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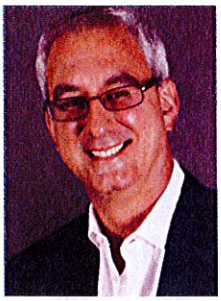
PUBLIC LAW Journal

Landslides In California: What Are Your Insurance Options When You Feel The Earth Move?

Jonathan F. Golding and Christina R. Sansone



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I. INTRODUCTION[1]

California is as well known for slope instability as it is for sushi, Hollywood, and the Golden Gate Bridge. If you own residential real property in certain areas of California, slope instability is a fact of life. Late night talk show hosts joke that earthquakes and mudslides are two of the four seasons in California, and California residents might have a hard time challenging that thesis.

The purpose of this article is to consider the options that a residential property owner has when earth movement causes damage to real property.[2] The damage may be to the land itself, structures and other improvements on the land, or both. In any case, a property owner may seek to look first to his or her own homeowners' insurance company to pay for the damage. When a property owner files an insurance claim on his or her own insurance policy, it is known as a "first-party claim." As will be set forth in more detail below, in recent years insurance companies have included language in their homeowners' policies that make it difficult to prevail on a first-party claim for property damage arising out of earth movement.

An alternative, although not an exclusive option, is for the property owner to look to others to blame for the property damage. When a property owner sues a third party, causing the third-party to tender the lawsuit to his or her liability insurance carrier, that is known as a "third-party claim." Although third-party claims for property damage arising out of earth movement are not without their difficulties, the authors have had more success with those types of claims than with first-party claims. The reason for this relates to the different legal standard for causation in third-party claim cases, as well as the relative costs and risks for insurance companies in adjusting third-party claims.

II. FIRST-PARTY CLAIMS: HOMEOWNERS' INSURANCE COVERAGE FOR EARTH MOVEMENT

As a preface to any analysis of insurance policies, the first step always is to read the policy and all of its endorsements. Although most policies, including homeowners' policies, tend to be issued on standard insurance company forms, different policy forms and/or endorsements are commonly used. Moreover, insurance companies periodically update their policy and endorsement forms to address changes in legislation, case law, and insurance company risk profiles.

Most property insurers do not intend to cover landslides or other earth movement of any type.[3] In determining whether first-party coverage exists for a certain set of circumstances and a certain policy, the two fundamental issues are (1) is the *property* covered, and (2) is the *cause* covered.

Most property policies cover *buildings* (*e.g.*, houses) and other real property *improvements* (*e.g.*, paved areas, retaining walls, swimming pools, etc.). Most modern homeowners' policies exclude "land" as covered property, even if the land supports covered property.

A. Is the Property Covered?

To give an illustration of these types of provisions, consider the following policy language taken from a State Farm Fire and Casualty Company ("State Farm") Homeowners' Policy (FP-7955 CA) (the "State Farm Policy").[4] That policy, under Coverage A, provides coverage for a Dwelling. A "Dwelling" is defined as "the dwelling used principally as a private residence on the residence premises shown in the Declarations," and also includes: "structures attached to the dwelling;" "materials and supplies located on or adjacent to the residence premises for use in the construction, alteration or repair of the dwelling or other structures on the residence premises"; "foundation, floor slab and footings supported by the dwelling"; and "wall-to-wall carpeting attached to the dwelling."

Coverage B of the State Farm Policy covers "Dwelling Extension," which is defined as "other structures on the residence premises, separated from the dwelling by clear space." This includes "[s]tructures connected to the dwelling by only a fence, utility line, or similar connection. . . ."[5]

Virtually all insurance policies contain limitations and exclusions to coverage, including covered property. Significantly, the State Farm Policy excludes "land, including the land necessary to support any Coverage A property"; "any costs required to replace, rebuild, stabilize, or otherwise restore the land"; or "the costs of repair techniques designed to compensate for or prevent land instability to any property, whether or not insured under Coverage A."

B. Is the Cause Covered?

The State Farm Policy has a section entitled "LOSSES NOT INSURED." That section excludes, among other things, losses caused by "Earth Movement," which is defined as "the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not." Examples of excluded Earth Movement are "landslide, mudflow, mudslide, sinkhole, subsidence, erosion or movement resulting from improper compaction, site selection or other external forces. . . ."[6]

In evaluating whether policies such as the State Farm Policy provide coverage for a given loss caused, in whole or in part, by earth movement, courts consider the plain language of the policy, as well as public policy set forth in statutory provisions. Moreover, courts have developed well-honed rules of interpretation applicable specifically to insurance policies.

