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Autopsy of a Plain English Insurance Contract: Can Plain English Survive Proximate Cause?—Graham v. Public Employees Mut. Ins. Co., 98 Wn. 2d 533, 656 P.2d 1077 (1983)

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AUTOPSY OF A PLAIN ENGLISH INSURANCE CONTRACT: CAN PLAIN ENGLISH SURVIVE PROXIMATE CAUSE?—*Graham v. Public Employees Mut. Ins. Co.*, 98 Wn. 2d 533, 656 P.2d 1077 (1983)

In *Graham v. Public Employees Mut. Ins. Co. (PEMCO),*[1] several owners of homes destroyed by mudflows and water in the aftermath of the May 18, 1980, eruption of Mount St. Helens sought recovery under their plain English[2] homeowner's "all-risk"[3] policies. The question presented on appeal was whether the "earth movement" exclusion from coverage in those policies encompassed mudflows resulting from volcanic eruption. The court found that earth movement was not "specifically defined"[4] in the plain English policies. Rather than using traditional princi-

1. 98 Wn. 2d 533, 656 P.2d 1077 (1983). The Grahams claimed coverage under PEMCO's "all-risk" homeowner's policy; the Campbells, co-appellants against PEMCO, made the same claim under a "named peril" homeowner's policy. Both policies contained the same exclusionary language. Exhibits 5 & 6, Superior Ct. Clerk's Papers ("CP"), Graham v. PEMCO, No. 49,408 (Cowlitz County Super. Ct. 1981), *rev'd sub. nom.* Graham v. PEMCO, 98 Wn. 2d 533, 656 P.2d 1077 (1983); Verbatim Report of Proceedings at 15–17, Graham v. PEMCO, No. 49,408 (Cowlitz County Super. Ct. 1981), *rev'd*, 98 Wn. 2d 533, 656 P.2d 1077 (1983). The Fotheringills, whose case against Pennsylvania General Insurance Co. (PGI) was consolidated on appeal with that of the Grahams and Campbells, were covered under a homeowner's policy containing identical exclusionary language. Complaint of plaintiffs at 1–2, Fotheringill v. Pennsylvania Gen. Ins. Co. (PGI), No. 49,695 (Cowlitz County Super. Ct. 1981), *rev'd sub nom.* Graham v. PEMCO, 98 Wn. 2d 533, 656 P.2d 1077 (1983).

2. The policies were issued under the Homeowners 76 Policy Program, which replaced traditional legal language of older forms with significantly more readable language. Exhibits C & D (John Liner Letter), Graham v. PEMCO, 98 Wn. 2d 533, 656 P.2d 1077 (1983). The Homeowners 76 Policy, used in roughly half of the states, was drafted by the National Insurance Services Office and approved for use in Washington in 1977. *Id.*; R. Johnson & J. Jarvis, The Insurance Industry Response in Natural Disasters: Selected Problems & Implications 3-20 (1980) (available from Continuing Legal Education Comm., Wash. St. B. Ass'n) (contains reports by the Washington State Insurance Commissioner's Office following the eruption, including discussion of interpretation problems raised by simplified language). *See generally* Ciaramitaro, *Plain English in Insurance Contracts*, 62 MICH. B.J. 961 (1983).

3. The term "all-risk" is an insurance term of art. "All-risk" does not mean that all risks are covered; only risks not expressly excluded are covered. R. KEETON, BASIC INSURANCE LAW 270–72 (1960). The term encompasses miscellaneous risks in addition to the traditionally insured ones of fire, explosion, theft, and glass breakage.

4. Graham v. PEMCO, 98 Wn. 2d 533, 535, 656 P.2d 1077, 1079 (1983). The court made no further comment on the term "earth movement" even though the meaning of the term had been the primary issue below. The court could have interpreted the term according to its ordinary meaning as movement of "earth," that is, soil of any kind, including gravel, clay, loam, as distinct from rock. BLACK'S LAW DICTIONARY 457 (5th ed. 1979); *see, e.g.*, Niagara Fire Ins. Co. v. Curtsinger, 361 S.W.2d 762, 765 (Ky. 1962) (where homeowner was insured for "landslide" and the single word "landslide" in the policy was in no way defined, court applied the ordinary, dictionary meaning of the word as "the slipping down of a mass of earth"). The parties raised no issue of fact as to whether mudflow was a movement of earth. Brief of Respondent (PEMCO) at 3–4,*Graham*, 98 Wn. 2d 533,

ples of contract interpretation to resolve the dispute, the majority introduced a proximate cause analysis. The court reversed the summary judgment for the insurers and remanded the case. On remand, the jury was to determine whether the Mount St. Helens eruption was an "explosion"[5] within the policy terms, whether the earthquakes and harmonic tremors preceding that "explosion" were "earth movement" (thereby triggering an exception to the earth movement exclusion), and whether the eruption proximately caused the loss.[6]

The original unsimplified policy had resolved these rather strained factual issues with seven illustrations of excluded "earth movement," including "volcanic eruption" and "mudflows." The insurers deleted these illustrations, as the court observed, in an effort to simplify the policy language.[7] Consequently, the *Graham* decision appears to give sub-

656 P.2d 1077; Exhibit 4 at 3, *Graham*, No. 49,408 (Cowlitz County Super. Ct. 1981), *rev'd*, 98 Wn. 2d 533, 656 P.2d 1077.

5. The word "explosion" is used in insurance provisions as ordinary people use the term. 5 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 3085 (1970). *But see* Respondent's (PEMCO) Motion for Reconsideration at 4, *Graham*, 98 Wn. 2d 533, 656 P.2d 1077 (claiming "explosion" to be an insurance term of art). Where the policy furnishes no guide, its ordinary meaning prevails. 5 J. APPLEMAN, *supra*, § 3085. However, the term "explosion" customarily refers to accidental rather than natural explosions. *Id.* The term has not ordinarily been understood to encompass volcanic eruption, although the court did not acknowledge this. The explosion exception to the earth movement exclusion is, in fact, a historical reflex. Insurance companies have traditionally paid for accidental explosion damage (although it could be expressly excluded), fire loss, or glass breakage regardless of the cause. For the original policy to make sense, the term "explosion" must refer to something other than a volcanic eruption: "This policy does not insure against loss . . . caused by . . . volcanic eruption . . . unless loss by fire, explosion or breakage of glass . . . ensues . . . . " 98 Wn. 2d at 535, 656 P.2d at 1079.

The supreme court did not consider the insurance industry's meaning for the term "explosion," a meaning which in any event was unknown to the insureds. Affidavit of Fotheringill in Opposition to Summary Judgment, Fotheringill v. PGI, No. 49,695 (Cowlitz County Super. Ct. 1981), *rev'd sub. nom.* Graham v. PEMCO, 98 Wn. 2d 533, 656 P.2d 1077 (1983); Affidavit of Graham & Campbell in Opposition to Motion for Summary Judgment, *Graham*, No. 49,408 (Cowlitz County Super. Ct. 1981), *rev'd sub. nom.* Graham v. PEMCO, 98 Wn. 2d 533, 656 P.2d 1077 (1983); Brief of Appellants at 11–12, *Graham*, 98 Wn. 2d 533, 656 P.2d 1077 (1983). Because the new policy did not offer the contextual evidence found above in the original, the court did not have to account for that evidence. The question of whether an original policy can be used as extrinsic evidence of the meaning of its plain English successor is as yet unanswered.

