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Washington's Judicial Invalidation of Unambiguous Exclusion Clauses in Multiple Causation Insurance Cases

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WASHINGTON'S JUDICIAL INVALIDATION OF UNAMBIGUOUS EXCLUSION CLAUSES IN MULTIPLE CAUSATION INSURANCE CASES

Abstract: The Washington Supreme Court has restricted the use of unambiguous exclusion clauses that limit homeowners' insurance coverage in multiple causation cases. This Comment discusses the court's "proximate cause" analysis, judicial treatment of policy exclusions, and the insured's expectations of coverage. The Comment argues that the Washington approach to multiple causation cases should be narrowly construed in Washington and rejected in other jurisdictions, because its consequences may harm insurers and insureds alike.

In recent years, the Washington Supreme Court has placed important limits on an insurer's ability to draft policy exclusions that deny coverage in multiple causation cases.[1] Multiple causation insurance cases present a legal issue that has troubled courts in virtually every jurisdiction: Does an all-risk property insurance policy[2] cover a loss caused by two or more perils when one of the perils is excluded and the other peril is not excluded? The Washington Supreme Court has ruled that the policy covers a loss if the non-excluded peril is the efficient proximate cause[3] of the damage, even though an excluded peril contributed to the loss.[4] The court has also ruled that an insurer may

1. Multiple causation cases arise under two conceptually different, yet overlapping, types of circumstances. In some cases, two perils act sequentially to cause the damage through a causation "chain." For example, torrential rain may cause mudflow that damages a house. In concurrent causation cases, two perils act independently to cause the damage, with the existence of neither peril depending on the existence of the other. For example, an earthquake and negligent construction may act independently and simultaneously to cause damage to the foundation of a house. *See* Brewer, *Concurrent Causation in Insurance Contracts,* 59 MICH. L. REV. 1141, 1145 (1961). Courts frequently perceive no practical distinction between sequential and concurrent causation. *See, e.g.,* Frontier Lanes v. Canadian Indem. Co., 26 Wash. App. 342, 613 P.2d 166 (1980). This Comment subsumes both types of causation under the term multiple causation.

2. An all-risk insurance policy extends coverage for all losses to the subject matter unless the loss or its cause is specifically excluded. The specified risk or named peril policy extends coverage only if a peril enumerated in the policy causes the loss. In theory, the all-risk policy provides broader coverage than the specified risk policy. *See* Litsey, *Property Insurance Coverage and Policy Exclusions: Problems of Multiple Causation,* 35 FIC Q. 415 (1985).

3. Courts and commentators have defined "efficient cause" and "proximate cause" in many ways. One law dictionary defines efficient cause as "[t]he working cause; that cause which produces effects or results." BLACK'S LAW DICTIONARY 515 (6th ed. 1990). In Washington tort law, there may be more than one proximate cause of the damage. *See, e.g.,* Pratt v. Thomas, 80 Wash. 2d 117, 119, 491 P.2d 1285, 1286 (1971); Smith v. Acme Paving Co., 16 Wash. App. 389, 396, 558 P.2d 811, 816 (1976). In multiple causation insurance cases, however, Washington requires the finder of fact to identify only one peril that predominantly caused the loss. *See, e.g.,* Graham v. Public Employees Mut. Ins. Co., 98 Wash. 2d 533, 656 P.2d 1077 (1983).

4. *See, e.g.,* Graham v. Public Employees Mut. Ins. Co., 98 Wash. 2d 533, 656 P.2d 1077 (1983).

not enforce clauses that unambiguously exclude certain perils "whether occurring alone or in any sequence with a covered peril."[5] Only Washington and California have expressly stated that insurers may not enforce unambiguous exclusions that deny coverage where the excluded peril plays any role in the loss.[6]

The Washington and California cases present difficult questions regarding the insurer's need to limit coverage through policy language and the insured's expectation of coverage for losses that are predominantly caused by a covered peril. The cases also raise unanswered questions about the extent of insurers' liability for damage that appears to be outside the scope of a property insurance policy. This Comment addresses some of those questions, tracing the development of judicial limitations on policy exclusions and the application of proximate cause analysis in Washington and other jurisdictions, most notably California. The Comment argues that the Washington decisions should be narrowly construed, and that other jurisdictions should observe unambiguous policy language that excludes a specific peril regardless of its position in the chain of causation.

