluded peril, and the earth movement resulting therefrom may also have constituted a proximate cause.<sup>79</sup>

The court cited *Partridge* and *Guyton* as supporting its position.<sup>80</sup>

The emergence of concurrent causation as the appropriate standard continued in *Farmers Insurance Exchange v. Adams*,<sup>81</sup> a recent case addressing the multiple causation issue.

### III. *FARMERS INSURANCE EXCHANGE V. ADAMS*: STATEMENT OF THE CASE

In *Farmers Insurance Exchange v. Adams*,<sup>82</sup> the California court of appeal grappled with the question of whether the efficient proximate cause analysis "is necessarily the only analysis to be utilized in determining an insurer's liability for loss under an all-risk homeowner's policy."<sup>83</sup> The insureds' property was damaged due to "earth movement" following an unusually heavy rainstorm.<sup>84</sup> The policies in question excluded losses due to earth movement or water damage, but permitted coverage for losses due to third party negligence.<sup>85</sup> The insurer sought a declaratory judgment that the damage to the insureds' property was not covered

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AND THIS COMPANY SHALL THEN BE LIABLE ONLY FOR SUCH ENSUING LOSS,  
BUT THESE EXCLUSIONS DO NOT APPLY TO LOSS BY THEFT.

*Id.*

77. *Id.*

78. *Id.* at 725, 189 Cal. Rptr. at 660.

79. *Id.* at 727, 189 Cal. Rptr. at 661.

80. *Id.*

81. 170 Cal. App. 3d 712, 216 Cal. Rptr. 287 (1985).

82. *Adams*, 170 Cal. App. 3d 712, 216 Cal. Rptr. 287 (1985).

83. *Id.* at 716, 216 Cal. Rptr. at 289.

84. *Id.*

85. *Id.*

under the policy because the "efficient proximate cause" of the loss was earth movement, an excluded cause.<sup>86</sup>

The court of appeal rejected the insurer's assertion that the efficient proximate cause standard was the sole analysis applicable to multiple causation cases.<sup>87</sup> The court discussed the history of the efficient proximate cause standard beginning with *Sabella v. Wisler*,<sup>88</sup> but stated that its existence did not "foreclos[e] the likelihood of 'a concurrent proximate cause' analysis being applied to an appropriate factual situation."<sup>89</sup> The court stated that "[t]he *Partridge, Premier* and *Safeco* cases reveal that in an appropriate case coverage may be found not only where the included risk is the efficient or moving cause of the harm, but also where an included risk is a concurrent proximate cause of the harm."<sup>90</sup> The court concluded, on the basis of *Premier Insurance Co. v. Welch* and *Safeco Insurance Co. of America v. Guyton* that the insureds were covered if they could prove that third party negligence, an included peril, was a "concurrent proximate cause" of the loss.<sup>91</sup> The court, however, did not overrule the efficient proximate cause standard, stating instead that a blanket declaration in favor of any one standard was inappropriate given the numerous claims involved (over 300), each with varying fact patterns.<sup>92</sup>

#### IV. ANALYSIS

In the wake of *Farmers Insurance Exchange v. Adams*,<sup>93</sup> the viability of *Sabella v. Wisler*'s<sup>94</sup> efficient proximate cause standard has been cast in doubt. Because the concurrent cause theory is a broader standard of coverage, a peril that rises to the level of an efficient proximate cause will also meet the "concurrent cause" test. Thus, the efficient proximate cause standard becomes superfluous.

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86. *Id.* at 715-16, 216 Cal. Rptr. at 289.

87. *Id.* at 718, 216 Cal. Rptr. at 291.

88. 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

89. *Adams*, 170 Cal. App. 3d at 718-19, 216 Cal. Rptr. at 291. The *Adams* court cited the court of appeal's decision in *Gillis v. Sun Ins. Office, Ltd.*, 238 Cal. App. 2d 408, 47 Cal. Rptr. 868 (1965), as expressly limiting the application of the efficient proximate cause standard to fact patterns similar to those of *Sabella* and its progeny. *Adams*, 170 Cal. App. 3d at 718-19, 216 Cal. Rptr. at 291.

90. *Adams*, 170 Cal. App. 3d at 722, 216 Cal. Rptr. at 294 (emphasis in original).

91. *Id.* (citing *Premier Ins. Co. v. Welch*, 140 Cal. App. 3d 720, 189 Cal. Rptr. 657 (1983) and *Safeco Ins. Co. of Am. v. Guyton*, 692 F.2d 551 (9th Cir. 1982)).

92. *Id.* at 715, 722, 216 Cal. Rptr. at 289, 294.

93. 170 Cal. App. 3d 712, 216 Cal. Rptr. 287 (1985).

94. 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

A. *Sections 530 and 532 of the California Insurance Code*

A major controversy surrounding the concurrent cause standard concerns its impact on sections 530 and 532 of the California Insurance Code. The court in *Farmers Insurance Exchange v. Adams*,<sup>95</sup> like its predecessors, failed to adequately address this issue.