The *Graham* court avoided this issue of extrinsic evidence, following without comment the Washington cases in which the meaning of "explosion" was found to be a matter of common experience. *E.g.*, Oroville Cordell Fruit Growers, Inc. v. Minneapolis Fire & Marine Ins. Co., 68 Wn. 2d 117, 122, 125, 411 P.2d 873, 876–77, 878 (1966), *app.*, 72 Wn. 2d 544, 434 P.2d 3 (1967) (meaning of "explosion" in insurance policy must be construed in its popular senses, by ordinary people).

6. Graham v. PEMCO, 98 Wn. 2d at 539, 656 P.2d at 1081.

7. *Id.* at 535, 656 P.2d at 1079. The plain English policy was meant to exclude all types of earth movement, including the seven types described in the original form. Exhibit D (John Liner Letter), *supra* note 2; Brief of Respondent PEMCO, *supra* note 4, at 7–8; Supplemental Affidavit of Patricia Colp Kelsey at 2–3, *Graham v. PEMCO*, No. 49,408 (Cowlitz County Super. Ct. 1981) (new policy form constituted "no change in intent"), *rev'd sub. nom.* Graham v. PEMCO, 98 Wn. 2d 533, 656 P.2d 1077; *see also* R. Johnson & J. Jarvis, *supra* note 2, at 3-23, 3-24.

stance to the caveat familiar to plain English advocates: if legal boilerplate is removed, a court may find an instrument ambiguous and thus subject to reconstruction.[8]

Although the result in *Graham* discourages plain English form drafting, the case's significance extends beyond questions of policy language simplification. *Graham* illustrates the cost of just results reached for the wrong reasons. *Graham* should have been a simple decision. Explosion was a covered peril under the all-risk policy. The eruption could reasonably have been viewed as an explosion, both in terms of the common meaning of the word "explosion" and of the policy itself. The eruption was the dominant cause of the loss: if the eruption had not occurred, the homes would not have been destroyed. Thus, an insured-against peril was the dominant cause of the insured's loss. Instead of this straightforward solution to the case, the majority chose a technical solution that required the overturning of thirty-three years of previous Washington case law. The majority's technical solution—based on proximate cause reasoning—has consequences more costly than a reversal of precedent and the unnecessary complication of one insurance decision. In the wake of the eruption and the *Graham* litigation, the technical content of plain English form policies in Washington has been increased in an effort to limit coverage.[9] The new proximate cause test has thrust on Washington attorneys the difficult task of second-guessing the court as to where on the chain of causation it will stop its analysis. Agents and insureds are no longer able to settle their own disputes because neither of them can determine proximate cause. The public, the insurance industry, the courts, and conscientious attorneys are all harmed by the resulting increase in claims litigation. A study of the unusual context and elaborate reasoning of *Graham* reveals how this potentially simple case made bad law.

This Note first analyzes the majority's introduction of a tort concept of proximate cause for deciding insurance cases—and for covertly making public policy.[10] Second, the Note analyzes the dissent's failure to modify

8. Counsel for PEMCO, Douglas Houser, raised this issue at trial, describing the case to the court as a "good philosophical test" of simplification. Verbatim Report of Proceedings, *supra* note 1, at 42–43. *See generally* Woodyard, *Readable Policies . . . Advanced Calculus vs. Truck Stop Lust?*, 11 BRIEF, Nov. 1981, at 33–35 (one of the great concerns about the conversion to readable policies is the likelihood of increased risk; model enactments for policy simplification are designed to avoid increasing the risks assumed under the redrafted policies).

9. *See infra* note 81.

10. The practice of policy-making under the rubric of proximate cause is well documented in California insurance decisions. *See, e.g.*, Sabella v. Wisler, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963); Premier Ins. Co. v. Welch, 140 Cal. App. 3d 720, 189 Cal. Rptr. 657 (1983); State Farm Fire and Casualty Co. v. Kohl, 131 Cal. App. 3d 1031, 182 Cal. Rptr. 720 (1982); State Farm Mut. Auto. Ins. Co. v. Partridge, 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973). *See generally* Voght, *Tests of Causation and the Florida Jury Instructions—The Current Conflict and the*

its traditional contract analysis to meet the needs of consumers who purchase standard form contracts. The Note recommends the use of an adhesion contract analysis and a common sense test of causation for deciding consumer insurance cases. The Note considers the insurance industry's dilemma as it attempts to respond to plain language legislation while still controlling its exposure to liability. The Note considers as well the public interest in fair and comprehensible insurance policies.

I. FACTUAL BACKGROUND

The Grahams purchased PEMCO's most comprehensive all-risk homeowner's insurance policy.[11] As with most insurance transactions,[12] the terms of the deal were packaged—they were not negotiated, nor were they negotiable. No agent explained the form to them or specifically explained the exclusions from their "all-risk" coverage.[13] They began paying premiums before they received their printed policy in the mail. Several years later, they received a second, plain English policy without notice of any substantive change. The Grahams did not read either the original or the simplified policy until after their home was destroyed.[14]

Although they were unaware of it, the Grahams' all-risk coverage under both their original and the simplified policy was limited by a broad exclusion for losses caused by "earth movement." The plain English policy contained the following exclusions for earth movement and water damage:

> SECTION 1—EXCLUSIONS.
> We do not cover loss resulting directly or indirectly from:
> . . . .
> 2. Earth Movement. Direct loss by fire, explosion, theft, or breakage of glass or safety glazing materials resulting from earth movement is covered.
> 3. Water damage, meaning:
> a. flood, ...[15]

Need for a Change, 32 U. FLA L. REV. 308, 310–11 (1980) (fact and policy are tangled in the realm of proximate cause).

11. Exhibit 5, (Grahams' Homeowners Policy), *supra* note 1. Telephone interview with John Barlow, Counsel for the Grahams and the Campbells (Aug. 24, 1983) (notes on file with the *Washington Law Review*). PEMCO has never offered coverage for volcanic eruption. Interrogatories to Defendant and Answers at 6, Graham v. PEMCO, No. 49,408 (Cowlitz County Super. Ct. 1981), *rev'd sub. nom.* Graham v. PEMCO, 98 Wn. 2d 533, 656 P.2d 1077 (1983).

12. R. KEETON, *supra* note 3, at 60.

13. Telephone interview with John Barlow, *supra* note 11. They had not given thought to a possible eruption. However, they did not believe that they had earthquake coverage. *Id.*

14. *Id.*

15. 98 Wn. 2d at 535, 656 P.2d at 1079.

The original policy contained the same exclusion in longer and less readable form:

> This policy does not insure against loss:
>
> . . . .
>
> 2. caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting; unless loss by fire, explosion or breakage of glass constituting a part of the building(s) covered hereunder, including glass in storm doors and storm windows, ensues, and this Company shall then be liable only for such ensuing loss, but this exclusion does not apply to loss by theft; . . . .[16]

The plain English policy was in effect on May 18, 1980, when Mount St. Helens erupted. The eruption melted snow, ice, and glacial blocks which then combined with hot ash, debris, and torrential rains from the eruption cloud to flood the nearby Toutle River valley with mud and water. Approximately ten hours after the eruption began, a mudflow, combined with or preceded by flooding, stripped 150 square miles of the Toutle River Basin of timber and all structures,[17] including the Grahams' home.[18]

The Grahams filed a claim with their insurer, PEMCO, who rejected it on the basis of the earth movement exclusion. The Grahams, joined by the Campbells, then brought suit against PEMCO. The Fotheringills brought a parallel suit against Pennsylvania Gen. Ins. Co. After hearing nearly identical arguments, the superior court granted summary judgment for PEMCO and PGI.[19] The superior court found that the direct cause of