C. Statutory Framework Applicable to Insurance Policies

Section 530 of the California Insurance Code 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.

At first blush, this language seems to suggest that where a loss is proximately caused by a covered peril, such as fire, the fact that "a peril not contemplated by the contract" is a remote cause of the loss should not preclude coverage so long as the covered peril (*e.g.*, fire) is not a remote cause of the loss. However, section 532 of the Insurance Code clarifies that "a peril not contemplated by the contract," as set forth in section 530, must be distinguished from "a peril . . . specially excepted in a contract of insurance:"

> 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.[7]

Based on these sections, since earth movement usually is "specially excepted" as a cause of loss in homeowners' policies, California appellate courts have had many opportunities to interpret insurance policy coverage and exclusion language under the prism of public policy enacted in sections 530 and 532.[8]

D. Rules of Interpretation for Insurance Policies

In *MacKinnon v. Truck Ins. Exchange*,[9] the California Supreme Court[10] summarized the rules of interpretation for insurance policies, as follows:

> Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation. "The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties. Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract. The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage, controls judicial interpretation. A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract."[11]

In *MacKinnon*, the Supreme Court went on to explain that insurance *coverage* is interpreted broadly, but *exclusionary clauses* are interpreted narrowly, so that insurance policies will meet the reasonable expectations of the insured:

> Moreover, insurance coverage is "interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] . . . exclusionary clauses are interpreted narrowly against the insurer." "[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again 'any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.' [Citation.] Thus, 'the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language.' [Citation.] The exclusionary clause 'must be *conspicuous, plain and clear.*'" This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded. The burden is on the insured to establish that the claim is within the basic scope of coverage and on the insurer to establish that the claim is specifically excluded.[12]

Generally, with respect to earth movement, if a policy expressly excludes land, then land is not covered, even if the land supports covered property.[13] If a policy does not expressly exclude land, then land is covered to extent the land supports other covered property.[14] Except for situations in which a policy is ambiguous as to whether land or other property is or is not covered, this analysis is relatively straightforward. Many of the cases in this area focus on the more difficult issue of loss causation.

E. The "Efficient Proximate Cause" Doctrine

1. Sabella v. Whistler

In *Sabella v. Wisler*,[15] the California Supreme Court adopted the "efficient proximate cause" doctrine to address the thorny issue of loss causation for insurance coverage where there are multiple potential causes of a loss. Under that doctrine, where at least one covered cause and at least one non-covered cause converge to produce a loss, coverage generally depends upon which cause (the covered cause or the non-covered cause) is the "predominant" (or "efficient proximate") cause of the loss.

In *Sabella,* a residence was negligently constructed prior to September 1955 over an old quarry without a soils inspection, which, if conducted, would have disclosed that the underlying building site was actually on filled uncompacted land. During construction, the contractor also negligently installed a sewer. No disclosures as to the condition of the soil or the sewer pipe were made prior to the plaintiffs' purchase of the residence in October 1955.

The plaintiffs subsequently purchased an insurance policy from National Union Fire Insurance Company ("NUFI"). Among other things, the policy contained an "All Physical Loss' Building Endorsement" that excluded losses resulting from ". . . settling, cracking, shrinkage, or expansion of pavements, foundations, walls, floors, or ceilings; unless loss by . . . collapse of buildings ensues. . . ."[16] After purchasing the policy, the plaintiffs discovered a sewer leak from the negligently installed sewer pipe that caused outflow from the house to infiltrate the unstable earth near and below the foundation, causing the house to settle in uneven elevations up to seven inches.[17]

The Court upheld the trial court's finding that the settling and sewer damage was the "direct and proximate result of the negligence of Wisler [the contractor]."[18] Thus, the Court found the contractor was liable to the homeowners for his negligence in constructing the dwelling upon an improperly compacted lot.[19]

In examining the plaintiffs' first-party insurance action against NUFI, the Court found that NUFI "is liable because the rupture of the sewer line attributable to the negligence of a third party, rather than settling, was the efficient proximate cause of the loss." The Court explained:

> The policy excepted loss resulting from settling, and the findings of the court below indicate that the broken sewer line emptied waste water into the loose fill, setting in motion the forces tending toward settlement. As stated in 6 Couch, Insurance (1930) § 1466, "[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." The virtual absence of subsidence damage in the prior four years of the existence of the house here in question clearly indicates that the broken pipe was the predominating or moving efficient cause of the loss.[20]