I. JUDICIAL TREATMENT OF MULTIPLE CAUSATION INSURANCE CASES

Courts may choose between two established but conflicting doctrines when deciding whether to honor clauses that exclude perils that merely contribute to a loss. First, a court may apply the proximate cause doctrine. The proximate cause doctrine has existed for hundreds of years in the common law of torts.[7] American courts have borrowed that doctrine to resolve insurance disputes for over a century.[8] Alternatively, a court may apply principles of contract law. Courts have traditionally viewed insurance policies as contracts and

5. Safeco Ins. Co. v. Hirschmann, 112 Wash. 2d 621, 624, 773 P.2d 413, 414 (1989).

6. *See id.* at 627, 773 P.2d at 415–16; Howell v. State Farm Fire & Casualty Co., 218 Cal. App. 3d 1446, 267 Cal. Rptr. 708 (1990), *review denied,* No. S015345 (Cal., June 21, 1990) (LEXIS, Lexsee Service).

7. The original definition of proximate cause came from Francis Bacon, Lord Chancellor, in 1630. Bacon focused on the proximity in time and space of the cause to the damage. S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 11:1 (1986). The term now refers only to whether the cause is legally sufficient to establish liability. *See* W. PROSSER, LAW OF TORTS 236–90 (4th ed. 1971).

8. The proximate cause rule in insurance cases originated in Louisiana Mut. Ins. Co. v. Tweed, 74 U.S. (7 Wall.) 44 (1869). The most famous early case applying the proximate cause doctrine to an insurance dispute was Bird v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86 (1918). In *Bird,* Justice Cardozo treated the notion of proximate cause in terms of proximity in time and space. 120 N.E. at 87–89.

have resolved disputes in accordance with policy language.[9] If a court applies principles of contract law, the threshold issue is whether the policy unambiguously denies coverage in the case at hand.[10] If the policy unambiguously denies coverage, it is not necessary to consider the relative importance of different perils that contributed to a loss.

A. Judicial Limitations on Insurance Policy Exclusions

For many years, courts have placed limits on insurance policy exclusions.[11] From the time of the earliest marine policies drafted at Lloyd's Coffee House in England, some insurers have been tempted to place overly restrictive limitations on coverage.[12] Some insurers drafted limitations that were unconscionable on their face or were concealed in a maze of fine print.[13] Although early policies were frequently negotiated between business people of equal sophistication, insurers developed standard policies as they marketed their products to a wider range of consumers.[14] Many policies became adhesion contracts that left little bargaining power to consumers.[15] Courts responded by limiting the insurer's right to place exclusions in all-risk policies.[16]

Courts have limited policy exclusions through various judicial doctrines. For example, all courts construe ambiguous policy language against insurers.[17] Many courts also honor the objectively reasonable expectations of insureds.[18] Courts honor an insured's expectations because insurance policies are complicated and few policyholders read them. Insureds often do not receive the policy until the contract has already been made.[19] Some courts will therefore honor reasonable

9. *See infra* notes 28–29 and accompanying text.

10. *See infra* notes 117–19 and accompanying text.

11. Keeton, *Insurance Law Rights at Variance with Policy Provisions,* 83 HARV. L. REV. 961, 963–66 (1970).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* In addition to common law doctrines, statutes and administrative regulations have also placed some restrictions on the insurer's discretion in drafting policies. *Id.* at 964.

17. *See, e.g.,* R. KEETON & A. WIDISS, INSURANCE LAW 628–30 (1988). One authority states that when an exclusion seems unfair or socially undesirable, courts strive to find ambiguities, even where no ambiguity is apparent. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured,* 67 VA. L. REV. 1151, 1154 (1981).

18. Abraham, *supra* note 17, at 1153. However, courts usually do not explicitly recognize the principle of honoring reasonable expectations. *See, e.g.,* Keeton, *supra* note 11, at 973.