16. *Id.*

17. R. Leed, Environmental Considerations Resulting from the Mount St. Helens Eruptions in Natural Disasters: Selected Problems and Implications 4-4 (1980) (available from Continuing Legal Education Comm., Wash. St. B. Ass'n). Within four days of the eruption, the Washington Insurance Commissioner met with the heads of insurance companies and strongly encouraged them to cover all losses. R. Johnson & J. Jarvis, *supra* note 2, at 3-4. The Commissioner advised the insurance companies that the eruption was a covered "explosion" under the standard form. *Id.* at 3-5. *But see* discussion of "explosion," *supra* note 5. Most insurance companies paid for damage caused by the volcano regardless of the technical language in their forms. R. Johnson & J. Jarvis, *supra* note 2, at 3-5, 3-26; telephone interview with J. Scott Jarvis, Public Defender, Office of Insurance Commissioner (Aug. 29, 1983) (notes on file with the *Washington Law Review*). A number of companies with "all-risk" policies containing the old "volcanic eruption" exclusion waived it and paid claims. R. Johnson & J. Jarvis, *supra* note 2, at 3-27. The total bill for damage to real property was relatively small—$25–26 million. Telephone interview with J. Scott Jarvis, *supra*. Due to the extensive national publicity, the public relations impact was relatively large. Thus, companies may have paid claims to avoid adverse publicity and to match the generosity of competing companies rather than in direct response to the Commissioner's analysis of the eruption as an insured-against peril.

18. The Graham's home was located 20 to 25 miles away from Mount St. Helens. *Graham*, 98 Wn. 2d at 534, 656 P.2d at 1079.

19. *Id.* at 535–36, 656 P.2d at 1079.

damage to the plaintiffs' homes was a combination of mudflow and flood and that the policies contained specific exclusions for damage by earth movement or flood.[20] On direct appeal from the summary judgment, the supreme court reversed and remanded, holding that whether an insured-against peril caused the losses was a question of fact for the jury.[21]

II. COURT'S ANALYSIS

A. *Majority Opinion*

Although the appellants brought their complaint as breach of contract, the majority answered in terms of the tort concept of proximate cause.[22] The court reasoned that (1) if the eruption of Mount St. Helens were found to be an "explosion,"[23] (2) if that explosion were caused by preliminary earth movement (tremors and preliminary earthquakes), and (3) if the Grahams' loss were due directly to Mount St. Helens' eruption, then their loss would be covered by the policy as "direct loss from an explosion resulting from earth movement."[24] The majority opinion fo-

20. Verbatim Report of Proceedings, *supra* note 1, at 54–55. The court found that a mudflow is "the movement of earth together with the movement of water." *Id.* at 55. However, the trial court expressed "a very strong hunch that when they [the supreme court] get this case before them they're going to find that they don't agree with what they said [in Bruener v. Twin City Fire Ins. Co., 37 Wn. 2d 181, 222 P.2d 833 (1950)]." *Id.* at 52. The court stated twice that it did not necessarily agree with the result *Bruener* required it to reach. *Id.* at 52, 54. For discussion of *Bruener* (the controlling prior case), see *infra* note 25.

21. 98 Wn. 2d at 536, 656 P.2d at 1079–80. Both PEMCO and PGI settled with their insureds before retrial. The cases were dismissed in Cowlitz County Superior Court on Oct. 5, 1983. Graham v. PEMCO, No. 49,408 (Cowlitz County Super. Ct. 1981).

22. The Grahams sued PEMCO for breach of contract. Brief of Appellants, *supra* note 5, at 3, 5. The majority began its opinion by noting that "earth movement" is undefined and that the meaning of "explosion" is a factual issue for the jury.*Graham*, 98 Wn. 2d at 536, 656 P.2d at 1079–80. The majority did not otherwise examine the terms of the written contract or the nature of the insurance agreement.

23. Both the plaintiffs and the court apparently overlooked the primary fact that the insurance contracts covered direct loss by "explosion" whether or not preceded by "earth movement." Thus, plaintiffs were erroneously relieved of their burden to prove their loss by an "explosion" in the first instance. Respondent PEMCO's Motion for Reconsideration, *supra* note 5, at 4–5; Brief of Appellants, *supra* note 5, at 28 (assertion that loss was due to a covered "explosion" is not explained or supported). *See generally* 5 J. APPLEMAN, *supra* note 5, § 3086 (Application of Explosion Provisions), § 3085 (Provisions as to Loss Caused by Explosion). Thus, the reach of the earth movement exclusion was a secondary, not a primary, question.

24. 98 Wn. 2d at 536, 656 P.2d at 1080; *cf.* Employers Casualty Co. v. Wainwright, 8 Colo. App. 292, 473 P.2d 181 (1970). In *Wainwright*, where a covered peril combined with an excluded peril, and the excluded peril was not an incident of the covered peril, the court limited liability to loss caused by the covered peril.

In *Graham*, the covered peril was explosion and the excluded peril was earth movement. If the earth movement preceding the explosion was not caused by the explosion (and no evidence or argument was presented to establish such a causal connection), then under the *Wainwright* reasoning the insureds would recover that portion of the damages resulting from the explosion alone. No evidence

cused on the third premise—whether the Grahams' loss was a direct result of the eruption. In so doing, the court overturned the last direct cause rule of *Bruener v. Twin City Fire Ins. Co.*,[25] as "an anomaly, inconsistent with the rule in the majority of other jurisdictions." [26] The court did not summarize the authority in other states. That authority can best be characterized as inconsistent, although a proximate cause rule is widely used elsewhere.

In early automobile cases, the Washington court used proximate cause,[27] which it later abandoned in *Bruener*. When *Bruener* was decided in 1950, authority in other states was irreconcilable and results widely divergent.[28] Although the result in *Bruener* has been criticized, the legal theory was consistent with the general insurance principle that "[y]ou are

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appears in the record of any damage caused by the explosion alone (other than by means of earth movement after the eruption). Thus, under *Wainwright*, the Grahams would recover nothing unless they could show damage caused by the force of the explosion itself, i.e., glass breakage due to the concussion. PEMCO did pay claims for glass damage and direct damage caused by ash. Interrogatories to Defendant and Answers, *supra* note 11, at 2, 4.

25. 37 Wn. 2d 181, 222 P.2d 833 (1950); *Graham*, 98 Wn. 2d at 537–39, 656 P.2d at 1080–81. The *Graham* decision ended a 33-year banishment of a tort concept of proximate cause from insurance law in Washington. *Bruener* substituted a last direct cause rule for the earlier proximate cause rule of Ploe v. International Indem. Co., 128 Wash. 480, 223 P. 327 (1924). In *Bruener*, the plaintiff's automobile skidded on an icy road and struck an embankment. Plaintiff sued to recover from the defendant insurance company for the amount of damage to the car. The comprehensive clause of the policy excluded loss caused by collision of an automobile with another object. The court held that collision with an embankment was within the exclusion and that the damage was caused by collision, not skidding. *Bruener*, 37 Wn. 2d at 184–85, 222 P.2d at 835.

The *Bruener* court acknowledged that the line of insurance cases applying the rules of proximate cause was followed by the Washington court in *Ploe*. *Id.* at 184, 222 P.2d at 835. The court reasoned, however, that the tort concept of proximate cause was inappropriate for insurance cases because it served the single purpose of fixing culpability, with which insurance is not concerned. *Id.* at 183, 222 P.2d at 835.

> [T]he tort rules of proximate cause reach back of both the injury and the physical cause to fix the blame on those who created the situation in which the physical laws of nature operated . . . . Insurance cases are not concerned with why the injury occurred or the question of culpability, but only with the nature of the injury and how it happened.