In *Sabella v. Wisler*, the California Supreme Court held that if a strict construction of section 532 were allowed:

where an excepted peril operated to any extent in the chain of causation so that 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 the proximate cause of the loss. Such a result would be directly contrary to the provision in section 530, in accordance with the general rule, for liability of the insurer where the peril insured against proximately results in the loss.<sup>96</sup>

Thus, the court explained, sections 530 and 532 must be read in conjunction with one another, such that the excluded peril without "which the loss would not have occurred, is the peril proximately causing the loss."<sup>97</sup> Thus, coverage is denied only where the excluded peril is the proximate cause of the loss. This interpretation of sections 530 and 532 gives meaning to two seemingly irreconcilable provisions in the law, and prevents insurers from statutorily expanding the scope of the exclusions contained in their policies.<sup>98</sup>

95. 170 Cal. App. 3d 712, 216 Cal. Rptr. 287 (1985).

96. 59 Cal. 2d 21, 33, 377 P.2d 889, 896, 27 Cal. Rptr. 689, 696 (1963) (citation omitted).

97. *Id.* at 33-34, 377 P.2d at 896, 27 Cal. Rptr. at 696 (citation omitted). The *Sabella* interpretation of §§ 530 and 532 is not without precedent. In *Pacific Heating and Ventilating Co. v. Williamsburgh City Fire Ins. Co.*, 158 Cal. 367, 372, 111 P. 4, 6 (1910), the court held that §§ 2626 and 2628 of the California Civil Code (from which Insurance Code §§ 530 and 532 were adopted) must be read in conjunction with one another. See *supra* notes 25-26 and accompanying text for full discussion. The *Pacific Heating* court, as did the court in *Sabella*, refused to broaden the scope of the policy exception in question by applying a strict construction of the "but for" language of § 2628. *Pacific Heating*, 158 Cal. at 373, 111 P. at 6.

98. *Sabella*, 59 Cal. 2d at 33, 377 P.2d at 896, 27 Cal. Rptr. at 696. In *Pacific Heating*, the insured's policy only excluded loss by fire directly caused by an earthquake, not, as was the case, loss by fire *remotely* resulting therefrom. 158 Cal. at 373, 111 P. at 6. A strict application of then § 2628 would have expanded the scope of the exclusion to include losses in any way contributed to by earthquake no matter how remote its effects, so long as the loss would not have occurred without it. *Id.* The court rejected this interpretation stating that while it was their duty to "carry out the contracts as made by the parties . . . , [the court must], at the same time, prevent if possible the exceptions and conditions from wholly devouring the policy." *Id.* at 370, 111 P. at 5. The court noted that "the plain common-sense reading of the policy would convey no information to plaintiff that he could not recover if the cause of the fire was an earthquake." *Id.* at 371, 111 P. at 5.

In enunciating the concurrent cause standard, the court in *State Farm Mutual Automobile Insurance Co. v. Partridge*<sup>99</sup> engaged in only a cursory discussion of sections 530 and 532, which it relegated to a single footnote.<sup>100</sup> There, the court asserted that its "concurrent cause" standard was "consistent with Insurance Code sections 530 and 532, as authoritatively construed in *Sabella v. Wisler . . .*"<sup>101</sup> The court then discussed *Sabella's* rejection of the strict "but for" interpretation of section 532 sought by the insurer. However, the court made no attempt to explain how the concurrent cause standard was consistent with section 532 when read in conjunction with section 530, as required by *Sabella*.<sup>102</sup>

To a certain extent, an examination of the relevant Insurance Code sections in light of the concurrent cause standard becomes an exercise in semantics. Section 530 speaks in terms of proximate and remote causes.<sup>103</sup> Accordingly, in order to give both sections effect, section 532 must also be construed in terms of proximate and remote perils.<sup>104</sup> Under *Sabella*, the insured's claim will not be covered if the excepted "but for" peril was the proximate cause of the loss.<sup>105</sup> Under the concurrent cause standard, however, "coverage is available whenever an insured risk constitutes a proximate cause . . . , even if an excluded risk is a concurrent proximate cause. . . ." <sup>106</sup> The concurrent cause standard renders section 532 virtually meaningless. It would only apply to deny coverage when all of the "but for" proximate causes are excluded.<sup>107</sup> If all proximate causes of a loss are excluded (i.e., none of the included perils have risen to the level of a proximate cause) then section 532 is needless since there is no dispute regarding coverage. Under the express terms of the policy, the loss is excluded.<sup>108</sup> Thus, section 532 becomes superfluous. This is contrary to the general rule that a statute must be interpreted in a manner which gives it meaning and validity,<sup>109</sup> yet *Partridge, Safeco Insurance Co. of America v. Guyton, Premier Insurance Co. v.*

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99. 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973).

100. *Id.* at 105 n.11, 514 P.2d at 130 n.11, 109 Cal. Rptr. at 818 n.11.

101. *Id.*

102. *Id.*

103. See CAL. INS. CODE § 530 (West 1972).

104. See *Partridge*, 10 Cal. 3d at 105 n.11, 514 P.2d at 130 n.11, 109 Cal. Rptr. at 818 n.11; *Sabella*, 59 Cal. 2d at 33, 377 P.2d at 896, 27 Cal. Rptr. at 696.

105. *Sabella*, 59 Cal. 2d at 33, 377 P.2d at 896, 27 Cal. Rptr. at 696.

106. *Partridge*, 10 Cal. 3d at 105 n.11, 514 P.2d at 130 n.11, 109 Cal. Rptr. at 818 n.11.