19. Keeton, *supra* note 11, at 968.

expectations of coverage even when the policy is unambiguous.[20] Courts are most likely to apply the expectations principle where the insurer fails to call the exclusion to the attention of the insured, where the exclusion is inconsistent with the type of policy at issue, where the exclusion is substantively unfair, or where no other coverage for the loss is available.[21]

Although courts place some limits on the insurer's discretion to exclude perils from all-risk policies, insurers rely on exclusions when determining the pricing and availability of these policies.[22] Exclusions permit insurers to offer the advantages of all-risk policies while keeping premiums as low as possible.[23] Because all-risk policies offer advantages to insureds, market forces generally prevent insurers from drafting so many exclusions that the policies become specified peril policies in disguise.[24] Exclusions also help insurers avoid adverse selection of policyholders.[25] Some perils are unusually severe or are highly concentrated among a particular group of insureds. If those perils are not identified and excluded, the inclusion of those perils may result in higher premiums and lower sales.[26] People not confronted with the included perils will be less likely to buy the insurance. This may cause the "risk pool"[27] to diminish, and the insurer's ability to spread the risk will therefore diminish.

20. Abraham, *supra* note 17, at 1153.

21. *Id.* at 1154.

22. *See, e.g.*, J. LAUNIE, J. LEE & N. BAGLINI, PRINCIPLES OF PROPERTY AND LIABILITY UNDERWRITING 92 (2d ed. 1977).

23. All-risk policies provide protection against perils that are unforeseen by the insurer and the insured. R. KEETON & A. WIDISS, *supra* note 17, at 463. All-risk policies also increase the likelihood that insureds will prevail in lawsuits. Courts are most likely to interpret all-risk policy language in a manner that avoids coverage gaps, and insurers assume the burden of proving exceptions to coverage. *Id.*

24. In all-risk policies "there are [typically] very few provisions which limit the risks that are to be transferred." *Id.* at 462.

25. "Adverse selection [of insureds] occurs whenever potential insureds are treated alike irrespective of some factor that differentiates them as insurance risks." *Id.* at 14. When an insurer does not distinguish between potential insureds who pose significantly different risks, a disproportionately high percentage of applications will come from high-risk applicants because they will receive a better bargain. *Id.* If a policy cannot include adequate protections against adverse selection, insurers must increase premiums to offset potentially higher costs. *Id.* at 15. When developing a "risk pool" of policyholders, insurers must therefore ensure that the policyholders face a roughly equivalent risk of loss.

26. *Id.* at 14–15.

27. Insurers base premiums upon the predicted cost of meeting losses in the ventures which the insurer has grouped into a "pool of risks." *Id.* at 11–12. Insurers rely on a large and predictable risk pool to properly distribute risks among the policyholders. *Id.* at 12–13.

B. The Washington Cases

Washington has traditionally viewed insurance policies as contracts and has respected the insurer's right to limit its liability where such a limitation does not violate public policy.[28] Because insurers are usually the drafters of insurance policies, Washington courts generally construe ambiguities against insurers.[29] Principles of contract law suggest that unambiguous exclusion clauses should be enforceable in all insurance disputes, including multiple causation cases. Recently, however, the Washington Supreme Court refused to enforce a clause that unambiguously excluded a peril regardless of the peril's role in the chain of causation.[30]

1. Initial Application of the Proximate Cause Test in Washington

Washington first applied the proximate cause test in *Graham v. Public Employees Mut. Ins. Co.*[31] In *Graham,* mudflow from the eruption of Mt. St. Helens destroyed the plaintiff's home. The plaintiff's homeowner's policy did not cover loss "resulting directly or indirectly from . . . earth movement." The policy did cover direct loss by "explosion . . . resulting from earth movement."[32] Leaving to the jury the question of whether the eruption was an "explosion resulting from earth movement," the court considered whether the eruption directly caused the loss.[33] The court determined that "direct loss" referred to the proximate cause of the loss and that this issue was also a jury question.[34]

The importance of *Graham* concerned the appropriate test of causation. *Graham* replaced the "direct, violent, and efficient cause" stan-

28. *See, e.g.,* Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wash. 2d 203, 643 P.2d 441 (1982); Sears, Roebuck & Co. v. Hartford Accident & Indem. Co., 50 Wash. 2d 443, 313 P.2d 347 (1957).