Id. at 183–184, 222 P.2d at 835. The *Bruener* court thus applied the traditional distinction between causation in tort and causation in contract law. *See* Bird v. St. Paul Fire and Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86, 88 (1918) (J. Cardozo's observation that in the law of torts there is a tendency to go farther back in the search for causes than in the law of contracts, especially insurance contracts).

26. 98 Wn. 2d at 537–38, 656 P.2d at 1080 (footnote omitted). The court's single authority for its "majority rule" is 18 G. COUCH, ON INSURANCE 2D (Rev. ed.) § 74:696 (1983). In theory, however, *Bruener* is consistent with general insurance principles. Bird v. St. Paul Fire and Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86, 88 (1918). *See generally* W. PROSSER, LAW OF TORTS 244 (4th ed. 1971) (word "proximate" means nothing more than "near" or "immediate" with emphasis on physical or mechanical closeness); 18 G. COUCH, *supra*, § 74:712 ("The words 'direct cause' are synonymous in legal intendment with 'proximate cause.' ").

27. *See supra* note 25. *See, e.g.*, Ploe v. International Indem. Co., 128 Wash. 480, 223 P. 327 (1924).

28. Annot., 23 A.L.R. 2d 385, 393 (1950).

not to trouble yourself with distant causes.''[29] Since the *Bruener* decision, courts in other jurisdictions have moved toward readings of exclusions that are more generous to the insured, often by means of proximate cause analysis. Perhaps due to the obscurity of proximate cause theory, the decisions are not uniform in their approach.[30]

The majority offered as its reason for adopting the proximate cause rule that the ''mechanical simplicity of the *Bruener* rule does not allow inquiry into the intent and expectations of the parties to the insurance contract.''[31] The majority did not, however, inquire into the intent and expectations of the parties. The court's definition of proximate cause suggests that the court's purpose was to bring Washington case law in line with its reading of proximate cause cases in other jurisdictions.[32]

The court concluded that since the facts in *Graham* were capable of supporting different inferences, the question of proximate cause was for the jury.[33] Specifically, the court found that a jury could ''determine [that] the water displacement, melting snow and ice and mudflows were mere manifestations of the eruption, finding that the eruption of Mount St. Helens was the proximate cause of the damage to appellants' homes.''[34] The majority opinion was thus focused exclusively on the tort concept of proximate cause.

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29. Bird v. St. Paul Fire and Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86, 88 (1918).

30. Cresthill Indus. v. Providence Wash. Ins. Co., 53 A.D.2d 488, 385 N.Y.S.2d 797, 799 (1976) (where an excluded peril and a covered peril combined to cause loss, court found no controlling New York precedent and absence of uniform authority in other states). The *Cresthill* court allowed recovery where water damage, an excluded peril, had been caused by vandalism, a covered peril. *See also* Hatley v. Truck Ins. Exchange, 261 Or. 606, 494 P.2d 426 (1972); Allstate Ins. Co. v. Coin-O-Mat, Inc., 202 So. 2d 598 (Fla. Dist. Ct. App. 1967); General Accident Fire & Life Assurance Corp. v. Azar, 103 Ga. App. 215, 119 S.E.2d 82 (1961); Lanza Enters., Inc. v. Continental Ins. Co., 142 So. 2d 580 (La. Ct. App. 1962); Beauty Supplies, Inc. v. Hanover Ins. Co., 526 S.W.2d 75 (Mo. Ct. App. 1975); Parnell v. Rohrer Chevrolet Co., 95 N.J. Super. 471, 231 A.2d 824 (1967). *Contra* Pacific Indem. Co. v. N.A., Inc., 120 Ga. App. 793, 172 S.E.2d 192 (1969) (where losses from theft were excluded by policy language, no liability for vandalism of property caused by such theft).

31. 98 Wn. 2d at 538, 656 P.2d at 1081.

32. *See supra* note 30 and accompanying text. The court described proximate cause as the ''efficient or predominant cause which sets into motion the chain of events producing the loss.'' 98 Wn. 2d at 538, 656 P.2d at 1081; 18 G. COUCH, *supra* note 26, § 74:709; *accord* Brandt v. Premier Ins. Co., 260 Or. 392, 490 P.2d 984, 988 (1971) (proximate cause is the efficient cause, which, while not necessarily last in time, ''is of such an overpowering and irresistible nature that its course and predictable results cannot be materially affected by subsequent intervening acts or events''); Frontis v. Milwaukee Ins. Co., 156 Conn. 492, 242 A.2d 749, 753 (1968) (proximate cause for insurance purposes is ''active efficient cause that sets in motion a train of events which brings about a result without the intervention of any [independent force]'').

33. 98 Wn. 2d at 539, 656 P.2d at 1081.

34. *Id.*

B. The Dissent

The dissent is brief and undeveloped. After observing that the majority strayed from the basic issues of the case,[35] the three dissenting justices took the traditional contract approach to an insurance case—as a dispute over private law made between two consenting parties.[36] Under this objective approach, the policy was viewed as an embodiment of the parties' intent. Thus the only questions to be asked were: What are the express terms of the written contract? Are any terms ambiguous? If unambiguous, would there be coverage?[37] If terms are ambiguous, of course, then the contract is construed against the insurance company as the drafting agent, within the bounds of the reasonable expectations of the insured.[38]

The dissent viewed the court's initial task as one of identifying the contract terms.[39] The dissent found that the policy provided coverage for fire and explosion and excluded coverage for earth movement.[40] The dissent observed that the next step—to determine whether these policy terms were ambiguous—was ignored by the majority.[41]

The dissent criticized the majority for improperly applying the terms of the policy to the chain of events. The majority concluded that the explosion of Mount St. Helens, if preceded by earth movement, brought the incident within the terms of the policy. The dissent pointed out that the majority left out a necessary additional inquiry: should the earth movement exclusion be applied a second time to exclude coverage from mudflows?[42] This presented a strictly legal issue to be resolved by considering

35. *Id.* at 540, 656 P.2d at 1081–82 (Brachtenbach, J., dissenting).

36. *Id.*

37. *Id.*

38. In insurance law, the general principle of construing ambiguous language in an exclusion is to construe it in favor of the insured. 12 G. COUCH, ON INSURANCE 2D (Rev. ed.) § 44A:3 (1981). Ambiguous or doubtful language or terms must be given the strongest interpretation against the insurer which they will reasonably bear or the most advantageous interpretation to the insured. Courts are not inclined to permit the insurer to take advantage of any ambiguity, especially when the plaintiff's cause is meritorious and the defense technical. 2 G. COUCH, ON INSURANCE 2D (Rev. ed.) § 15:74 (1984).

Although neither the dissent nor the majority answered the question of whether any of the provisions are technically ambiguous (not merely "undefined"), the plain English earth movement exception is confusing. The first sentence excludes loss "resulting directly or indirectly from earth movement." The second sentence provides coverage for loss by fire, explosion, theft, or breakage of glass resulting from earth movement—that is, loss indirectly caused by earth movement. Thus, to the lay reader, the broad exclusion in the first sentence appears to contradict the coverage for indirect loss in the second.

39. 98 Wn. 2d at 540, 656 P.2d at 1082 (Brachtenbach, J., dissenting).

