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TEN YEARS AFTER GARVEY  
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# The Efficient Proximate Cause Doctrine in California: Ten Years After *Garvey*

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Ten years ago, California courts applied conflicting standards when addressing the question of coverage under an all risk insurance policy in cases where the loss could be attributed to two causes, one an excluded risk and the other a covered risk. In 1989, the California Supreme Court resolved that conflict when it decided *Garvey v. State Farm Fire & Casualty Co.*<sup>1</sup> There, the court ruled that when a loss is caused by a combination of a covered risk and a specifically excluded risk, the loss is covered only if the covered risk was the “efficient proximate cause” of the loss.

In so holding, the California Supreme Court rejected a developing body of law that had evolved from its holding in *State Farm Mutual Auto Insurance Co. v. Partridge*,<sup>2</sup> in which courts applied a “concurrent causation” analysis to first-party property insurance coverage claims. Under the concurrent cause theory, there was coverage if at least one of the identified causes was a non-excluded peril. Instead, the *Garvey* court reaffirmed and clarified the applicability of the efficient proximate cause analysis the Supreme Court first articulated twenty-six years earlier in *Sabella v. Wisler*.<sup>3</sup>

This article analyzes the current state of the efficient proximate cause doctrine in California. As a background for this discussion, this article briefly revisits the *Garvey* decision and the development of the efficient proximate cause doctrine in California.

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<sup>1</sup> 770 P.2d 704 (Cal. 1989).

<sup>2</sup> 514 P.2d 123 (Cal. 1973).

<sup>3</sup> 377 P.2d 889 (Cal. 1963). The “efficient proximate cause” doctrine is often mistakenly referred to as the “concurrent cause” doctrine. Concurrent cause is actually a misnomer because it suggests that the events, actions, or forces must occur simultaneously. The “efficient proximate cause” doctrine as developed by the courts in *Garvey* and *Sabella*, applies where the actions, events, or forces occur sequentially.

**THE DEVELOPMENT OF THE EFFICIENT PROXIMATE  
CAUSE DOCTRINE**

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Since 1872, California has had on its books two—and at times conflicting—statutes which address coverage under an insurance policy.<sup>4</sup> Insurance Code section 530 states that an insurance policy provides coverage when an insured peril is the “proximate cause” of the loss.<sup>5</sup> But, under Insurance Code section 532, a loss is excluded if the loss would not have occurred “but for” the excluded risk even though the “immediate cause” of the loss was a covered risk.<sup>6</sup> Thus, sections 530 and 532 appear to conflict where the loss can be attributed to two causes, one an excluded risk and the other a covered risk.

In *Sabella v. Wisler*,<sup>7</sup> the California Supreme Court sought to reconcile the two statutes. There, *Sabella* sought coverage under an all risk policy for subsidence damage to his home which could be attributed to several causes: subsidence (an excluded risk) and a contractor’s negligence in installing a sewer line and building the house on uncompacted soil (both covered risks).<sup>8</sup> The Supreme Court concluded that when section 532 is read along with section 530, section 532’s “but for” clause necessarily referred to a “proximate cause” of the loss, while the “immediate cause” referred to the cause most immediate in time to the loss.<sup>9</sup> Thus, the court held that where a loss can be attributed to two causes, one

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<sup>4</sup> Sections 530 and 532 were enacted with the rest of the Insurance Code in 1935. *Howell v. State Farm Fire & Casualty Co.*, 267 Cal. Rptr. 708, 722 (Cal. Ct. App. 1990) (Barry-Deal, J., concurring). Present sections 530 and 532 were reenactments of former Civil Code sections 2626 and 2628, respectively. *See id.* at 722-723. Civil Code sections 2626 and 2628, in turn, were enacted in 1872 as part of the general codification of California law. *Id.* at 720. It appears that both statutes were taken directly from the 1865 New York Civil Code. *See id.*

<sup>5</sup> *See* Cal. Ins. Code § 530 (West Supp. 1999). Section 530 states: “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.” *Id.*

<sup>6</sup> *See* Cal. Ins. Code § 532 (West 1993). Section 532 states: “If a peril is specifically excepted in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted.” *Id.*

<sup>7</sup> 377 P.2d 889 (Cal. 1963).

<sup>8</sup> *Id.* at 890-892. The contractor built a house on uncompacted fill and negligently installed a sewer line. Eventually, the sewer line failed, causing water to saturate the ground around the insured’s home, resulting in subsidence. *Id.* at 891-892.