NUFI's attempt to establish non-liability by relying on section 532 for the proposition that the loss would not have occurred "but for" the settling of the underlying earth and house, was unavailing. The Court responded that section 532 must be read in conjunction with section 530, stating:

> [S]ection 530 provides 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." It is thus apparent that if section 532 were construed in the manner contended for by defendant insurer, 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 resulted in the loss. . . . It would appear therefore 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 and the peril there referred to as the "immediate cause of the loss" is that which is immediate in time to the occurrence of the damage.[21]

Thus, the sewer pipe rupture that caused the improperly placed fill to fail was the "efficient" cause that triggered the event; therefore, there was coverage.[22]

2. *Garvey v. State Farm Fire & Casualty Co.*

Decades later, in *Garvey v. State Farm Fire & Casualty Co.*,[23] the California Supreme Court reaffirmed *Sabella's* application of the efficient proximate cause doctrine for first-party property insurance causation analysis. The Court sought to resolve confusion over first-party cases regarding insurance coverage under the "all risk" section of a homeowner's insurance policy "when loss to an insured's property can be attributed to two causes, one of which is a non-excluded peril, and the other an excluded peril."[24] The Court stated that lower courts had been misapplying the holdings of *Sabella*, a first-party case, and *Partridge*,[25] a third-party case further discussed below, by deviating from *Sabella's* efficient proximate cause analysis for first-party claims.

In *Garvey*, the plaintiffs/homeowners purchased an "all risk" homeowners policy of insurance with similar exclusions found in the policy in *Sabella*, this time from State Farm. The plaintiffs filed a claim with State Farm after a house addition pulled away from the main structure and a deck and garden wall were damaged. The claim was based on the belief that the policy implicitly provided coverage for losses caused by the contractor's negligence, which was not specifically excluded in the policy.

The trial court found in favor of the plaintiffs by relying in part on *Sabella* and granted a directed verdict to the plaintiffs on the theory that there was proximate cause based on an expert witness' statement that the negligent construction was a concurrent cause of the structure's failure. The Supreme Court disagreed with the trial court's failure to apply the "efficient proximate cause" doctrine and affirmed the Court of Appeal decision reversing the directed verdict. It began by reviewing the Court's holding in *Sabella*:

> [In *Sabella*], we explained that when section 532 is read along with section 530, the "but for" clause of section 532 necessarily refers to a "proximate cause" of the loss, and the "immediate cause" refers to the cause most immediate in time to the damage.
>
> *Sabella* held: "[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."
>
> Furthermore, in characterizing the "but for" clause of section 532 as referring to the efficient proximate cause of the loss, we impliedly recognized that coverage would not exist if the covered risk was simply a remote cause of the loss, or if an excluded risk was the efficient proximate (meaning predominant) cause of the loss. On the other hand, the fact that an excluded risk contributed to the loss would not preclude coverage if such a risk was a remote cause of the loss.[26]

The Court emphasized that the distinction between tort liability coverage under third-party coverage and property loss coverage under first-party coverage is key to understanding the two types of coverage in homeowners' policies.[27] It defined "efficient proximate cause" in the first-party loss context as the "prime or moving cause"[28] or "predominating cause" (citing *Sabella*). "Indeed, we believe misinterpretation of the *Sabella* definition of 'efficient proximate cause' has added to the confusion in the courts and, in part, is responsible for the erroneous application of *Partridge* . . . to first party property loss cases."[29]

Confusing matters further, "First-and third-party coverage is today typically provided in a single policy, and under both types of coverage, once the insured shows that an event falls within the scope of basic coverage under the policy, the burden is on the insurer to prove a claim is specifically excluded."[30] Each policy section must be analyzed by its by separate exclusions and the cause of a loss in the context of a property insurance policy is totally different from that in a liability policy. "This distinction is critical to the resolution of losses involving multiple causes."[31] On remand, "[i]f the earth movement was the efficient proximate cause of the loss, then coverage would be denied under *Sabella*, . . . On the other hand, if negligence was the efficient proximate cause of the loss, then coverage exists under *Sabella*."[32] The Supreme Court resisted the insured's argument that the Court should apply the same "concurrent" causation standard as it adopted for third-party liability cases in *Partridge*,[33] which is addressed below.