40. *Id.*

41. *Id.*

42. *Id.* at 541, 656 P.2d at 1082. The dissent did not consider the effect of exceptions to exclusionary clauses under general insurance principles. When a policy exclusion itself contains an exception clause, the effect of the latter is to restrict the sphere of operation of the exclusion. Thus the

the earth movement exclusion a second time. According to the dissent, the majority used proximate cause "to circumvent the clear terms of the policy," stopping its inquiry at a point on the causation chain where coverage would be provided.[43] The dissent objected to such a reversal of the court's past practice. The court had previously refused to revise insurance contracts even to serve abstract justice.[44] The dissent concluded that its interpretation of the policy was "necessary to give effect to the expectations that the parties had at the time they contracted for insurance coverage."[45]

III. CRITICISM OF THE *GRAHAM* DECISION

As Dean Green observed about proximate cause half a century ago, "The deplorable expenditure and stupendous waste of judicial energy which has been employed in converting this simple problem into an insoluble riddle beggars description."[46] More recently, proximate cause has been reviled as "the joker in poker, wild in aces, straights, and flushes,"—a card trick that judges do with the causation conundrum.[47] Proximate cause survives its critics in part because such legerdemain allows the fact-finder to reach up the chain of causation to fasten liability where it chooses.

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exclusion is made inapplicable and recovery is allowed if the harm sustained is otherwise within the coverage of the policy. 12 G. COUCH, *supra* note 38, at § 44A:5 (1983). In *Graham*, if the explosion exception made the earth movement exclusion inapplicable, and the harm was not otherwise excluded, then there would be coverage. The exclusion would, in other words, be made inoperative and so could not be "applied a second time." 98 Wn. 2d at 540, 656, P.2d at 1082 (Brachtenbach, J., dissenting).

43. 98 Wn. 2d at 541, 656 P.2d at 1082 (Brachtenbach, J., dissenting). The majority opinion stops with earth tremors preceding the eruption in an effort to satisfy the exception to the earth movement exclusion.

44. *Id.* The dissent refers to Sears, Roebuck & Co. v. Hartford Accident & Indem. Co., 50 Wn. 2d 443, 449, 313 P.2d 347, 350 (1957), where the court said that "neither abstract justice nor any rule of construction can create a contract for the parties which they did not make for themselves." *See, e.g.*, Robin v. Blue Cross Hosp. Serv., Inc. 637 S.W.2d 695 (Mo. 1982) (where policy language is unambiguous, court must enforce it according to its own terms); Monti v. Rockwood Ins. Co., 303 Pa. Super. 473, 450 A.2d 24 (1982) (court should not rewrite policy terms where language is plain).

45. 98 Wn. 2d at 541, 656 P.2d at 1082 (Brachtenbach, J., dissenting). The dissent noted that the Grahams had additional flood insurance and that their claim and recovery for "this damage demonstrates that they at least viewed the primary cause of the damage as unrelated to the explosion." *Id.* at 541 n.3, 656 P.2d at 1082 n.3. This non sequitur is not explained. Neither the Grahams' expectations at the time of purchase nor their view of the primary cause is evidenced by their recovery under an additional insurance policy.

46. L. GREEN, RATIONALE OF PROXIMATE CAUSE 5 (1927); *see also* Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN L. REV. 19, 21 (1936).

47. Vinson, *Proximate Cause Fog Spreads*, 69 A.B.A. J. 1042, 1042–43 (1983).

To introduce a tort concept of proximate cause into Washington insurance law, the *Graham* majority relied on a case characteristic of the present national trend favoring proximate cause, *Franklin Packaging Co. v. California Union Insurance Company*.[48] *Franklin* involved the applicability of a water damage exclusion in a fire policy insuring against direct loss by vandalism. The court found the exclusion not to apply where vandals damaged a water-cooled air conditioner, thereby causing a water leak. The water backed up in the company's warehouse after a sewer pipe had been accidentally blocked by a plumbing contractor. The *Franklin* court emphasized that recovery may be allowed "where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk."[49] Similarly, in *Graham,* the court found that the chain of causation was not necessarily broken by the last step (mudflow).[50]

Franklin differs significantly from *Graham* in three respects. First, *Franklin* involved commercial insurance, presumably purchased at arm's length by informed business people, while *Graham* involved consumer insurance purchased by uninformed homeowners. Second, in *Franklin* vandalism was an expressly insured-against peril, whereas in *Graham* a volcanic eruption was not seriously contemplated by either insurer or insured.[51] Third, two distinct causes— vandalism and accidental blockage of the drain—combined to create the loss in *Franklin,* whereas the eruption was the sole cause of mudflows and loss in *Graham.*

The *Franklin* proximate cause rule, which exemplifies the rule in a majority of states, assists the court where two (or more) concurrent, independent causes—one insured against and one excluded—combine. For insurance purposes, if either concurrent cause is insured against, there will be coverage.[52] But the first question must always be whether any cause in question is insured against. The *Graham* court overlooked that question in its "ardour to explain the relationship of proximate cause to insurance law."[53]

Because the eruption was the sole independent cause of loss, the *Gra-*

48. 171 N.J. Super. 188, 408 A.2d 448 (1979).

49. 408 A.2d at 449 (quoting 5 J. APPLEMAN, *supra* note 5, § 3083, at 309–11 (1970)).

50. 98 Wn. 2d at 539, 656 P.2d at 1081.

51. *See infra* note 82; *see also* Frontier Lanes v. Canadian Indem. Co., 26 Wn. App. 342, 346, 613 P.2d 166, 168–69 (1980) (the immediate physical cause of the loss must be a covered peril, and the parties must reasonably have expected to be covered for the eventuality causing the loss when they contracted for coverage). *See infra* note 87.

52. 18 G. COUCH, *supra* note 26, § 74:721.

53. *Graham,* 98 Wn. 2d at 539–40, 656 P.2d at 1081 (Brachtenbach, J. dissenting); *see* Respondent PEMCO'S Motion for Reconsideration, *supra* note 5, at 4 ("the jury questions as posed by the Court in its majority Opinion do not contemplate this relevant threshold inquiry").

ham court did not need a proximate cause rule to enable it to select between two or more concurrent independent causes.

Nevertheless, *Graham* replaced the certainty of the *Bruener* rule with the enigma of proximate cause. In contrast to the unpredictability of proximate cause, the *Bruener* rule of last direct physical cause provided an efficient, inexpensive, and comprehensible way of determining coverage questions in property insurance cases.[54] The *Bruener* rule was particularly well-suited for fixing liability under commercial insurance policies where parties bargain for expressly limited coverage. In most cases, the last direct physical cause can be easily determined by the insured and the insurer, facilitating prompt disposition and payment of claims. A proximate cause rule, however, destroys this simple, comprehensive standard. If the insurer and insured must reach up the chain of causation, they are more likely to require the court's assistance to determine at which link to stop. Where successive proximate causes are alternately covered and excluded under a policy, agents and insureds will be hard pressed to reach an agreement or even an understanding of their options. As a result, insureds would suffer long delays awaiting trial and large initial expenses in litigation. Often the only asset the insured has to compensate for catastrophic property loss, especially loss of a business, is the insurance. Thus, if the insurance money is not paid promptly, the loss may be irremediable. Further harm to the insureds results from the insurance companies' increased litigation costs, which are necessarily reflected in premiums.[55] In summary, although the *Bruener* rule was better suited for commercial insurance transactions than for consumer purchases, it favored neither the insurer nor the insured; it was equitable, easily understood, swift, and relatively inexpensive, and it could be followed without judicial assistance.[56]

Although none of the parties argued for proximate cause or for the abandonment of the *Bruener* "last direct cause" rule,[57] the court embraced proximate cause to determine the scope of coverage. By so doing, the majority unnecessarily complicated the central issue. Because explo-

54. The policy rationale of the last direct cause rule was clarified for the court in the Brief of Respondent PGI, Graham v. PEMCO, 98 Wn. 2d 533, 656 P.2d 1077 (1983). The following textual discussion incorporates PGI's arguments.