<sup>9</sup> *Id.* at 896-897.

an excluded risk and the other a covered risk, the “efficient cause” is the cause to which the loss is to be attributed.<sup>10</sup>

In the ten years following *Sabella*, the California courts of appeal consistently applied the efficient proximate cause analysis to resolve multiple cause coverage questions under all risk property insurance policies.<sup>11</sup> But things changed after the California Supreme Court’s 1973 decision in *State Farm Mutual Auto Insurance Co. v. Partridge*.<sup>12</sup>

In *Partridge*, the Supreme Court held that where there are concurrent proximate causes under a third-party *liability* insurance policy, there is coverage “whenever an insured risk constitutes simply a concurrent proximate cause of the injuries.”<sup>13</sup> After *Partridge*, courts began applying *Partridge*’s concurrent causation approach to find coverage under first-party property policies; thus, courts found coverage in any case where a covered risk was simply a concurrent cause of the insured’s loss.<sup>14</sup>

In 1989, the applicability of *Partridge* to first-party property policies was before the California Supreme Court in *Garvey v. State Farm Fire & Casualty Co.*<sup>15</sup> *Garvey* arose out of a claim under an all risk homeowner’s policy for the costs to repair damage to a house addition which was pulling away from the main house and for damage to a deck and garden

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<sup>10</sup> *Id.* at 895.

<sup>11</sup> *See, e.g.*, *Gillis v. Sun Ins. Office, Ltd.*, 47 Cal. Rptr. 868, 872-878 (1965) (finding coverage under policy which excluded water damage where wind, a covered peril, caused a gangway to fall on and sink a dock because wind was the efficient proximate cause of the loss); *Sauer v. General Ins. Co. of Am.*, 37 Cal. Rptr. 303, 305-306 (1964) (finding coverage where water leaking from a plumbing system, a covered risk, was the efficient proximate cause of subsidence damage, an excluded risk).

<sup>12</sup> 514 P.2d 123 (Cal. 1973).

<sup>13</sup> *Id.* at 130 (emphasis in original).

<sup>14</sup> *See, e.g.*, *Safeco Ins. Co. of Am v. Guyton*, 692 F.2d 551, 554-555 (9th Cir. 1982) (reversing district court’s finding that there was no coverage for insured’s flood damage claim where flood—an excluded risk—was the “efficient proximate cause” of the loss and holding that there was coverage under the *Partridge* because the water district’s negligence in failing to provide adequate flood control facilities (a covered risk) was also a cause of the insured’s loss); *Farmers Ins. Exch. v. Adams*, 216 Cal. Rptr. 287, 294 (Cal. Ct. App. 1985) (holding that coverage may be found under *Partridge* where an included risk is a concurrent proximate cause of the loss); *Premier Ins. Co. v. Welch*, 189 Cal. Rptr. 657, 662 (Cal. Ct. App. 1983) (applying *Partridge* and finding coverage for home damaged when it slid from its foundation after a heavy rain (an excluded risk) where a third party’s negligence (a covered risk) damaged a subdrain and was “a concurrent proximate cause of the loss.”).

<sup>15</sup> 770 P.2d 704(Cal. 1989).

wall.<sup>16</sup> State Farm denied the Garveys' claim based on the policy's earth movement exclusion.<sup>17</sup> Thereafter, the Garveys sued for breach of contract and bad faith, claiming that there was coverage because the damage was caused by contractor negligence, a non-excluded peril.<sup>18</sup> The trial court, relying on *Partridge*, granted a directed verdict to the Garveys on the coverage issue, reasoning that the contractor's negligence was a concurrent proximate cause of the loss. The jury then found State Farm liable for \$47,000 under the policy and \$1 million in punitive damages.<sup>19</sup>

On appeal, the Supreme Court rejected *Partridge's* concurrent causation approach in first-party cases. Instead, the court reaffirmed *Sabella's* efficient proximate cause analysis.<sup>20</sup> The court found that courts had misinterpreted and misapplied *Sabella* and *Partridge* by finding coverage in first-party cases under the *Partridge* concurrent causation approach instead of applying the *Sabella* efficient proximate cause analysis.<sup>21</sup> The court also found that this was contrary to the criteria in Insurance Code sections 530 and 532, the *Sabella* decision, and the important distinctions between first- and third-party coverages.<sup>22</sup> The court noted that because "a covered peril usually can be asserted to exist somewhere in the chain of causation in cases involving multiple causes, applying the *Partridge* approach to coverage in first-party cases effectively nullifies policy exclusions in 'all risk' homeowner's property loss policies, thereby essentially abrogating the limiting terms of

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<sup>16</sup> *Id.* at 705.