107. See O. Becker, P. Levin, & C. Holland, *supra* note 18, at 50. So long as an included concurrent proximate cause exists, § 532 will not apply. *Id.*

108. *Id.*

109. See *Turner v. Board of Trustees, Calexico Unified School Dist.*, 16 Cal. 3d 818, 548 P.2d 1115, 129 Cal. Rptr. 443 (1976).

*Welch*<sup>110</sup> and *Adams* failed to discuss the viability of section 532 under a concurrent cause interpretation.<sup>111</sup>

### B. *The Scope of the Concurrent Cause Standard*

Another criticism of the concurrent cause standard concerns the undefined scope of its application. In *Farmers Insurance Exchange v. Adams*,<sup>112</sup> the court stated that "in an appropriate case coverage may be found not only where the included risk is the efficient or moving cause of the harm, but also where an included risk is a concurrent proximate cause of the harm."<sup>113</sup> The *Adams* decision, however, does not indicate when it is "appropriate" to apply the concurrent cause standard, which leaves insurers without guidance in handling future claims. Apparently, the court assumed the application of the concurrent cause standard was clear. An examination of the cases preceding *Adams*, however, illustrates that courts have applied the concurrent cause standard in a variety of factual settings and not on a consistent basis.

In *State Farm Mutual Automobile Insurance Co. v. Partridge*,<sup>114</sup> the court applied the concurrent cause standard to a liability policy where the insured's negligent acts, one an included peril and the other an excluded peril, operated simultaneously to produce the harm.<sup>115</sup> This standard was also employed in *Safeco Insurance Co. of America v. Guyton*,<sup>116</sup> to afford coverage under first party policies where the negligent maintenance of the flood control system combined with heavy rains and flood-

110. *Premier*, 140 Cal. App. 3d 720, 189 Cal. Rptr. 657 (1983).

111. Instead, the *Partridge* court maintained that its holding was supported by dictum found in *Hughes v. Potomac Insurance Co.*, 199 Cal. App. 2d 239 (1962), which stated that "[i]t has been held that when two causes join in causing an injury, one of which is insured against, the insured is covered by the policy. . . ." *Partridge*, 10 Cal. 3d at 105, 514 P.2d at 131, 109 Cal. Rptr. at 819 (quoting *Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239, 244, 18 Cal. Rptr. 650, 652 (1962) (citing *Zimmerman v. Continental Ins. Co.*, 99 Cal. App. 723, 726, 279 P. 464, 465 (1929))). However, in both *Hughes* and *Zimmerman*, from which this assertion originated, the court found in favor of the insured based upon the application of the *efficient proximate cause standard*. *Hughes*, 199 Cal. App. 2d at 244, 18 Cal. Rptr. at 652; *Zimmerman*, 99 Cal. App. at 726, 279 P. at 465. In *Zimmerman*, immediately following the dictum in question, in fact in the same sentence, the court held that "while from the nature of the accident and other circumstances shown different conclusions might be drawn, the inference which appears to have been drawn by the trial court that the insured was struck by the car is not unreasonable and is supported by the evidence. 99 Cal. App. at 726, 279 P. at 465. The court's holding is consistent with the efficient proximate cause standard.

112. 170 Cal. App. 3d 712, 216 Cal. Rptr. 287 (1985).

113. *Id.* at 722, 216 Cal. Rptr. at 294 (emphasis in original).

114. 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973).

115. *Id.* at 104-05, 514 P.2d at 130, 109 Cal. Rptr. at 818.

116. 692 F.2d 551 (9th Cir. 1982).

ing to concurrently cause the insureds' losses.<sup>117</sup> In both *Partridge* and *Safeco* the simultaneous operation of an included peril and an excluded peril was held to have caused the loss and, thus, triggered the application of the concurrent cause standard.<sup>118</sup>

In the next case to examine the multiple causation issue, *Premier Insurance Co. v. Welch*,<sup>119</sup> a case factually similar to *Sabella v. Wisler*,<sup>120</sup> the court held that the negligent installation of a subdrain (an included peril), rather than the heavy rainfall (an excluded peril) was the "efficient cause of the loss."<sup>121</sup> In dictum, the court additionally stated that:

[T]he judgment at bench must be reversed for the second reason spelled out by [the insureds]: i.e., that the damaged subdrain was, at the very least, a concurrent proximate cause of the property loss incurred by appellants which ipso facto gave rise to respondent's liability in spite of the fact that the rainfall, an excluded peril, and the earth movement resulting therefrom may also have constituted a proximate cause.<sup>122</sup>

In stating that the concurrent cause standard would also apply, the *Premier* court expanded the standard's application. The unifying principle of *Partridge* and *Safeco* lay in the temporal connection between the concurrent causes—simultaneous occurrence. Yet in *Premier* the negligence preceded the operation of the excluded peril.<sup>123</sup>

The confusion regarding the applicability of each standard has not been resolved in subsequent decisions, including *Adams*. The *Adams* court attempted to distinguish the applicability of each standard on temporal grounds (i.e., whether the operation of the included peril preceded or occurred simultaneously with the excluded peril).<sup>124</sup> Yet the court approved *Premier's* application of both standards in a situation which, if

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117. *Id.* at 553-55. The negligence which gave rise to the insurer's liability in *Safeco* can be distinguished from that which occurred in *Sabella*, in which the court applied the efficient proximate cause standard. See *id.*; see also *Sabella v. Wisler*, 59 Cal. 2d 21, 26, 377 P.2d 889, 892, 27 Cal. Rptr. 689, 692 (1963). In *Sabella* both the negligent compaction of the soil beneath the insured's house and the negligent installation of the sewer line occurred prior to the operation of the excluded peril. *Id.* at 24-27, 377 P.2d at 891-92, 27 Cal. Rptr. at 691-92. In *Safeco*, the city's failure to properly maintain the flood control system was a continuing act of negligence which occurred simultaneously with the excluded peril to produce the harm. *Safeco*, 692 F.2d at 553-55.