Sixteen years later in *Julian v Hartford Underwriters Ins. Co.*,[34] (discussed in further detail below) the California Supreme Court amplified its holding in *Garvey* as follows:

> In *Garvey*, we explained that in adopting this principle, *Sabella* "impliedly recognized that coverage would not exist if the covered risk was simply a *remote* cause of the loss, or if an excluded risk was the efficient proximate (meaning predominant) cause of the loss. On the other hand, the fact that an excluded risk contributed to the loss would not preclude coverage if such a risk was a remote cause of the loss." *Garvey* clarified that the "efficient proximate cause" of a loss is the predominant, or most important cause of a loss. By focusing the causal inquiry on the most important cause of a loss, the efficient proximate cause doctrine creates a "workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer."[35]

3. *Julian v. Hartford Underwriters Ins. Co.*

In *Julian v. Hartford Underwriters Ins. Co.*,[36] the California Supreme Court considered insurance policy exclusions, and affirmed that an insurer may tailor an exclusion so that it applies only to certain types of losses (*e.g.*, rain, but only if rain causes earth movement), so long as the exclusion does not conflict with section 530 and the efficient proximate cause doctrine.[37]

Following *Sabella*, the Court in *Julian* examined another first-party insurance dispute to determine

> . . . whether an insurer may, consistent with section 530 and the efficient proximate cause doctrine, deny coverage for a loss resulting from a rain-induced landslide by invoking, among other exclusions within a form policy, a provision that excludes coverage for losses caused by weather conditions that "contribute in any way with" an excluded cause or event such as a landslide.[38]

The Court established that "an insurer may not preclude application of efficient proximate cause analysis through inconsistent or sweeping policy language,"[39] which, if present in the policy, would have rendered the policy's coverage terms "virtually illusory."[40] The Court found in this case that neither section 530 nor the efficient proximate cause doctrine were violated:

> [T]he proximate cause of the loss was a named, excluded peril. Weather conditions are specifically excluded whenever they combine with earth movement to cause a loss. The policy is unambiguous

as to what was covered and what was excluded from coverage.[41]

Julian addressed only the application of the weather conditions clause to the loss arising from the rain-induced landslide. The peril of rain causing a landslide is genuine, widely understood, and not a mere drafting fiction. Thus, the landslide was not an independent causal agent; instead it was directly dependent on the heavy rains. Because there was no violation of section 530 or the efficient proximate cause doctrine, Hartford Underwriters Insurance Company prevailed.[42] The Court's holding could appear to be a narrow one. Nevertheless, it contributed to establishing the efficient proximate cause doctrine as the preferred method for resolving first-party disputes where there are multiple causes of loss in California.

III. THIRD-PARTY CLAIMS: GENERAL AND PROFESSIONAL LIABILITY

A. Third-Party Liability

As discussed in Part II above, first-party property insurance claims are claims that a property owner makes with respect to damage to his or her own property. Third-party liability insurance claims arise when a property owner sues a third party for damaging his or her property. Third-party liability may arise in many different contexts, but some of the most common defendants are: (1) neighbors, (2) common interest developments, such as homeowners associations, (3) public entities, (4) developers, (5) general contractors and specialty/trade subcontractors, and (6) design professionals.

In *Garvey*, the California Supreme Court distinguished between first-party property insurance claims and third-party liability insurance claims. With respect to third-party liability insurance claims, the Court wrote:

> [T]he right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty. This liability analysis differs substantially from the coverage analysis in the property insurance context, which draws on the relationship between perils that are either covered or excluded in the contract. In liability insurance, by insuring for personal liability, and agreeing to cover the insured for his own negligence, the insurer agrees to cover the insured for a broader spectrum of risks.[43]

Thus, while property policies are focused on the insured or excluded "perils" that cause damage to insured property, liability policies cover the insured for his or her own negligent conduct that results in damage to the real property of another.

B. General Liability v. Professional Liability Policies

Liability policies usually are broken down into two categories: general liability and professional liability.[44] Typically, general liability policies are carried by general contractors, specialty/trade subcontractors, governmental entities, most businesses, and homeowners. They may be referred to as "occurrence" policies because coverage usually is *triggered* by an occurrence (*e.g.*, fire) that causes a loss (*e.g.*, damage to real property) to someone other than the insured.[45]

Professional liability policies, also known as "errors and omissions" policies, typically are carried by design professionals (*e.g.*, architects and engineers), as well as project managers, surveyors, realtors, attorneys, accountants, physicians, and other professionals. Those policies may be referred to as "claims made" or "claims made and reported" policies because coverage usually is *triggered* by a claim (*e.g.*, negligence) made against the insured by a third party and reported to the insurer during that same policy period, rather than any underlying personal injury or property damage.[46] The fact that the injury or loss may have occurred prior to the policy period in which the claim is made is not significant with respect to coverage.[47]