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

<sup>18</sup> *Id.* at 706.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 705. The court of appeal's decision in *Garvey* was another example of a court's misinterpretation and misapplication of *Sabella*.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* The *Garvey* court addressed at length the distinction between liability and property insurance. The court quoted one commentator "Liability and corresponding coverage under a third-party insurance policy must be carefully distinguished from the coverage analysis applied in a first-party property contract. Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability." *Id.* at 710 (quoting Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 Forum 385, 386 (1985)). The *Garvey* court noted that for these reasons it was important to separate the causation analysis under the two different types of coverages. Specifically, the court observed that coverage under a property policy is determined by reference to causation from certain perils that are either covered or excluded by the policy, while third-party liability insurance draws on traditional tort concepts of fault, proximate cause, and duty. *Id.* at 710. The court stated that in the property insurance context, the parties can tailor the policy according to the needs of the insured and excluded risks, and in the process, determine the corresponding premium to meet the economic needs of the insured. *Id.* at 711.

insurance contracts in such cases.”<sup>23</sup> Thus, the court reasoned that *Partridge* was never intended to provide such a result in first-party cases, and that *Partridge* analysis was limited only to “*liability* cases in which true concurrent causes, each originating from an independent act of negligence, simultaneously join together to produce injury.”<sup>24</sup>

### **THE CURRENT STATE OF THE EFFICIENT PROXIMATE CAUSE DOCTRINE**

#### **The Meaning of “Efficient Proximate Cause”**

The *Garvey* court defined efficient proximate cause to mean “predominating cause.”<sup>25</sup> The court did not further define “predominating.” The dictionary defines that word to mean “having superior strength, influence, authority, or position.”<sup>26</sup> One suggested jury instruction and at least one commentator simply define predominating cause to be the “most important” cause, which seems to be the best definition of the term.<sup>27</sup>

A few courts mistakenly have defined efficient proximate cause to mean the “moving cause.”<sup>28</sup> The source of this apparent confusion lies with the *Sabella* court’s

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<sup>23</sup> *Id.* at 705.

<sup>24</sup> *Id.* (emphasis in original).

<sup>25</sup> *Id.* at 708.

<sup>26</sup> Webster’s Third New International Dictionary 1786 (1993).

<sup>27</sup> H. Walter Croskey et al., California Practice Guide: Insurance Litigation I 6:135.1 (1998); California Forms of Jury Instruction § 23.131[1] (1998). The “efficient proximate cause” jury instruction reads:

You have heard evidence in this case that more than one [event/peril] may have [caused/contributed to/aggravated] [insured’s] loss. The “efficient proximate cause” of a loss is the cause that was the most important event in producing the loss. Under [insurer’s] policy, the loss is covered only if you find that the most important cause of the loss was [an event/a peril] that is covered under the policy.

*Id.*

<sup>28</sup> See, e.g., *Allstate Ins. Co. v. Smith*, 929 F.2d 447, 451 (9th Cir. 1985) (“We find that although rain `operate[d] more immediately in producing the disaster,’ it was the contractor’s failure to cover the premises that `set in motion’ the chain of events leading to Smith’s losses.”); *Brian Chuchua’s Jeep, Inc. v. Farmers Ins. Group*, 13 Cal. Rptr. 2d 444, 445 (1992) (the efficient proximate cause is “the one that sets others in motion”). See also *Berry v. Commercial Union Ins. Co.*, 87 F.3d 387, 391 (9th Cir. 1996) (recognizing existence of two tests); *Howell v. State Farm Fire & Casualty Co.*, 267 Cal. Rptr. 708, 716 (Cal. Ct. App. 1990) (same).

suggestion that “efficient cause” meant both the “one that sets others in motion” and “the predominating or moving efficient cause.”<sup>29</sup>

But the *Garvey* court explicitly rejected the “moving cause” test, concluding that the misinterpretation of that test added to the confusion in the courts:

We use the term “efficient proximate cause” (meaning predominating cause) when referring to the *Sabella* analysis because we believe the phrase “moving cause” can be misconstrued to deny coverage erroneously, particularly when it is understood literally to mean the “triggering” cause. 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 cases.<sup>30</sup>