118. *Safeco*, 692 F.2d at 553-55; *Partridge*, 10 Cal. 3d at 104-05, 514 P.2d at 130, 109 Cal. Rptr. at 818.

119. 140 Cal. App. 3d 720, 189 Cal. Rptr. 657 (1983).

120. 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

121. *Premier*, 140 Cal. App. 3d at 725, 189 Cal. Rptr. at 660.

122. *Id.* at 727, 189 Cal. Rptr. at 661.

123. *Id.* at 725, 189 Cal. Rptr. at 660.

124. *Adams*, 170 Cal. App. 3d at 718, 216 Cal. Rptr. at 291.



based upon a temporal distinction, would have required the use of the efficient cause standard by itself.<sup>125</sup> It appears, however, that the courts—including *Adams*—are now treating the dictum contained in *Premier* as an alternative holding prescribing insurer liability any time an included concurrent proximate cause can be identified.<sup>126</sup> The insured need no longer show that the included peril was the “dominant or efficient cause” of the loss. It is enough that the excluded peril is a concurrent proximate cause.<sup>127</sup>

### C. *The Application of the Concurrent Proximate Cause Standard to First Party Insurance*

The decision to apply the concurrent proximate cause standard to first party property insurance has been widely criticized.<sup>128</sup> The court in *State Farm Mutual Automobile Insurance Co. v. Partridge*,<sup>129</sup> which first adopted this standard, specifically held that it was to apply to coverage determinations under a “liability insurance policy.”<sup>130</sup> Yet, the Ninth Circuit in *Safeco Insurance Co. of America v. Guyton*,<sup>131</sup> and later the California court of appeal in *Premier Insurance Co. v. Welch*<sup>132</sup> extended the application of the concurrent cause standard to include first party policies without *any* discussion of the possible consequences of this extension, in fact, without any discussion at all.<sup>133</sup> While extending the efficient proximate cause standard to first party property insurance is not clearly erroneous, the court owes at least some explanation of why the extension was merited. Unfortunately, subsequent decisions, including *Farmers Insurance Exchange v. Adams* have also failed to justify this extension.

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125. *Id.* at 720-21, 216 Cal. Rptr. at 292-93. The court’s attempted temporal distinction regarding the applicability of each standard is arbitrary and unnecessary. To predicate liability on the order of occurrence of multiple perils leaves the issue of coverage to be decided by fortuity, a result which undermines the goal of contracting parties—certainty.

126. *Id.* at 722, 216 Cal. Rptr. at 293.

127. *See, e.g., id.*, 216 Cal. Rptr. at 294; *Premier*, 140 Cal. App. 3d at 727, 189 Cal. Rptr. at 661.

128. *See, e.g., Bragg, Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385 (1985).

129. 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973).

130. *Id.* at 104-05, 514 P.2d 123, 130, 109 Cal. Rptr. 811, 818 (1973).

131. 692 F.2d 551 (9th Cir. 1982).

132. 140 Cal. App. 3d 720, 189 Cal. Rptr. 657 (1983).

133. *See Safeco*, 692 F.2d at 555; *Premier*, 140 Cal. App. 3d at 727-28, 189 Cal. Rptr. at 661-62. It is important to note that the decisions of the circuit court are not binding upon the state courts contained in the area of their federal jurisdiction. Yet, the California Court of Appeal in *Premier* cited *Safeco* as dispositive in the insured’s favor. *Premier*, 140 Cal. App. 3d at 728, 189 Cal. Rptr. at 662.

### 1. Distinguishing first party and third party policies

In an effort to demonstrate the impropriety of enlarging the application of the concurrent cause standard, insurance industry advocates have attempted to distinguish liability and first party policies.<sup>134</sup> They assert that under a first party policy, coverage determinations are based upon contract principles.<sup>135</sup> Coverage is not predicated on fault but on the occurrence of a peril intended to be covered by the contract.<sup>136</sup> Under a liability policy, however, insurance company attorneys have argued that:

[T]he right to indemnity . . . does not arise upon the happening of a physical event . . . . Rather, coverage is provided only if the insured is found legally liable based upon principles of tort law. Such a coverage determination turns on an examination of tort principles of liability. . . . Those courts which have dealt with this distinction have focused on the difference between duty, foreseeability and fault on the one hand, and the reasonable expectations of the insured and insurer on the other.<sup>137</sup>

Insurance advocates find support for their argument in *Bird v. St. Paul Fire and Marine Insurance Co.*,<sup>138</sup> in which Justice Cardozo stated that:

in the law of torts . . . there is a tendency to go farther back in the search for causes than there is in the law of contracts. Especially in the law of insurance, the rule is that, "You are not to trouble yourself with distant causes." "In an action on a policy, the *causa proxima* is alone considered in ascertaining the cause of loss; but in cases of other contracts and in questions of tort the *causa causans* is by no means disregarded."<sup>139</sup>

Thus, industry advocates assert that under insurance contracts the concept of causation is wedded to the reasonable expectations of the parties, while under liability policies causation is determined strictly upon tort principles.