The distinction between these types of policies is critical to determining which insurer(s) are "on the risk" and the policy period(s) that are impacted.[48] The distinction also may be important because, in most cases, professional liability policies are *wasting* policies (in other words, the policy limits are reduced by defense costs), whereas general liability policies usually are not wasting policies.[49]

C. Duty to Defend v. Duty to Indemnify

In *Certain Underwriters at Lloyd's of London v. Superior Court*,[50] the California Supreme Court explained that, in a liability policy, the insurer usually obligates itself to both defend and indemnify the insured for a covered claim; however, these obligations are not "co-terminus." The insurer's duty to indemnify is "broad," but its duty to defend is "broader."[51]

The California Supreme Court had the occasion to address the scope of the insurer's duty to defend in *Foster-Gardner*,

Inc. v. National Union Fire Ins. Co.[52] In *Foster-Gardner*, the Court held:

> An insurer has a duty to defend when the policy is ambiguous and the insured would reasonably expect the insurer to defend him or her against the suit based on the nature and kind of risk covered by the policy, or when the underlying suit potentially seeks damages within the coverage of the policy. The duty to defend is "a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded [citation], or until it has been shown that there is no potential for coverage." It extends to allegations that are actually and even only potentially covered. Indeed, the insurer must defend the entire action even when only one of several causes of action is potentially covered.[53]

Thus, one of the advantages of a third-party claim for the property owner, as compared to a first-party claim, is that the insurer may have a duty to defend the insured even where the claim is only potentially covered, and the insurer must defend the entire action even if that potential coverage only exists as to one of the causes of action alleged in the complaint. This creates a financial obligation for the insurer that often leads to an economic settlement of a claim that, ultimately, may not have been covered if the case were to go to trial.[54]

D. *Partridge* and the "Concurrent Cause" Doctrine

As set forth above, in *Sabella*, *Garvey*, and *Julian*, the California Supreme Court adopted and reaffirmed the application of the "efficient proximate cause" doctrine for first-party claim causation where there are multiple causes of injury or damage. The Court pointed out in *Garvey*, however, that "a broader spectrum of risks" exists in the context of third-party liability insurance than first-party property insurance.[55] As a result, *Garvey* reaffirmed the holding of *Partridge* adopting the "concurrent cause" standard for causation in third-party liability insurance cases.

"Concurrent cause" exists where "two separate acts of negligence simultaneously join together to cause an injury."[56] Although *Partridge* is not a landslide case, it provides a good illustration of the application of "concurrent cause" rule.

Partridge involved two concurrent negligent acts of Partridge, the named insured under two insurance policies issued by State Farm; one auto-related and the other non-auto-related. It contains somewhat novel facts, which the trial court called "blatant recklessness" on the part of Partridge.

The facts were undisputed. Wayne Partridge, a hunting enthusiast, was the named insured of the two insurance policies issued by State Farm. Prior to the date of the accident, Partridge filed down the trigger mechanism of his .357 Magnum pistol to lighten the trigger pull so that the gun would have "hair trigger action." The trial court specifically found this modification of the gun to be a negligent act, creating an exceptionally dangerous weapon.[57]

On the evening of July 26, 1969, Partridge and two friends, Vanida Neilson and Ray Albertson, were driving in the countryside in Partridge's four-wheel drive Ford Bronco hunting jackrabbits by shooting out of the windows of the moving vehicle. Vanida Neilson was sitting in the front seat between Partridge and Albertson. Partridge was using his modified .357 Magnum gun. Driving his vehicle off the paved road onto the adjacent rough terrain, the vehicle hit a bump and the pistol discharged and, with the gun pointed at Vanida, the bullet entered Vanida's left arm and penetrated down to her spinal cord, resulting in paralysis.[58] Vanida sued Partridge for personal injuries and Partridge filed claims under both his homeowner's policy and his automobile liability policy.

The Court found liability under both insurance policies despite the fact that the homeowner's policy excluded injuries "arising out of the use" of an automobile. The Court stated, "such exclusion does not preclude coverage when an accident results from the concurrence of a non-auto-related cause and an auto-related cause."[59] Coverage for the auto-related cause was not in question because the accident bore a causal relationship to the use of the insured vehicle. The more vexing issue before the Court focused on whether the homeowner's policy exclusion applied in this case where, State Farm argued, the injuries involved the use of the car, an excluded cause.