55. PGI predicted that "[u]nder the proximate cause rule, liability under the policy would be contested in court as frequently and as vigorously as fault is contested in automobile accident cases." *Id.* at 4.

56. *But see infra* note 88.

57. Although the appellants argued for the overruling of *Bruener* in the alternative, the major thrust of their argument was that they were entitled to recovery under *Bruener*. Brief of Appellants, *supra* note 5, at 14–16, 28–29, 32; telephone interview with John Barlow, *supra* note 15 (appellants did not argue orally for overturning of *Bruener* because they viewed the result of *Bruener* as correct in spite of the reasoning).

sion was a covered peril under the all-risk policy, once Mount St. Helens was found to have "exploded" in the common meaning of the term,[58] then the only remaining issue was whether to trace back from the loss to the explosion or to the intermediate mudflow as the dominant cause. This simplified reasoning clarifies the dissent's position as well: the dissent, following *Bruener,* traced cause back only to the mudflow, which was earth movement and, as such, an excluded peril.

In short, the majority should first have asked whether the volcanic eruption was an explosion and thus effectively covered by the policy. The second and last question would then have been whether to trace back to the explosion or to the mudflow as the dominant cause of the loss.

The majority instead confused the issues by attempting to find coverage for an "explosion" within the terms of the earth movement exclusion. To do so, the court considered whether the eruption was an explosion caused by earth movement. The court's elastic definition of proximate cause[59] and its assignment of proximate cause as a question of fact for the jury[60] left the answer to this confusing inquiry uncertain. However, given the nationwide sympathy for those who lost homes in the disaster, a jury was extremely likely to find for the insureds, whether or not it understood "proximate cause."

IV. THE SOLUTION: ADHESION CONTRACT ANALYSIS OF CONSUMER INSURANCE POLICIES

Neither the majority's causation analysis nor the dissent's contract analysis addressed the fundamental problem in this case: neither party knowingly accepted the risk of loss from volcanic eruption. As with most consumer insurance contracts, there was no "dickered deal" or "meeting of minds." Because the insureds were not notified of exclusions and did not receive printed policies before beginning to perform their payment obligations, they did not consent to the exclusions to coverage.[61] What should a court do with a "contract" founded on such vague expectations?

In the past, courts have customarily used failure of consideration, lack

58. *See supra* note 5 (discussion of "explosion").

59. *Graham,* 98 Wn. 2d at 538, 656 P.2d at 1080–81; *see supra* note 39 (quoting majority's definition of proximate cause).

60. 98 Wn. 2d at 539, 656 P.2d at 1081.

61. Nothing in the record reveals what the insureds' expectations were at the time that they contracted for coverage. In their affidavits, the insureds expressed an expectation after the eruption that their losses would be covered. Affidavit of Grahams and Campbells in Opposition to Motion for Summary Judgment, *supra* note 5; Supplemental Affidavit of Tamara Graham in Opposition to Summary Judgment, Graham v. PEMCO, No. 49,408 (Cowlitz County Super. Ct. 1981), *rev'd sub. nom.* Graham v. PEMCO, 98 Wn. 2d 533, 656 P.2d 1077 (1983).

of mutual assent, or construction of ambiguous language to deal with contract terms that they found offensive.[62] Such case-by-case justice, however, makes the law unreliable. Instead, the courts should recognize a consumer insurance agreement for what it usually is: a contract of adhesion.[63] The term "adhesion contract" is used in this Note to mean a printed form contract used for numerous insureds who are unable to alter its terms and whose bargaining position is inferior to that of the drafter. To treat insureds as alert, informed parties, mindful of their self-interest and able to defend it, is to ignore the reality of insurance transactions.[64] Exclusions in insurance contracts, which insurers apply unilaterally and which insureds are often unaware of, give the clearest example of the dangers inherent in adhesion contracts.[65]

A contract of adhesion requires different standards for enforcement than a contract bargained for at arm's length.[66] Some courts shift the burden of proving a condition to recovery away from the plaintiff insured to the defendant insurer in insurance cases by characterizing the condition as a condition subsequent.[67] Other courts require the insurer to carry the bur-

62. J. CALAMARI & J. PERILLO, CONTRACTS 320 (1977); Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV 198, 222 (1919) (describes judicial "flanking movements").

63. The term "adhesion contract" was introduced to American legal thought by Edwin W. Patterson. Patterson, *supra* note 62, at 222; *see also* Bolgar, *The Contract of Adhesion: A Comparison of Theory and Practice*, 20 AM. J. COMP L. 53 (1972). Patterson introduced the term to refer to contracts drawn up by the insurer to which the insured merely "adheres."

Courts have recently begun to treat contracts of adhesion or standard form contracts differently than other contracts, especially regarding the duty to read. J. CALAMARI & J. PERILLO, *supra* note 65, at 336–47. *See generally* Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981) (analysis of theories of reformation, of equitable estoppel, of the expectations principle, or risk-allocation, and of judicial cost-spreading); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM L. REV 629 (1943) (whether unity of law of contract can be maintained in face of increasing use of contracts of adhesion).

64. J. CALAMARI & J. PERILLO, *supra* note 62, at 346.

65. Note, *A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U. L. REV 1175, 1177 (1982).

66. J. CALAMARI & J. PERILLO, *supra* note 62, at 336–40. Courts increasingly require the party seeking to enforce an adhesion contract to carry the burden of showing that its provisions were explained to the other and that there was a real and voluntary meeting of minds. *See, e.g.*, Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971).

RESTATEMENT (SECOND) OF CONTRACTS § 211 comments a, b, f (1975), recognizes the usefulness of standard forms and the limited authority of agents to vary the forms; it suggests that a party should not be bound by unknown terms beyond the range of reasonable expectation. *See* J. CALAMARI & J. PERILLO, *supra* note 62, at 344–45. Several tests of reasonableness are offered: (1) Is the term bizarre or oppressive? (2) Does a term eviscerate non-standard terms explicitly agreed to? (3) Does a term eliminate the dominant purpose of the transaction? *Id.* at 345. *See generally* Murray, *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV 735 (1982) (criticism of treatment of standardized forms and analysis of difficulties that the Reporter had in dealing with the reality of unread, printed forms).

67. 12 G. COUCH, *supra* note 42, § 44A:3 (1981) ("The burden is upon the insurer to establish

den of showing that the exclusionary provisions were explained to the insured.[68] Still others have expressly adopted the doctrine of reasonable expectations under which objectively reasonable expectations of insureds are honored even though policy provisions would negate them.[69]

The most important new standard is the court's modification of the duty to read. Although courts and scholars frequently recognize that insureds do not read their policies and that insurers do not expect them to,[70] this reality is too often overlooked in judicial analysis. Adhesion contracts should be enforced against an insured only if (1) the insured actually consented to the contents of the policy and (2) the terms of the policy are fair. If an insured consents only by a signature or by acceptance of a mailed policy, then courts should consider whether the terms of the contract are

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the applicability of an exception, and it is necessarily inoperative when the factual situation to which it applies does not exist . . . ." (footnotes omitted)); *id.* § 44A:10 ("The burden of proof is upon the insurer to plead and prove that the loss sustained was within a policy exception . . . ."(footnote omitted)). For example, the *Graham* court could have shifted the burden of proving the absence of earth movement to the insurers as the only parties with knowledge of the exact meaning of the exclusion. J. CALAMARI & J. PERILLO, *supra* note 69, at 386–88; *see, e.g.*, Sincoff v. Liberty Mut. Fire Ins. Co., 11 N.Y.2d 386, 183 N.E.2d 899 (1962) (rule that insurer must prove ambiguous terms is particularly applicable where exclusion is involved).