Thus, most appellate courts have rejected the use of “moving cause” as the definition of efficient proximate cause. In *Mission National Insurance Co. v. Coachella Valley Water District*,<sup>31</sup> for example, the court found that a jury instruction defining efficient proximate cause as “the cause that sets the others in motion” was erroneous because it improperly suggested to the jury that the jury should search for the “triggering cause” rather than the predominating cause.<sup>32</sup>

In sum, *Garvey* commands that only a predominant cause test be employed to determine the efficient proximate cause. As *Mission National* illustrates, use of the “moving cause” test in a jury instruction likely would be reversible error.

### When to Apply the Efficient Proximate Cause Analysis

The California Supreme Court said that an efficient proximate cause analysis is required whenever “a loss is caused by a combination of a covered and specifically

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<sup>29</sup> *Sabella v. Wisler*, 377 P.2d at 895. The *Sabella* court also found support for its decision in *Brooks v. Metropolitan Life Ins. Co.*, 163 P.2d 689 (Cal. 1945), a case involving a claim made under a homeowner’s policy for accidental death. There, the insured, who was suffering from incurable cancer, an excluded peril, was killed in a fire, a covered peril. *Id.* at 690. The court found that “recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause.” *Id.*

<sup>30</sup> *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704, 708 (Cal. 1989). The *Garvey* court used the “predominant cause” definition again when discussing what the jury must decide, which leaves no doubt as to the correct meaning of “efficient proximate cause.” *Id.* at 715 n.11 (“[A] reasonable juror could find that under the facts of this case, negligent construction was the predominant cause of the property damage.”).

<sup>31</sup> 258 Cal. Rptr. 639 (Cal. CL App. 1989).

<sup>32</sup> *Id.* at 645.

excluded risks.”<sup>33</sup> But this does not mean that an efficient proximate cause analysis is required in every case where the insurer and insured each proffer a separate cause of the loss. Rather, an efficient proximate cause analysis is required only where there are two or more separate and distinct perils, each of which under some circumstances could have occurred independently of each other and caused the loss.<sup>34</sup>

Thus, an efficient proximate cause analysis is not required where the loss was caused by a single cause, although one subject to various characterizations. In *Chadwick v. Farmers Insurance Exchange*,<sup>35</sup> for example, the insured sought coverage for damage due to defective framing. The insurer denied the claim based on the all risk policy’s “latent defect” exclusion. But the insured asserted that negligent construction, a non-excluded peril, caused the latent defect.<sup>36</sup> The appellate court rejected the insured’s argument, reasoning that the alleged negligence was not a distinct peril:

We reject this argument because builder negligence, under the facts of this case, is not a peril distinct from the creation of the defective framing.... Whether characterized as negligent, intentional or innocently inadvertent, the peril itself—the defective framing—is one and the same. To say builder negligence “caused” the defective framing is, in this context, to indulge in misleading wordplay, akin perhaps to saying a murder’s malice aforethought “caused” the killing.<sup>37</sup>

Thus, the court found that when “the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations, the efficient proximate cause analysis has no application.”<sup>38</sup> The court reasoned that “[i]f every possible characterization of an action or event were counted an additional peril, the exclusions in all-risk insurance contracts would be largely meaningless.”<sup>39</sup>

The court reached a similar conclusion in *Finn v. Continental Insurance Co.*<sup>40</sup> There, Finn sought coverage for foundation damage caused by a leak from a broken sewer

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<sup>33</sup> State Farm Fire & Casualty Co. v. Von Der Lieth, 820 P.2d 285, 291 (Cal. 1991).

<sup>34</sup> E.g., Pieper v. Commercial Underwriters Ins. Co., 69 Cal. Rptr. 2d 551, 557 (Cal. Cr. App. 1997); Finn v. Continental Ins. Co., 267 Cal. Rptr. 22, 24 (Cal. Cr. App. 1990).

<sup>35</sup> 21 Cal. Rptr. 2d 871 (Cal. Cr. App. 1993).

<sup>36</sup> *Id.* at 873.

<sup>37</sup> *Id.* at 873-874.

<sup>38</sup> *Id.* at 874.