The Court set forth the rule of construction relied upon by *MacKinnon* that, "whereas coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured, exclusionary clauses are interpreted narrowly against the insurer."[60] With regard to the "use" of an automobile, it is not necessarily determinative that the homeowner's policy's exclusionary clause would take effect. In some cases, automobile and non-automobile liability policies may overlap.[61] In this case, the insurer did not deny that Partridge's negligence in filing the trigger mechanism of his gun was a risk covered by the homeowner's policy. The negligent modification of the gun sufficed in itself to render him fully liable for the resulting injuries. The liability arose

from the insured's non-auto-related conduct that existed independently of any "use" of his car.[62]

The Court upheld the trial court's reasoning that Partridge had been negligent both in modifying the gun and in driving his vehicle off the paved road onto the rough terrain. Both acts were independent concurrent acts of negligence leading to Vanida's injuries. Therefore, both State Farm policies applied and Vanida was entitled to recover under both.

E. *City of Carlsbad v. Insurance Co. of State of Pennsylvania*

In *City of Carlsbad v. Insurance Co. of State of Pennsylvania*,[63] the Fourth District Court of Appeal considered whether the "efficient proximate cause" doctrine or the "concurrent cause" doctrine should be applied to a third-party liability claim involving a landslide, and the effect of an insurance policy exclusion for "damage arising out of land subsidence, for any reason whatsoever."[64]

In *Carlsbad*, a landslide was caused by the negligent maintenance of the water system jointly operated by the City of Carlsbad and the Carlsbad Municipal Water District (jointly, the "City"). The landslide caused extensive damage or destruction to several condominium units in the City. The City tendered a third-party liability claim to the Insurance Company of the State of Pennsylvania ("ISOP").[65] ISOP denied coverage based on an exclusion that barred coverage for "any property damage arising out of land subsidence for any reason whatsoever."[66]

The trial court granted summary judgment in favor of the insurer "finding an exclusion that barred coverage for 'any property damage arising out of land subsidence for any reason whatsoever' barred coverage for the property damage."[67] On appeal, the court rejected the City's assertion that it was entitled to indemnification under the efficient proximate cause doctrine pursuant to *Garvey* and *Julian*, based on the City's negligent maintenance of its water system. The court found that whereas the efficient proximate cause doctrine is limited to first-party cases where an insured seeks coverage for damage to his or her own property interests, this case was a third-party liability case controlled by the concurrent cause doctrine. The court explained, "first party cases applying the efficient proximate cause doctrine upon which the City relies are irrelevant to our analysis."[68] Moreover, even if the efficient proximate cause doctrine and section 530 were applicable, they would not assist the City as they do not prohibit an insurer from excluding some manifestations of a covered peril, provided the exclusion "plainly and precisely communicates" to the insured which manifestations the policy does not cover.[69]

Thus, the policy exclusion disallowing damage caused by land subsidence, including landslides, plainly and precisely explained to the City that the peril was not covered, regardless of the cause. Accordingly, that exclusion barred coverage for damage resulting from the landslide.[70]

Homeowners who suffer a loss from earth movement might submit a first-party claim and a third-party claim if warranted by the facts. If a homeowner's first-party property claims are denied for lack of coverage, their only *first-party* recourse would be to "self-insure," that is, to absorb the loss through their own assets. This would be a harsh economic result for any property owner.

Carlsbad highlights the advantage of third-party liability claims for property owners who have suffered a loss not covered by their own policy (or if they chose not to submit the claim to their own policy). The result for the condominium owners in *Carlsbad* was different because they made third-party liability claims against the City. The City remained liable to them despite the fact that the City's general liability insurance claim was denied. Thus, the condominium owners had additional recourse—the negligent defendant's own assets, which might be available to respond to the loss.[71]

IV. CONCLUSION

As can be seen from the discussion above, most standard property insurance policies exclude damage predominantly resulting from landslides (alone or in combination with other excluded causes) in first-party claims.[72] Wherever possible, it is advisable to consider negligent conduct of third parties that cause damage and that could be brought in a third-party liability action. There is a strong interplay between the technical and legal aspects of any land movement case and, because each case is factually intensive, the assistance of experienced technical experts who specialize in earth movement situations will be required.

Liability and corresponding coverage under a third-party liability insurance policy must be carefully distinguished from the coverage analysis applied to a first-party property policy. Among other things, property insurance, unlike liability insurance, is concerned with the relationship between covered and excluded perils and unconcerned with establishing negligence or otherwise assessing tort liability.[73]

Endnotes

1 This article is based on a panel discussion at the 2017 Real Property Section Annual Retreat.

2 For purposes of this article, the term "earth movement" is used to describe any movement of land including but not limited to landslide, sinking, settling, expansion, contraction, subsidence, or shifting.