68. *See, e.g.*, Russell v. Bankers Life Co., 46 Cal. App. 3d 405, 413, 120 Cal. Rptr. 627, 631 (1975) (insurer granting broad coverage assumes duty of defining for the insured exclusionary clauses explicitly and clearly); Note, *supra* note 65, at 1199 (use of an exclusion by the insurer should be considered an affirmative defense to a claim, and the customer's assent to such exclusion should be a required evidentiary element of that defense).

69. *See, e.g.*, Safeco Ins. Co. v. Gilstrap, 141 Cal. App. 3d 524, 533, 190 Cal. Rptr. 425, 431 (1983) (where insured claimed liability coverage for negligent entrustment of a motor vehicle under a homeowner's insurance policy, court denied claim as unreasonable; the test is what a reasonable person in the position of an insured would have understood the words to mean); Mount Vernon Fire Ins. Co. v. Pied Piper Kiddy Rides Inc., 445 A.2d 949, 954 (Del. Super. Ct. 1982) (an insurance contract should be read to accord with the reasonable expectation of the purchaser); Memphis Furniture Mfg. Co. v. American Casualty Co., 480 S.W.2d 531 (Tenn. 1972) (whether damage resulted from insured-against risk depends on intention of parties as disclosed by whole policy); 5 J. APPLEMAN, *supra* note 5, § 3083 (court's guide is the reasonable expectation and purpose of ordinary businessman when making an ordinary business contract; it is his intention, expressed or fairly to be inferred, that counts); Keeton, *Reasonable Expectations in the Second Decade*, 12 FORUM 275, 276–78 (1976). *But see* Kelso, *Idaho and the Doctrine of Reasonable Expectations: A Springboard for an Analysis of a New Approach to a Valuable But Often Misunderstood Doctrine*, 47 INS. COUNS. J. 325 (1980) (Idaho retreats from doctrine of reasonable expectations; approach proposed is analogous to courts' treatment of Uniform Commercial Code, Article 2.

70. RESTATEMENT (SECOND) OF CONTRACTS § 211 comment b (1981); Murray, *supra* note 66, at 739, 782; Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 540, 544, 562 (1971); Note, *supra* note 65, at 1180; Note, *Insurance—Charging the Insured with Notice of the Contents of the Policy*, 30 TEX. L. REV. 634 (1952).

Paradoxically, the insured public may have better coverage under a highly technical policy than a plain English one. The court may not impose a duty to read the technical policy. One unappreciated consequence of plain English policies is that courts can more reasonably hold the insured to a duty to read and understand such a policy, regardless of the general truth that people do not read their policies.

so unexpected or unfair that enforcement should be withheld[71] and the duty to read avoided. Courts should apply the same standards to plain English policies. Where there is no true assent to support a contract of adhesion, its legitimacy must rest on compliance with public interest,[72] not on an unrealistic presumption that the insured has comprehended and consented to the terms of the policy.

The duty to read should neither be enforced without true assent to terms, nor should it be entirely avoidable.[73] Rather, both insurer and insured should act responsibly to create an enforceable contract.[74] The insurer should provide a comprehensible policy and inform its customers expressly of the scope and limits of their coverage. The insureds should be notified by their agents of their responsibility to read their policies and should in some objective way acknowledge their understanding of the major policy terms.

Insureds must be clearly informed of policy exclusions in order to have an opportunity to obtain coverage elsewhere. Plain English drafting is not enough, since many insureds do not read their policies regardless of their form.[75] True assent should consist of (1) an understanding of the exclusionary clauses in question and (2) an opportunity to decline or accept.[76]

The insurer could offer meaningful choice and avoid charges of unconscionability by giving the insured a checklist of major risks to be excluded or covered with a sliding scale of coverage costs. Universal perils, such as fire and landslide, as well as those specific to an area, such as freezing, volcano, tornado, or hurricane, could be offered or specifically excluded. If an insurer chose not to offer additional coverage for an additional premium, then the insured could either knowingly carry the risk himself or shop elsewhere.

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71. *See* J. CALAMARI & J. PERILLO *supra* note 62, at 339–43, (discussion of Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965)).

72. Slawson, *supra* note 70, at 566.

73. *See generally* J. CALAMARI & J. PERILLO, *supra* note 62, at 330–34. For a classic criticism of the outdated duty to read rule, see Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

74. The alternative is for the legislature or an administrative agency to dictate standard forms. J. CALAMARI & J. PERILLO. *supra* note 62, at 347. While the "most obvious and economical place to resolve such an issue would be at the state insurance commissioner's office," these offices may be understaffed and too closely aligned with the industry itself. Note, *Insurance—Judicial Construction: The Final Stop for Interpretation of Exclusionary Provisions*, 29 DRAKE L. REV. 793, 809 (1979–80). Increased staffing and the introduction of consumer participants in policy approval could offset these problems. *Id.; see also* Sheldon, *Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control*, 22 AM. J. COMP. LAW 17 (1974).

75. *See supra* notes 13–14, 70, and accompanying text.

76. *See generally* J. CALAMARI & J. PERILLO, *supra* note 62, at 346–47.

The insured's knowledge, or reasonably imputed knowledge, of the scope of coverage could be evidenced by the insured's initialing[77] of exclusionary clauses, by records of conversations, or by written responses to checklists of optional coverage.[78] Absent specific knowledge of an exclusion or other term, the insured should be covered according to a court's or a jury's estimation of the public's general understanding of coverage under the circumstances.[79] The jury should concern itself with interpretation of policy language, such as "explosion" or "earth movement," only if the insured assented to the terms of the policy. The policy terms should be irrelevant to a coverage dispute if an insured cannot in fairness be held to a duty to read or if an insured would not have understood the policy if read.

V. ROLE OF THE PLAIN ENGLISH POLICY

If insurers must communicate the substance of their policy to their insureds in order to rely on its terms, they will have to produce policy forms that both their customers and their agents can readily understand. The *Graham* decision discourages such simplification. Although *Graham* may be an anomaly, limited to its particular facts, insurance companies and attorneys cannot afford to ignore it. While twenty-seven states now require plain language in insurance policies,[80] this decision encourages Washington insurance companies to use technical detail in their forms to prevent the court from rewriting them in favor of insureds.[81] The simpli-

77. Note, *supra* note 65, at 1200.

78. Such checklists are commonly used in car rental forms to document a customer's decisions about optional insurance.

79. Millers Casualty Ins. v. Briggs, 100 Wn. 2d 1, 8, 665 P.2d 891, 895 (1983) (unanimous court stated that "[o]ur conclusion is also dictated by common sense and the consuming public's general understanding of coverage under these circumstances"); *see also* Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800, 810, 640 P.2d 764, 769, 180 Cal. Rptr. 628, 633 (1982) (primary focus of court's inquiry is reasonable expectations of insured at time he purchased coverage); Thompson v. Grange Ins. Ass'n, 34 Wn. App. 151, 161, 660 P.2d 307, 313 (1983) (insurance policy will be given fair, reasonable, and sensible construction such as would be given by average purchaser); *cf.* Whitlock v. Old American Ins. Co., 21 Utah 2d 131, 442 P.2d 26, 28 (1968) (court takes a "fair and practical view of what must have been the intent of the parties" in entering into an insurance contract); Rizzuto v. Morris, 22 Wn. App. 951, 957, 592 P.2d 688, 691 (1979) (court's review of cases leads to conclusion that intent of parties is primary factor considered by the courts in construing exemptive clauses).