<sup>39</sup> *Id.*

<sup>40</sup> 267 Cal. Rptr. 22 (Cal. Cr. App. 1990).

pipe. The leak occurred over a period of six months to several years.<sup>41</sup> Although the policy excluded damage from continuous or repeated seepage or leakage from the plumbing system, Finn asserted that a sudden break in the pipe was covered peril and the efficient proximate cause of the leakage.<sup>42</sup> The court rejected the argument, finding that an efficient proximate cause analysis was unnecessary because there were not two distinct perils:

The *Sabella* analysis has no application here because leakage and broken pipes are not two distinct or separate perils. In *Sabella*, and in the cases applying it, the two perils were conceptually distinct: that is, they could each, under some circumstances, have occurred independently of the other and caused damage. In the present case there are not two conceptually distinct perils. Leakage or seepage cannot occur without a rupture or incomplete joining of the pipes. This case involved not multiple causes but only one, a leaking pipe.<sup>43</sup>

More recently, the court in *Pieper v. Commercial Underwriters Insurance Co.*<sup>44</sup> also declined to apply an efficient proximate cause analysis where the insured's proffered cause was not distinct from the excluded cause. In *Pieper*, the issue was whether there was coverage for damage to the insured's fine arts collection caused by a brush fire, an excluded risk, which was started by arson, a covered risk.<sup>45</sup> The Piepers argued that the efficient proximate cause of the loss was arson.<sup>46</sup> But the appellate court enforced the brush fire exclusion, specifically rejecting the Piepers' efficient proximate cause argument.<sup>47</sup> The court found that there were not two distinct perils which occurred independently and caused the Piepers' damage. Rather, the court said there was one single cause—fire.<sup>48</sup> The court explained that a brush fire cannot start without a source of ignition and, thus, "it was irrelevant what caused the fire."<sup>49</sup>

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<sup>41</sup> *Id.* at 23.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 24 (citations omitted).

<sup>44</sup> 69 Cal. Rptr. 2d 551 (Cal. Ct. App. 1997).

<sup>45</sup> The Piepers' Malibu home and contents were destroyed during a large brush fire. The fire was caused by arson. Commercial Underwriters' all-risk policy, which insured a fine arts collection in the Piepers' home, included an exclusion for loss or damage caused by brush fire. *Id.* at 552.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 556-558.

<sup>48</sup> *Id.* at 558.

<sup>49</sup> *Id.*

Thus, an efficient proximate cause analysis is required only where two or more separate and distinct perils, each of which could have occurred independently and caused the loss. An efficient proximate cause analysis is not required where the loss was caused by a single cause, even though that cause may be susceptible to various characterizations.

### **Applicability of the Efficient Proximate Cause Doctrine to Named Peril Policies**

*Garvey*, and many of the cases following it, addressed coverage under an all risk homeowners' policy. The same efficient proximate cause analysis also has been applied to all risk commercial policies.<sup>50</sup> But does an efficient proximate cause analysis apply where the policy is a named peril policy rather than an all risk policy?<sup>51</sup>

The California courts have not addressed this issue in a published decision. But in an unreported decision, the Ninth Circuit in *Chicago Insurance Co. v. Cabigas*<sup>52</sup> found no reason to distinguish between all risk policies and named peril policies. There, the Cabigas obtained a policy specifically insuring the peril of earthquake on their home. The loss was caused by both earthquake and a non-earthquake peril.<sup>53</sup> The trial court instructed the jury to find the loss covered if it concluded that earthquake was the "predominant" cause of the loss.<sup>54</sup> On appeal, the Cabigas asserted that *Garvey* did not apply because "stronger equities favoring the insured under a specified-peril policy."<sup>55</sup> The Ninth Circuit disagreed. The court found that *Garvey* rejected any notion that the *Partridge* concurrent causation analysis should apply to a first-party property policy.<sup>56</sup> The court also found that *Garvey* "equated the causation problems presented under all-risk and specified peril policies," quoting the following from *Garvey*:

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<sup>50</sup> See, e.g., *Berry v. Commercial Union Ins. Co.*, 87 F.3d 387, 388 (9th Cir. 1996) (policy for commercial farming operation); *Howell v. State Farm Fire & Casualty Co.*, 267 Cal. Rptr. 708, 709 (Cal. Ct. App. 1990) (commercial policy for dog kennel).