These attempted distinctions are unpersuasive. First, under a liability policy, the initial finding of the insured's liability is clearly decided upon principles of tort law. But whether a particular tort liability is covered by the policy, is determined, as is coverage under a first party policy,

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134. See, e.g., O. Becker, P. Levin & C. Holland, *supra* note 18, at 42-44; Bragg, *supra* note 128, at 386.

135. O. Becker, P. Levin & C. Holland, *supra* note 18, at 42-44.

136. *Id.*

137. *Id.* at 43-44.

138. 224 N.Y. 47, 120 N.E. 86 (1918).

139. *Id.* at 49, 120 N.E. at 88 (quoting *Fenton v. Thorley & Co.*, A.C. 443, 454 (1903)).

upon principles of contract law.<sup>140</sup> While still a *causa proxima*, the efficient cause is a tort-like concept and, as such, blurs the theoretical purity between tort and contract.

Finally, looking to the parties' intentions as suggested by insurance company attorneys, is not the answer it appears to be. Given insurance sales methods and the adhesive nature of insurance contracts, the expectations of the parties may not be reflected in the contract.<sup>141</sup> Even if coverage against flood or earthquake is available at an additional premium, the consumer's failure to purchase such coverage may not be an informed decision.<sup>142</sup> The purchaser may not have been adequately informed of what perils were not covered, and may not have received information as to the availability of additional coverage.<sup>143</sup>

## 2. The economic impact of extending the concurrent cause standard from first party to third party policies

A better argument counseling against the use of the concurrent cause standard for coverage determinations under first party policies can be found in the economic impact of its application. The overall economic effects of utilizing the concurrent cause standard in connection with liability policies are minimal. In *Partridge*, the use of the concurrent cause standard was necessary to provide coverage under a rather bizarre set of circumstances.<sup>144</sup> The insured committed two negligent acts (filing the trigger of his gun and driving recklessly); the latter falling squarely within an exclusion of the policy.<sup>145</sup> Such a situation is unlikely to occur with great frequency, and the concurrent cause standard is equally unlikely to affect coverage determinations under most homeowners' liability policies.

The concurrent cause standard, however, may affect coverage under virtually every first party property insurance policy issued in this state. The destruction of insured property is frequently caused by the operation of multiple perils and thus may trigger the application of the concurrent cause standard. Each new claim presented to the insurer must now be

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140. See E. VAUGHAN, *supra* note 61, at 445.

141. See *infra* notes 172-75 and accompanying text for a discussion of insurance policies and sales methods.

142. See *infra* note 175 and accompanying text for a discussion of earthquake coverage at additional premiums.

143. See *infra* note 175 and accompanying text for a discussion of a possible way to insure the protection of the parties' reasonable expectations.

144. *Partridge*, 10 Cal. 3d at 97-98, 514 P.2d at 125-26, 109 Cal. Rptr. at 813-14. See *supra* notes 51-53 and accompanying text for a discussion of *Partridge*.

145. *Partridge*, 10 Cal. 3d at 98-99, 514 P.2d at 126-27, 109 Cal. Rptr. at 814.

examined in light of this broad coverage standard. Accordingly, insurance companies may face extended liability on a potentially overwhelming number of claims.

## V. THE AFTERMATH OF THE ADAMS DECISION

The significance of *Farmers Insurance Exchange v. Adams*<sup>146</sup> lies in its uncritical acceptance of the concurrent cause line of cases, which have expanded liability for insurers. Dispensing with potentially arbitrary temporal distinctions, the concurrent cause analysis assesses liability any time an included peril rises to the level of a proximate cause, even though it may not have been the primary or dominant cause of the harm.<sup>147</sup> By eliminating the requirement that the included peril be the dominant cause of the harm, the court has removed the element of fairness from the coverage determination process. The court in *Sabella v. Wisler*<sup>148</sup> sought to preserve this element—for the insured—when it refused to adopt a construction of California Insurance Code section 532 which would have denied coverage every time the loss would not have occurred “but for” the operation of an excluded peril, no matter how remote its effects.<sup>149</sup> The strict “but for” construction of section 532 was patently unfair in that it could be invoked to deny coverage in practically every instance of concurrent causation, even though the proximate cause of the harm was an included peril.<sup>150</sup> By the same token, the concurrent cause standard is unfair to the insurer in that it will almost always establish insurer liability since the insured peril need no longer be the primary cause of the loss. This is particularly true given that third party negligence is considered an included peril. If a home fails to withstand the forces of nature, it could be claimed, arguably, to have been negligently constructed. Similarly, the existence of a flood control system which later fails could be considered evidence of negligent construction, maintenance or planning. The ease with which one can point to third party negligence as a proximate cause of a loss illustrates the need for a fairness requirement to avoid the kind of lopsided determinations which the *Sabella* court found unacceptable.<sup>151</sup>

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146. *Farmers Ins. Exch. v. Adams*, 170 Cal. App. 3d 712, 216 Cal. Rptr. 287 (1985).