80. American Council on Life Insurance statistic reported by Document Design Center, American Institutes for Research, SIMPLY STATED No. 38, Aug. 1983, at 4.

81. As of April 1984, 95% of the homeowners and dwelling fire policies offered in Washington had been modified with regard to volcano coverage. Letter from J. Scott Jarvis to Lynn Squires (April 9, 1984) (on file with the *Washington Law Review*) (letter includes Washington Insurance Commissioner's suggested Volcanic Eruption Endorsement, issued Dec. 30, 1980). The eruption alone did not cause companies to submit new forms or amendatory filings. R. Johnson & J. Jarvis, *supra* note

fied form in *Graham* allowed the court to extend coverage beyond what either the companies or their insureds had envisioned: full compensation for a volcanic eruption.[82]

Although a plain English policy may expose the insurer to unwanted risks, as illustrated in *Graham*, such a policy probably forestalls many claims. In most cases of loss or damage, an insured will accept a company's denial of coverage if the printed form contains a clear exclusion. If the insureds in *Graham* had found language clearly denying coverage for volcanic eruption, they might not have persisted, even though they had not expressly agreed to such an exclusion.[83] Accordingly, claims would be reduced.

One of the chief obstacles to an insured's understanding of insurance forms is the use of unfamiliar causation language.[84] The legal distinction between cause in fact and proximate cause is difficult even for lawyers to master and not all of them succeed. Judges certainly have misunderstood that difficult distinction.[85] How much less able is an insured, given a few words of explanation in a policy, to comprehend the extent of his coverage under a proximate cause theory?

A plain English policy for consumers should incorporate a clear, nonlegal test for causation or simply use "cause" in its ordinary sense. Causation for those untrained in law is a matter of common sense. The insured untroubled by proximate cause could predictably conclude that, for example, if an insured had not been drunk, he would not have driven

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2, at 3-36; *see also* Note, *supra* note 73, at 793 ("[a]dverse judicial construction encourages policy drafters to increase their use of technical policy language in an attempt to more clearly define the rights and duties which are part of the insurance contract" (footnotes omitted)).

82. "Probably no one considered, in 1977, [when the plain language form was approved] that there was likely to be one [volcanic eruption]." R. Johnson & J. Jarvis, *supra* note 2, at 3-23.

83. Ignorance of the policy is a defense few people would want to make. If, however, the policy were unclear or might be read to provide coverage, regardless of what the insureds thought they were covered for, then the insureds might litigate, with a good chance of recovery.

84. Policies should be drafted without the customary causation language, such as "direct cause," "indirect cause," or "ensuing cause." Instead, everyday terms should be used to illustrate exceptions, for example:

> We exclude these risks from your coverage:
>
> b. damage caused by earth movement, for example, earthquake, landslide, or volcanic eruption;
>
> c. damage caused by water, for example, flooding or tidal wave; . . . .

An insured or a juror would then have several illustrative events with which to compare the event in question. Due to the inescapable imprecision of language and the multitude of possible causes, no policy can be made "watertight" or entirely comprehensive. Rather, language should reflect the common understanding of both insureds and jurors.

Regardless of the number of examples that might be included, lawyers will apply the rule of *ejusdem generis* to expand or contract the list to suit a client's needs. Boilerplate evolves as a defense to such ingenuity.

85. Voght, *supra* note 10, at 310.

across the center line;[86] if an insured had cleaned its roof drains, the roof would not have collapsed from accumulated water;[87] or, in *Graham,* if the volcano had not exploded, then homes would not have been destroyed.[88] When assigning cause in this way, lay persons intuitively consider more than physical facts.[89] Since no event has a single cause, a selection must be made from convergent causes to explain any event. A common sense view of causation will necessarily reflect a blending of fact and value, of actuality and public policy. If the insured and the insurer disagree about the common sense cause of a loss, then that question of fact should be for the jury.

VI. CONCLUSION

The scope of consumer insurance coverage should be openly debated, not veiled by causation theories or avoided by traditional contract analy-

86. In Cummings v. Pacific Standard Life Ins. Co., 10 Wn. App. 220, 516 P.2d 1077 (1973), the insured, driving northbound, collided with two southbound cars, was thrown from his car and killed. A medical examiner at the accident scene determined that the insured had a blood alcohol content of .2% by weight; expert testimony established that such a person would be incapable of driving an automobile. The court, anxious to avoid an "illegal occupation" and intoxication exclusion in the insured's policy, upheld the trial court's finding that cause was not proven because the proximate cause could have been mechanical failure. Even if there had been mechanical failure (or any evidence of it), a jury could have found that extreme drunkenness would prevent a driver from reacting normally to it. The *Cummings* court, like the *Graham* majority, reached the right result for the wrong reasons. The intoxication exclusion, now statutorily prohibited, was unconscionable. If the court had used an adhesion contract analysis rather than its dubious proximate cause reasoning, it could have reached the right result straightforwardly. *See supra* notes 63–79 and accompanying text; Bird v. St. Paul Fire and Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86, 87 (1918) (Cardozo's argument for common-sense cause).

87. Frontier Lanes v. Canadian Indem. Co., 26 Wn. App. 342, 613 P.2d 166 (1980). An insured was denied coverage under a vandalism policy when his roof collapsed from accumulated water. The water accumulated because a downspout was plugged by cans thrown onto the roof. A common sense perception of cause would be failure to clean the downspouts rather than vandalism. The court denied coverage, but only after carefully examining "direct loss," "immediate physical cause," "efficient proximate cause," "confluence of unlikely circumstances," and whether the cans had to have been thrown with the intention of clogging the drains. *Id.* at 344–47, 613 P.2d 167–68.

88. These illustrate the "but for" test of causation, which is not merely mechanical, but reflects evaluation of the appropriate cause. *Contra* Voght, *supra* note 10, at 313 n.42. Under a "but for" test, the losses were clearly caused by the eruption; that is, they would not have occurred but for the eruption. This test satisfies common sense in situations where the *Bruener* last direct cause test, *supra* note 25, would lead to absurd results. For example, where a policy covers vandalism but excludes flood, an insured should be compensated for loss caused by vandals who break water pipes resulting in flooding of a business premises; although "flooding" is the last direct cause, the common sense cause is vandalism. Under the "but for" analysis, the loss would not have occurred but for the vandals.

89. Vinson, *supra* note 47, at 1044.

sis. Proximate cause in particular is too ambiguous to serve as a measurement of the scope of public protection.[90]

An adhesion contract analysis would allow the court to address public policy issues directly. The Washington courts should use a different set of rules for a consumer transaction in which a standard insurance form is used than for one in which the terms of the agreement are negotiated.[91] These rules would incorporate public expectations and actual purchasing practices of insureds and insurers. Where the insurer cannot demonstrate true assent by the insured or the basic fairness of a provision of the contract, then the scope of coverage should be determined by common sense and the consuming public's general understanding of coverage under comparable circumstances. Where causation is at issue, a common sense appraisal of everyday modes of thought and the ordinary use of language should guide the inquiry.

Lynn B. Squires

90. *Id.* at 1043.

91. J. CALAMARI & J. PERILLO, *supra* note 62, at 347 (the "ultimate result may be a radically different set of rules for transactions in which all major aspects of the agreement are negotiated and those in which standard forms are used").