<sup>51</sup> An all risk policy covers all risks of physical damage except those specifically excluded perils. See *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704, 710 (Cal. 1989). In contrast, a named peril policy covers physical damage caused by one of the enumerated perils. *Id.*

<sup>52</sup> 1995 WL 107288 (9th Cir. March 13, 1995). In the Ninth Circuit, unpublished opinions are not precedential and should not be cited except when relevant under the doctrines of law of the case, *res judicata*, or collateral estoppel. See 9th Cir. Rule 36-3.

<sup>53</sup> The opinion does not identify the non-earthquake peril.

<sup>54</sup> *Id.* at \*1.

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

<sup>56</sup> *Id.*

If one of the causes (perils) arguably falls within the coverage grant—commonly either because it is specifically insured (as in a named peril policy) or not specifically excepted or excluded (as in an “all risks” policy)—disputes over coverage can arise. The task becomes one of identifying the most important cause of the loss to that cause.<sup>57</sup>

Given the *Garvey* court’s focus on the nature of first-party property insurance, the Ninth Circuit was “satisfied that the California Supreme Court would apply the *Garvey* causation standard to a specified-peril policy.”<sup>58</sup>

The court’s analysis in *Cabigas* is sound. The *Garvey* court emphasized the differences between first-party property insurance and third-party liability insurance when it rejected the concurrent cause analysis in favor of the efficient proximate cause analysis. The type of property policy involved was not a factor in the court’s decision. Further, the analysis of coverage in multiple cause cases is essentially the same whether the policy is a named peril policy or an all risk policy.

While the efficient proximate cause analysis should apply to named peril policies, there is one important difference between its application to an all risk policy and to a named peril policy—the burden of proof. Under an all risk policy, the insurer has the burden of proving that the efficient proximate cause of the loss was an excluded peril.<sup>59</sup> But under a named peril policy, the insured bears the burden of proving that the efficient proximate cause of the loss was a specifically enumerated peril.<sup>60</sup>

### Simultaneously Occurring Causes

The efficient proximate cause doctrine as developed by the courts in *Garvey* and *Sabella* applies where the actions, events, or forces occur sequentially. The *Garvey* court specifically did not address the situation where “separate excluded and covered causes simultaneously join together to produce damage.”<sup>61</sup>

But the *Garvey* court noted that in a case where two simultaneously occurring actions or events caused the damage, it might be impossible to determine which cause was

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<sup>57</sup> *Id.* at \*2 (quoting *Garvey*, 770 P.2d at 710, quoting Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 Forum 385, 386 (1985)).

<sup>58</sup> *Id.* at \*2

<sup>59</sup> *See, e.g.*, *Pieper v. Commercial Underwriters Ins. Co.*, 69 Cal. Rptr. 2d 551, 558 (Cal. Ct. App. 1997); *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704, 710 (Cal. 1989); *Strubble v. United Services Auto. Ass’n*, 110 Cal. Rptr. 828, 831-832 (Cal. Ct. App. 1973).

<sup>60</sup> *See, e.g.*, *Strubble*, 110 Cal. Rptr. at 831.

<sup>61</sup> *Garvey*, 770 P.2d at 713 n.9.

the efficient proximate cause of the loss, and that the court might consider developing a concurrent causation doctrine similar to the one applied by the court of appeal in *Garvey*.<sup>62</sup> The court of appeal formulated a two-prong test which incorporated elements of both *Sabella* and *Partridge*: If the covered risk and the excluded risk are both causes in fact and if the two risks are independent of each other, the *Partridge* analysis applied, that is, the loss was covered if the covered risk was a concurring proximate cause of the loss.<sup>63</sup> If, on the other hand, the two risks are dependent upon each other, the *Sabella* analysis is triggered, that is, the loss was covered only if the covered risk was the moving cause of the loss.<sup>64</sup>

The issue of coverage where separate excluded and covered causes simultaneously join together to produce damage has not arisen in a published case. And it is unclear what test the courts will apply. The *Garvey* court's *dicta* is the only guidance courts have on this issue.

### The Earthquake Exception

By statute, the *Garvey* efficient proximate cause doctrine will not apply in cases where earthquake is a non-covered peril and *a* proximate cause of the loss. Under California Insurance Code Section 10088, there shall be no recovery for loss caused by an earthquake absent a policy or endorsement specifically covering earthquake loss even if other non-excluded perils contribute to the loss:

Notwithstanding the provisions of Section 530, 532, or any other provision of law, and in the absence of an endorsement or additional policy provision specifically covering the peril of earthquake, no policy which by its terms does not cover the peril of earthquake shall provide or shall be held to provide coverage for any loss or damage when earthquake is a proximate cause regardless of whether the loss or damage also directly or indirectly results from or is contributed to, concurrently or in any sequence by any other proximate or remote cause, whether or not covered by the policy. . . .<sup>65</sup>

Section 10088 was enacted in 1984 as part of the Earthquake Insurance Act legislation passed requiring insurers of residential property to offer coverage for loss or damage caused by earthquake. Although the statute generally addresses residential property insurance, section 10088 expressly extends to "all policies of any nature, including, but not

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 712.