147. *See State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94, 104-05, 514 P.2d 123, 130-31, 109 Cal. Rptr. 811, 818-19 (1973).

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

149. *Id.* at 33, 377 P.2d at 896, 27 Cal. Rptr. at 696.

150. *Id.*

151. An underlying problem is the doctrinal weakness of proximate cause. Proximate cause has never really been more than a legal conclusion that justified a court's decision. If the court wanted to find liability, the negligent act was proximate; if liability was not to be imposed the

Given the current state of the law, an insurer's attempts to deny liability on the mistaken belief that the *Sabella* standard is applicable to a particular claim, may prove extremely improvident.<sup>152</sup> The insurer is left with two alternatives: either provide coverage whenever third party negligence can be found; or litigate each claim and face the possibility of a bad faith award with every defeat. Neither alternative is an attractive one.

#### A. *The Independent Concurrent Proximate Cause Standard*

As *State Farm Mutual Automobile Insurance Co. v. Partridge*<sup>153</sup> and *Safeco Insurance Co. of America v. Guyton*<sup>154</sup> illustrate, it is not always possible to identify the efficient or moving cause of a loss as required by the *Sabella v. Wisler* standard.<sup>155</sup> Accordingly, it is unfair to force the judiciary to make arbitrary decisions when a standard becomes unworkable in a given situation. However, the concurrent cause standard, as articulated in *Partridge*, is broad and highly susceptible to an expansive interpretation.<sup>156</sup>

One court's recent response, in *Garvey v. State Farm Fire and Casualty Co.*, was to require the included and excluded perils to be independent proximate causes of the harm in order to satisfy the *Partridge* standard.<sup>157</sup> This construction has surface appeal. If the causes are not independent, the *Sabella* standard applies to distinguish the "moving or efficient cause."<sup>158</sup> The *Garvey* court finds support for its "independence" requirement in *Partridge* itself, in which the court referred to the insured's negligent acts as "independent, concurrent proximate causes" of the victim's injuries.<sup>159</sup> The *Partridge* court held, however, that cover-

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negligent act was remote. Without an identifiable internal structure or guiding principles proximate causation remains an inconsistent standard.

152. Adding insult to injury, if an insurer attempts to assert the contractual rights justifiably thought to exist under the clear language of the policy, the insurer may be penalized in the form of an action for breach of the covenant of good faith and fair dealing. See *Garvey v. State Farm Fire & Casualty Co.*, 181 Cal. App. 3d 929, 227 Cal. Rptr. 209 (1986), *review granted*, Sept. 18, 1986 (SF25060); see *infra* notes 153-71 and accompanying text for a discussion of *Garvey*. Even if the bad faith claim is determined to be frivolous, it has nuisance value and may be costly to the insurer in terms of both money and loss of reputation.

153. 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973).

154. 692 F.2d 551 (9th Cir. 1982).

155. 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

156. The literal slippery slope.

157. *Garvey v. State Farm Fire & Casualty Co.*, 181 Cal. App. 3d 929, 227 Cal. Rptr. 209 (1986), *review granted*, Sept. 18, 1986 (SF25060).

158. *Id.* at 935-37, 227 Cal. Rptr. at 214-15.

159. *Partridge*, 10 Cal. 3d at 99, 514 P.2d at 127, 109 Cal. Rptr. at 815; see also *Garvey*, 181 Cal. App. 3d at 935 n.5, 227 Cal. Rptr. at 213 n.5. The *Partridge* court further stated that

age was available "whenever an insured risk constitutes simply a concurrent proximate cause" of the harm.<sup>160</sup> Yet the *Garvey* court presumptively states that the *Partridge* opinion must be viewed as a whole, compelling the conclusion reached by "every other court that has faced the question, that the covered risk must exist independently of the excluded risk before policy coverage may be found under *Partridge's* concurrent proximate cause analysis."<sup>161</sup>

The court cites numerous decisions as supporting an independent concurrent cause standard in an attempt to demonstrate the uniformity of its application.<sup>162</sup> A close examination of the cases, however, reveals past inconsistency. For example, in *National Indemnity Co. v. Farmers Home Mutual Insurance Co.*,<sup>163</sup> the insured negligently allowed a child she was babysitting to leave her car and run into the street where the child was struck and killed by a passing car.<sup>164</sup> The court held that the insured's failure to supervise the child (an included peril) was not independent of the use of the automobile (an excluded peril).<sup>165</sup> In other words, the insured's failure to supervise was negligent only in relation to the danger posed by the use of the automobile.<sup>166</sup> But in *Ohio Casualty Insurance Co. v. Hartford Accident and Indemnity Co.*,<sup>167</sup> a case factually similar to *National Indemnity*, the opposite conclusion was reached.<sup>168</sup> In *Ohio Casualty*, the insured negligently allowed a young girl to dive from his boat into a lake where she was immediately run over by another boat.<sup>169</sup> The court found that the insured's failure to adequately survey the surrounding area while he was responsible for the girl's safety (a covered risk) was independent of her dive from the boat (an excluded risk)

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"[t]here were two separate, distinct and different acts of negligence committed by [the insured], one of which was entirely disconnected with the use of a motor vehicle [the excluded peril]." *Partridge*, 10 Cal. 3d at 100, 514 P.2d at 127, 109 Cal. Rptr. at 815; see also *Garvey*, 181 Cal. App. 3d at 934, 227 Cal. Rptr. at 212.