29. *See, e.g.,* Morgan v. Prudential Ins. Co., 86 Wash. 2d 432, 545 P.2d 1193 (1976); Hocking v. British Am. Assurance Co., 62 Wash. 73, 113 P. 259 (1911). In Washington, ambiguous exclusion clauses are unenforceable as a matter of contract law. *See, e.g.,* Eurick v. Pemco Ins. Co., 108 Wash. 2d 338, 738 P.2d 251 (1987).

30. *See infra* notes 49–60 and accompanying text.

31. 98 Wash. 2d 533, 656 P.2d 1077 (1983).

32. *Id.* at 535, 656 P.2d at 1079. The exact policy language stated:

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 . . .

33. *Id.* at 536–37, 656 P.2d at 1079–80.

34. *Id.* at 537–39, 656 P.2d at 1080–81.

dard[35] with the "proximate cause" standard.[36] Insurers are therefore liable if a covered peril "is the efficient or predominant cause which sets into motion the chain of events producing the loss," regardless of whether the peril is "the last act in a chain of events."[37] The court did not directly address whether the earth movement exclusion at issue was ambiguous.

The dissent in *Graham* argued that the court failed to apply the plain language of the policy.[38] Chief Justice Brachtenbach stated that the court must first consider the threshold issue of whether any policy terms are ambiguous.[39] If the terms are unambiguous, the court must then consider whether the application of those terms would result in coverage.[40] The dissent's primary concern was that the court failed to consider the threshold issue at all.

2. *Expansion of the Proximate Cause Test in Washington*

Several years after *Graham,* the court expanded the application of the proximate cause rule. In *Villella v. Public Employees Mut. Ins. Co.,*[41] a negligently installed drainage system destabilized the soil underneath the Villellas' house, and the movement of the soil in turn damaged the house's foundation.[42] The plaintiffs' policy was an all-risk homeowner's policy, and the damage caused by the contractor's negligence was not excluded.[43] The policy did exclude losses "resulting directly or indirectly" from earth movement, which included "any loss caused by, resulting from, contributed to or aggravated by" the shifting of soil.[44] Although the exclusion applied to earth movement that merely "contributed" to the loss, the court held that the policy would cover the loss if the negligence was the efficient proximate cause.[45] The exclusion would not preclude coverage even if the earth

35. Bruener v. Twin City Fire Ins. Co., 37 Wash. 2d 181, 185, 222 P.2d 833, 835 (1950), *overruled by* Graham v. Public Employees Mut. Ins. Co., 98 Wash. 2d 533, 656 P.2d 1077 (1983). The *Bruener* view of causation was unusually narrow, however, and the *Graham* decision brought Washington in line with the majority of jurisdictions. *Graham,* 98 Wash. 2d at 538, 656 P.2d at 1080.

36. *Graham,* 98 Wash. 2d at 537–38, 656 P.2d at 1080–81.

37. *Id.* at 538, 656 P.2d at 1081.

38. *Id.* at 540, 656 P.2d at 1082 (Brachtenbach, C.J., dissenting).

39. *Id.*

40. *Id.*

41. 106 Wash. 2d 806, 725 P.2d 957 (1986).

42. *Id.* at 808–09, 725 P.2d at 958.

43. *Id.* at 816, 725 P.2d at 926.

44. *Id.* at 808–09, 725 P.2d at 959.

45. *Id.* at 819, 725 P.2d at 964.

movement contributed to or aggravated a loss proximately caused by the contractor's negligence.

The *Villella* court applied the proximate cause rule even when faced with a fairly specific exclusion clause. The exclusion denied coverage for "indirect" losses due to earth movement, including those in which the earth movement only "contributed to" or "aggravated" the loss.[46] Unlike the policy in *Graham,* the policy in *Villella* defined "earth movement." However, *Villella* also involved ambiguous policy language. Although the policy excluded coverage for earth movement, it did not exclude losses due to both earth movement and a different covered peril.[47] Thus, after *Villella,* insurers still viewed their primary task as drafting a sufficiently clear exclusion clause that would circumvent the court's proximate cause analysis.[48]

3. *The* Hirschmann *Decision*

In 1989, the Washington Supreme Court took its latest step in applying the proximate cause rule. In *Safeco Ins. Co. v. Hirschmann,*[49] the court found coverage even though the plaintiffs' homeowner's policy unambiguously excluded coverage for earth movement regardless of its importance in the chain of causation. Heavy rains saturated the soil around the Hirschmanns' house, causing an embankment to push the house from its foundation.[50] The plaintiffs' policy excluded damage due to earth movement "whether occurring alone or in any sequence with a covered peril."[51] Relying on *Villella,* the *Hirschmann* court interpreted the exclusion to apply only where earth movement was the efficient proximate cause of the damage.[52] The court warned insurers that future attempts to circumvent the effi-

46. *Id.* at 809, 725 P.2d at 959.