<sup>64</sup> *Id.*

<sup>65</sup> Cal. Ins. Code § 10088 (West 1993).

limited to, business and commercial forms providing coverage against loss due to damage to the property of the insured.”<sup>66</sup>

Section 10088 was enacted before *Garvey*. Thus, insureds may argue that there is coverage for some earthquake-related damages where the predominant cause of those damages was not earthquake but rather a covered peril. Although there is no case law addressing this issue, section 10088 should effectively eliminate coverage for all losses (with the exception of fire losses) caused in any way by an earthquake when a policy excludes earthquake.<sup>67</sup>

Indeed, *Garvey* was based on an interpretation of Insurance Code sections 530 and 532. The court held that these two sections require an insurer to provide coverage whenever an insured peril constitutes the predominant cause of the loss. Insurance Code section 10088 expressly addressed sections 530 and 532 by stating that it applies “notwithstanding the provisions of Section 530, 532, or any other provision of law. . . .”<sup>68</sup> Thus, the legislature clearly contemplated the application of section 10088 in all circumstances.

Courts also have said that section 10088 precludes coverage for all earthquake related losses absent specific earthquake coverage. For example, one appellate court indicated, in *dicta*, that section 10088 “precludes recovery for loss caused by earthquake absent a policy or endorsement specifically covering earthquake loss.”<sup>69</sup> Similarly, in his dissenting opinion in *Garvey*, Justice Mosk acknowledged that the legislature enacted Insurance Code section 10088 “as an exception to the general rule of sections 530 and 532” in the circumstance where earthquake is a proximate cause of the claimed loss or damage.<sup>70</sup>

The legislative intent set forth in Section 10081, the first section of the Earthquake Insurance Act, also confirms that section 10088 was meant to supersede any concurrent causation analysis:

It is the intent of the Legislature to make clear that loss caused by or resulting from an earthquake shall be compensable by insurance coverage only when earthquake protection is provided through policy provision or endorsement designed specifically to indemnify against the risk of earthquake loss, and not through

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<sup>66</sup> *Id.*

<sup>67</sup> *See id.* § 10088.5 (providing an exception for fire losses caused by or resulting from an earthquake).

<sup>68</sup> *Id.* § 10088.

<sup>69</sup> *Williams v. State Farm Fire & Casualty Co.*, 265 Cal. Rptr. 644, 646 (Cal. Ct. App. 1990).

<sup>70</sup> *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704, 727 (Cal. 1989) (Mask, J., dissenting).

policies where the peril of earthquake is specifically excluded even though another cause of loss acts together with the earthquake to produce the loss.<sup>71</sup>

Thus, the legislature intended section 10088 to operate to prevent insureds from recovering for earthquake losses by identifying other covered causes of the loss and from applying the efficient proximate cause analysis.

In sum, with the exception of fire losses, there is no coverage for loss or damage where earthquake is a proximate cause of that loss or damage if the insured did not purchase earthquake insurance. Even if there are other claimed proximate causes of the damage which are covered, Insurance Code section 10088 mandates that there is no coverage under the policy, and a *Garvey* analysis is unnecessary.

### Anti-Concurrent Cause Exclusions

One question left open by *Garvey* was whether a property insurer may contractually exclude coverage when a covered peril is the efficient proximate cause of the loss, but an excluded peril has contributed or was necessary to the loss. Indeed, many property insurance policies attempt to exclude coverage whenever an excluded risk directly or indirectly causes a loss even though a covered risk also contributed to the loss.<sup>72</sup> ISO's standard commercial property coverage form, for example, provides:

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.<sup>73</sup>

Insurers included this "anti-concurrent cause" language to preclude coverage for a loss caused by one of the excluded causes under the doctrine of concurrent causation.<sup>74</sup>

A federal district court first addressed the enforceability of anti-current cause language in *State Farm Fire & Casualty Co. v. Martin*.<sup>75</sup> There, the federal district court found that section 530 and *Sabella* did not prevent an insurer from contractually excluding coverage where an insured peril is merely a concurrent cause of the loss: "While the court

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<sup>71</sup> 1984 Cal. Stat. ch. 916, § 2, at 3073. *quoted* in *Williams v. State Farm Fire & Casualty Co.*, 265 Cal. Rptr. 644, 646 (Cal. Ct. App. 1990).