3 It is sometimes possible to purchase policies that are specifically intended to cover damage caused by earth movement. These usually are non-standard policies issued by "surplus lines" insurers. Since most property owners do not buy this type of insurance, those policies are beyond the scope of this article.

4 This policy may not contain the same policy language as other policies issued by State Farm, so, once again, the language of this particular policy form should be used only as an example.

5 For this State Farm Policy, the definition of "Dwelling Extension" is set forth in FP-7955. Actual policy language is copyrighted, and therefore unobtainable unless the company issues an actual policy. However, an exemplar of State Farm's Policy FP-7955 has been posted by the State of Nevada and can be found at: http://docs.nv.gov/doi/documents/home_policies/StateFarmForms/FP-7955.pdf.

6 Although outside the scope of this article, it should be noted that, pursuant to the LOSSES NOT INSURED section, losses caused by "Earthquake" or "Nuclear Hazard" are not insured "under any coverage for any loss which would not have occurred in the absence of" the earthquake. Such losses are not insured "regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of" Earthquake or Nuclear Hazard. *Id.*

7 Cal. Ins. Code § 532. Although earthquake is a cause of earth movement and property damage, it is outside the scope of this article because unique rules apply to that cause of loss. Indeed, it would be rare for a homeowners' policy to cover earthquake unless a special earthquake endorsement were purchased. Policies or endorsements that provide coverage for earthquake are expensive, and the potential property damage loss from an earthquake can be staggering. Thus, the legislature has determined that " . . . no policy which by its terms does not cover the peril of earthquake shall provide or shall be held to provide coverage for any loss or damage when earthquake is a proximate cause regardless of whether the loss or damage also directly or indirectly results from, or is contributed to, concurrently or in any sequence by any other proximate or remote cause, whether or not covered by the policy." Cal. Ins. Code § 10088.

8 *See e.g., Palacin v. Allstate Ins. Co.,* 119 Cal.App.4th 855, 861 (2004) ("The fundamental rule [of contract interpretation] is that a court must give effect to the mutual intention of the parties when they formed the contract. This intent is to be inferred, if possible, solely from the written provisions of the contract. (citations omitted). . . . The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' . . ., controls judicial interpretation." *City of Carlsbad v. Ins. Co. of State of Penn.*, 180 Cal.App.4th 176 (2009), quoting *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 32 Cal.4th 465, 470 (2004); *see also Powerine Oil Co., Inc. v. Super. Ct.,* 37 Cal.4th 377, 390 (2005).

9 *MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th 635 (2003) *as modified on denial of reh'g* (Sept. 17, 2003).

10 In this article, references to the "Supreme Court" or the "Court" mean the California Supreme Court unless otherwise noted.

11 *MacKinnon*, 31 Cal.4th at 647–48 (citations omitted).

12 *Id.* at 648 (emphasis in original; citations omitted).

13 *Fire Ins. Exch. v. Super. Ct. (Altman),* 116 Cal.App.4th 446 (2004). Some policies that exclude coverage for land will provide limited coverage (*e.g.*, $10,000) for land repair and/or installation of stabilizing devices if necessary to repair covered property. Insurance companies have learned that providing very limited coverage may be more advantageous to them than excluding coverage. By doing that, they may be able to pay out relatively small amounts for covered claims, rather than risk bad faith cases for denying claims altogether.

14 If the policy does not expressly exclude land, then land is covered to extent the land supports other covered property. *Pfeiffer v. General Ins. Corp.*, 185 F. Supp. 605 (N.D. Cal. 1960); *Hughes v. Potomac Ins. Co.*, 199 Cal.App.2d 239 (1962); *Snapp v. State Farm Fire & Casualty Co.*, 206 Cal. App.2d 827 (1962); *Strickland v. Federal Ins. Co.*, 200 Cal. App.3d 792 (1988).

15 *Sabella v. Wisler*, 59 Cal.2d 21, 27 (1963).

16 *Id.* at 26.

17 *Id. at* 27.

18 *Id.*

19 *Id.*

20 *Id.* at 31–32.

21 *Sabella*, 59 Cal.2d at 33–34 (internal citations omitted).

22 At the Court of Appeal level, there are a number of other cases that apply the efficient proximate cause doctrine. *See, e.g., Howell v. State Farm Fire & Cas. Co.*, 218 Cal. App.3d 1446 (1990) (fire (a covered cause) strips a hillside of vegetation; rain falls on the stripped hillside and results in earth movement (a non-covered cause)); *Sauer v. Gen. Ins. Co.*, 225 Cal.App.2d 275 (1964) (plumbing pipe bursts, releasing a sudden discharge of water (a covered cause); the infusion of water results in earth movement (a non-covered cause)).