160. *Partridge*, 10 Cal. 3d at 104-05, 514 P.2d at 130, 109 Cal. Rptr. at 818.

161. *Garvey*, 181 Cal. App. 3d at 935, 227 Cal. Rptr. at 213. The court of appeal goes so far as to claim that the independence requirement was implicit in its decision in *Premier Insurance Co. v. Welch*, where the court articulated its alternative holding that coverage was available to the insured under both the efficient proximate cause standard and the concurrent cause standard. *Id.* at 936, 942-43, 227 Cal. Rptr. at 218; see *supra* notes 119-23 and accompanying text for a discussion of the *Premier* decision. An examination of *Premier* reveals that the *Garvey* court is unreasonably attempting to stretch the *Premier* holding.

162. *Garvey*, 181 Cal. App. 3d at 938-41, 227 Cal. Rptr. at 215-17.

163. 95 Cal. App. 3d 102, 157 Cal. Rptr. 98 (1979).

164. *Id.* at 104-05, 157 Cal. Rptr. at 99-100.

165. *Id.* at 108-09, 157 Cal. Rptr. at 102.

166. *Id.*

167. 148 Cal. App. 3d 641, 196 Cal. Rptr. 164 (1983).

168. *Id.* at 647-48, 196 Cal. Rptr. at 168-69.

169. *Id.* at 643, 196 Cal. Rptr. at 165.

and awarded coverage under the insured's policy.<sup>170</sup> The results of these two cases are clearly at odds, and the *Garvey* court does little more than assert that *National Indemnity* was improperly decided.<sup>171</sup>

Still, *Garvey* attempts to limit the applicability of the concurrent cause standard, and perhaps represents a step in the right direction. The new standard is theoretically appealing. Unfortunately, even with the addition of an independence requirement the potential for arbitrary line drawing remains.

*B. Guarding the Parties' Reasonable Expectations: A Written Declaration of Policy Exceptions*

Courts appear to favor the insured in coverage disputes. Given the nature and importance of an insurance contract, the court's bias is perhaps justified. The insurance contract is one of adhesion, since the potential policyholder is unable to bargain with the insurer and must either accept or reject the policy terms as offered.<sup>172</sup> While he or she is free to engage another insurer, policy language is generally standard throughout the industry, providing little incentive to shop around other than with regard to premium rates.<sup>173</sup>

The method by which insurance is sold compounds the unequal position of the insured. The insurance agent usually describes policy limits, general coverage information, deductibles and premiums, but the prospective purchasers rarely view the policy itself until after the insurance is purchased.<sup>174</sup> The contract to purchase insurance is separate from the actual policy, which usually arrives in the mail several weeks later. The buyer is thus dependent upon the representations of the insurance agent as to the coverage provided under the policy.

Not surprisingly, the potential policyholder's reasonable expectations of coverage at the time the insurance is purchased may differ from what later, at the time of claim resolution, appears reasonable under the language of the policy. Given industry sales methods, an insurer's arguments to the effect that unambiguous exclusionary language should be the *sole* determinative factor in resolving coverage disputes are unpersuasive. The insured may reasonably expect coverage for losses caused by the negligent acts of another, and the fact that the negligence caused an excluded peril to damage the property may not reduce the insured's ex-

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170. *Id.* at 647-48, 196 Cal. Rptr. at 168-69.

171. *Garvey*, 181 Cal. App. 3d at 939 n.8, 227 Cal. Rptr. at 216 n.8.

172. E. VAUGHN, *supra* note 61, at 169.

173. *Id.* at 161.

174. *Id.* at 150.

pectations of coverage. The insured may realize that his or her policy does not cover losses due to a naturally occurring mudslide, but may expect coverage for losses due to a mudslide caused by the negligence of others. This is particularly true where no contrary indication has been given by the insurance agent.

If an insurance company does not wish to provide coverage for losses in any way caused by the typically excluded perils, whether contributed to by third party negligence or not, then the company should say so explicitly. Moreover, this information should not only be contained in the policy, but also in a written statement which would be fully explained by the insurance agent and signed by the prospective policyholder at the time the insurance is purchased.

Under current law, the insurance agent must affirmatively state that earthquake coverage is not provided under the basic homeowner's policy, and that if the customer desires such coverage it will be provided at a separate premium.<sup>175</sup> This law ensures that potential policyholders are not misled with regard to earthquake coverage, and insurers are secure in the knowledge that they will not be forced to pay claims for earthquake damage which the premiums were not calculated to cover. Since the insurer must already explain the earthquake exclusion to prospective purchasers, it would be a simple matter to require *all* exclusions contained in the policy to be explained in writing prior to the sale of homeowner's insurance. In this way, the expectations of both parties would be better protected.

While this proposal is not in itself a solution to the problems of concurrent causation, it may help to avoid misunderstandings which result in legal disputes and the reliance upon potentially arbitrary coverage standards.