<sup>72</sup> ISO Homeowners 3-Special Form (HO 00 03 04 91); ISO Causes of Loss-Basic Form (CP 10 10 06 95); ISO Causes of Loss-Broad Form (CP 10 20 06 95); ISO Causes of Loss-Special Form (CP 10 30 06 95).

<sup>73</sup> ISO Causes of Loss-Basic Form (CP 10 10 06 95); ISO Causes of Loss-Broad Form (CP 10 20 06 95); ISO Causes of Loss-Special Form (CP 10 30 06 95).

<sup>74</sup> *See generally*, 1 Linda G. Robinson & Jack P. Gibson, *Commercial Property Insurance* V.R.2 (1992).

<sup>75</sup> 668 F. Supp. 1379 (C.D. Cal. 1987), *aff'd*, 872 F.2d 319 (9th Cir. 1989).

in *Sabella* would not extend the statute so as to imply such restrictions on coverage of concurrent causes, there is nothing in the law denying the insurer the right to include such language as a term of the contract itself.<sup>76</sup>

But the California Court of Appeal in *Howell v. State Farm Fire & Casualty Co.*,<sup>77</sup> reached a different conclusion. The *Howell*, court held that a property insurer may not contractually exclude coverage when a covered peril is the efficient proximate cause of the loss.<sup>78</sup> The court reasoned that Insurance Code Section 530, as interpreted by *Sabella* and its progeny, requires a property insurer to provide coverage whenever an insured peril is the efficient proximate cause of the loss.<sup>79</sup> The *Howell*, court said that if the anti-concurrent cause language in the exclusion were given effect, an insurer would be able to exempt coverage even though an insured peril was the proximate cause of the loss. This would be contrary to Insurance Code section 530.<sup>80</sup>

The *Howell*, court tried to harmonize its decision with that in *Martin*. The court said *Martin* applied only to “concurrent causes” and not to “efficient proximate causes” as defined in *Sabella*.<sup>81</sup> That is, an insurer may contractually limit liability where a covered peril is merely a “concurrent cause” of the loss; *Martin* does not address whether the insurer may exclude coverage when an insured peril is the “efficient proximate cause” of the loss.<sup>82</sup>

The California Supreme Court has not addressed this issue. But the issue seems settled; courts will not allow insurers to use a causation exclusion to avoid the efficient proximate cause analysis.

## CONCLUSION

The *Garvey* court rejected application of the concurrent causation doctrine to claims under first-party property policies. *Garvey* refocused the analysis on the efficient proximate cause, which recognizes the important distinctions between first and third party coverages.

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<sup>76</sup> *Id.* at 1382 (emphasis in original).

<sup>77</sup> 267 Cal. Rptr. 708 (Cal. Ct. App. 1990).

<sup>78</sup> *Id.* at 711. In *Howell*, a landslide occurred on Howell’s property after a heavy rainfall. The year before, a fire destroyed much of the vegetation on the slope, making it more susceptible to rain-induced landslides. *Id.* at 709. State Farm’s policies excluded “water” and “earth movement” and contained anti-concurrent cause language. *Id.* at 710. State Farm asserted the loss was excluded because of the “water” or “earth movement” exclusions, while Howell, claimed loss was caused by fire. *Id.* at 711.

<sup>79</sup> *Id.* at 714.

<sup>80</sup> *Id.* at 712.

<sup>81</sup> *Id.* at 715.

<sup>82</sup> *Id.* at 715-716.

Thus, where a loss is caused by a combination of a covered risk and a specifically excluded risk, the loss is covered only if the covered risk was the efficient proximate cause—meaning the most important cause—of the loss. Similarly, the loss is excluded if the excluded risk was the efficient proximate cause of the loss. As developed by *Garvey* and its progeny, an efficient proximate cause analysis is required whenever a loss is caused by a combination of a covered and specifically excluded risks. But the risks must in fact be separate and distinct; the efficient proximate cause analysis is not required where one of the two causes is a remote cause, which alone could not have caused the loss.