23 *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal.3d 395, 257 (1989).

24 *Id.* at 396.

25 *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal.3d 94 (1973).

26 *Garvey*, 48 Cal.3d at 403 (internal citations omitted).

27 *Id.* at 399.

28 *Id.* at 403 (citing *Brooks v. Metro. Life Ins. Co.*, 27 Cal.2d 305 (1945)).

29 *Garvey*, 48 Cal.3d at 403–04.

30 *Id.* at 406.

31 *Id.*

32 *Id.* at 412–13 (internal citations omitted).

33 *Id.* at 406.

34 *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal.4th 747 (2005).

35 *Id.* at 754 (emphasis in original; internal citations omitted).

36 *Id.* at 747.

37 *Id.* at 754.

38 *Id.* at 751.

39 *Id.* at 754.

40 *Julian*, 25 Cal.4th at 756.

41 *Id.* at 757 (internal citations omitted).

42 *Id.* at 760.

43 *Garvey*, 48 Cal.3d at 407.

44 *See Pac. Employers Ins. Co. v. Super. Ct.*, 221 Cal.App.3d 1348, 1356–57 (1990).

45 *Id.*

46 *Id.*

47 *Id. Pacific Employers* has a thorough discussion of the application of the "notice-prejudice" rule, which "operates to bar insurance companies from disavowing coverage on the basis of lack of timely notice unless the insurance company can show actual prejudice from the delay." *Pacific Employers*, 221 Cal.App.3d at 1357. Practitioners should be diligent to assure timely notice to an insurer for any insurance claim; however, in the event of late notice, the "notice-prejudice" rule only applies to "occurrence" policies—it has little or no application to "claims made" policies. *Id.* at 1358 ("The effect of applying the 'notice prejudice rule' . . . to the facts of this case would be to convert PEIC's claims-made policy into an occurrence policy".) Under very limited circumstances, equity may excuse a late report of a claim on a "claims made" policy. *See, e.g., Root v. Am. Equity Specialty Ins. Co.*, 130 Cal. App.4th 926 (2005).

48 The distinction also may be critical to a determination of the applicable statute of limitations. A number of different statutes of limitation may apply to scenarios in which earth movement causes damage to real property, so a practitioner must be careful to analyze all potentially applicable statutes of limitations.

49 So, for example, if an injured property owner sues both an architect for design defects and a general contractor for construction defects, and each defendant has an insurance policy with a $1,000,000 policy limit, but the architect's policy is wasting, then the available policy limits to respond to a judgment may be $1,000,000 for the general contractor, but only $1,000,000 less defense costs for the architect.

50 *Certain Underwriters at Lloyd's of London v. Super. Ct.*, 24 Cal.4th 945 (2001) ("*Lloyds*").

51 *Id.*

52 *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 18 Cal.4th 857, *as modified* (1998).

53 *Id.* at 869 (internal citations omitted).

54 It is worth noting that an insurer has a duty to investigate its insured's claim. *See Egan v. Mut. of Omaha Ins. Co.*, 24 Cal.3d 809, 817 (1979) ("[W]e conclude that an insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim."). Thus, even if coverage may not potentially exist, the insurer may have a duty to retain expert consultants to perform testing and other investigation that ultimately may assist the insured by reducing its defense costs.

55 *Garvey*, 48 Cal.3d at 407.

56 *Id.* at 405.

57 *Partridge*, 10 Cal.3d at 98.

58 *Id.*

59 *Id.* at 97.

60 *Id.* at 101–02 (internal citations omitted).

61 *Id.* at 102.

62 *Id.* at 103.

63 *City of Carlsbad*, 180 Cal.App.4th at 176.

64 *Id.* at 179.

65 *Id.* at 178.

66 *Id.* at 179.

67 *Id.*

68 *Id.* at 183.

69 *Carlsbad,* 180 Cal.App.4th at 184.

70 *Id.*

71 Of course, before bringing an action against third parties, it always is prudent to investigate the potential insurance and assets available to pay a judgment. The property owner who has suffered a loss will not be pleased if the litigation costs only increase his or her costs because the suit ends up not being justified by the recovery.

72 This conclusion should not be interpreted to suggest that a first-party claim should be avoided; it is almost always prudent to make a first-party claim and determine whether any or all of the damage is covered.

73 *Garvey,* 48 Cal.3d at 406 (internal citation omitted).