### C. *New Policy Language*

In the wake of the court of appeal's decision in *Premier Insurance Co. v. Welch*,<sup>176</sup> State Farm, the nation's largest insurer, altered its policy language to address the concurrent causation issue.<sup>177</sup> The insertion of new policy language denying coverage for losses resulting from the combined operation of included and excluded perils limits the number of

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175. CAL. INS. CODE §§ 10081-88 (West Supp. 1986).

176. 140 Cal. App. 3d 720, 189 Cal. Rptr. 657 (1983).

177. The new policy language reads 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



claims to which the concurrent cause standard would be applicable. This is, of course, assuming that the courts will honor these new policies as written. It is unhelpful, costly and inefficient for courts to rewrite contracts and the new policy language is designed to avoid this result by directly addressing the concurrent causation issue. However, if the courts are so willing to rewrite such clearly unambiguous language as contained in the policies at issue in *Safeco Insurance Co. of America v. Guyton*<sup>178</sup> and *Premier*,<sup>179</sup> a question remains as to the degree of judicial deference which will be afforded the insurance industry's latest attempt to clearly delineate coverage limitations.

The consequence of a court's failure to honor unambiguous policy language is to force the insurer to pay awards in excess of the coverage limits upon which its premiums were based.<sup>180</sup> Such awards may threaten the financial solvency of a company. The central aim of any insurance regulatory system must be the preservation of the solidity of insurance funds, "for if nothing else, insurance must *insure*."<sup>181</sup> A court's decision to bring a whole class of occurrences within coverage limits may seriously breach the security of these funds, particularly, as in the instant case, where the court's actions affect a large number of policies. While it must be acknowledged that insurance companies attempt

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other causes acted concurrently or in any sequence with the excluded event to produce the loss.

- a. Ordinance or Law, . . . [defined] . . . .
- b. Earth Movement, . . . [defined] . . . .
- c. Water Damage, . . . [defined] . . . .
- d. Neglect, . . . [defined] . . . .
- e. War, . . . [defined] . . . .
- f. Nuclear Hazard, . . . [defined] . . . .

3. We do not insure for loss consisting of one or more of the items below. Further, we do not insure for loss described in Paragraphs 1. and 2. 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 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.

State Farm Insurance form 7176 (copy on file at Loyola of Los Angeles Law Review).

178. 692 F.2d 551 (9th Cir. 1982).

179. See *Premier*, 140 Cal. App. 3d 720, 189 Cal. Rptr. 657.

180. See Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 499 (1961).

181. *Id.* at 480.

to protect themselves through reinsurance, contingency reserves and surpluses, the degree of coverage expansion enunciated by the courts in *Premier* and *Farmers Insurance Exchange v. Adams*<sup>182</sup> may prove to be in excess of many companies' reserves, particularly those of smaller institutions. Obviously, insurers can either stop writing all-risk policies or substantially increase premium rates. However, the resulting harm (decreased availability of coverage) may outweigh the value of the increased coverage afforded to a limited number of individuals under the concurrent cause standard. Insurance would then be available only to those who could afford the higher premiums, a result contrary to the purpose of the homeowner's policy—to provide coverage against a broad range of perils at rates which the average homeowner can afford.<sup>183</sup>

## VI. CONCLUSION

The *Farmers Insurance Exchange v. Adams*<sup>184</sup> decision embraces the application of the concurrent cause standard for coverage determinations under first party policies. The court's adherence to the concurrent cause line of cases, in particular *Premier Insurance Co. v. Welch*,<sup>185</sup> likely signifies the end of the efficient cause standard. For while the California Supreme Court has yet to strike it down, its scope has been seriously undermined by the concurrent cause theory.

The concurrent cause standard provides coverage to the insured where the operation of an included peril proximately caused the loss, even though an excluded peril may also have contributed proximately to the harm. Thus, the courts appear to be protecting the insured's interest in receiving coverage for losses caused by perils which the insured reasonably expected to be covered by the all-risk policy, and which were not specifically excluded.

While the protection of the insured's expectations is an important duty of the courts, they may not go so far as to completely rewrite clearly unambiguous policies. The consequences of the court's expansion of insurer liability, increased premiums and decreased availability of insurance, may outweigh the benefits of increased coverage for a limited number of insureds.

The confusion created by the existence of two standards and the resulting extended liability of insurers requires the immediate attention of the California Supreme Court, if for no other reason than to restore

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182. 170 Cal. App. 3d 712, 216 Cal. Rptr. 287 (1985).

183. See E. VAUGHAN, *supra* note 61, at 150-51.

184. 170 Cal. App. 3d 712, 216 Cal. Rptr. 287 (1985).

185. 140 Cal. App. 3d 720, 189 Cal. Rptr. 287 (1983).

certainty to an industry which demands it. Although insurers have attempted to address the concurrent causation dilemma through the insertion of new policy language designed to exclude coverage for losses resulting from the combined operation of included and excluded perils, the new language has yet to be tested by the courts. Moreover, the number of outstanding claims filed prior to the enactment of the new policies and the potential for bad faith liability accompanying their resolution makes judicial intervention a necessity. Without such action, a few may benefit at the expense of many.

*Kathy Lee Eldredge\**

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