47. *See* Safeco Ins. Co. v. Hirschmann, 112 Wash. 2d 621, 634, 773 P.2d 413, 419 (1989) (Callow, C.J., dissenting).

48. The Washington Supreme Court later referred to the ongoing attempts of insurers to circumvent the proximate cause analysis. *See id.* at 626, 773 P.2d at 415.

49. 112 Wash. 2d 621, 773 P.2d 413 (1989).

50. *Id.* at 623–24, 773 P.2d at 413–14.

51. *Id.* at 624, 773 P.2d at 414. The exact policy language stated:

> We do not cover loss caused by any of the following excluded perils, whether occurring alone or in any sequence with a covered peril:
>
> . . . .
>
> 2. Earth Movement, meaning:
>
> a. earthquake; landslide; mudflow; earth sinking, rising or shifting; . . .

52. The court stated that the term "efficient proximate cause" should appear wherever the term "cause" appears. Thus, the exclusion clause would read: "We do not cover any loss where the efficient proximate cause is a landslide, whether occurring alone or in any sequence with a covered peril." *Id.* at 629, 773 P.2d at 416–17.

cient proximate cause rule through exclusion clauses would not succeed.[53]

The *Hirschmann* dissent focused on the majority's failure to draw significant distinctions between ambiguous and unambiguous exclusion clauses.[54] Chief Justice Callow emphasized that insurance policies are contracts and that unambiguous policy language should therefore determine coverage.[55] In this case, the language was "clear, explicit, and unambiguous."[56] The majority's application of the proximate cause analysis "effectively deprives insurers [and insureds] of the right to contract for coverage excluding specific risks."[57] Chief Justice Callow observed that prior case law did not support the invalidation of an unambiguous exclusion clause.[58] *Graham* and *Villella* simply indicate "that merely by excluding coverage for loss caused by *certain defined perils,* an insurance policy does not plainly negate coverage for losses caused by *both* covered and excluded perils."[59] Thus, the *Graham* and *Villella* courts merely "interpreted ambiguous contractual language to the advantage of the insured."[60]

C. *Cases From Other Jurisdictions*

Courts in different jurisdictions have reached various results in multiple causation cases.[61] Because almost all cases prior to *Hirschmann*[62] involved ambiguous policy language, it is unclear what result the various jurisdictions would reach when faced with an unambiguous exclusion clause. That question remains unanswered in almost every jurisdiction other than Washington and California.[63]

53. *Id.* at 627, 773 P.2d at 415–16.

54. *Id.* at 631–35, 773 P.2d at 418–20 (Callow, C.J., dissenting).

55. *Id.* at 632, 773 P.2d at 418.

56. *Id.*

57. *Id.* at 633, 773 P.2d at 418.

58. *Id.* at 633–35, 773 P.2d at 418–20. Particularly puzzling was the majority's statement that "[t]he *Villella* decision is dispositive of this case." *Id.* at 626, 773 P.2d at 415. The *Villella* decision, unlike *Hirschmann,* involved an ambiguous exclusion clause.

59. *Id.* at 634, 773 P.2d at 419 (emphasis in original).

60. *Id.*

61. *See* Withers, *Proximate Cause and Multiple Causation in First-Party Insurance Cases,* 20 FORUM 256 (1985).

62. 112 Wash. 2d 621, 773 P.2d 413 (1989).

63. One recent Arizona case specifically rejected the Washington and California rules in multiple causation insurance cases. *See* Millar v. State Farm Fire & Casualty Co., 167 Ariz. 93, 804 P.2d 822 (Ariz. Ct. App. 1990), *review denied,* 168 Ariz. 144, 811 P.2d 1081 (1991).

1. General Treatment By Other Jurisdictions

There is no consensus on the treatment of multiple causation insurance claims. Decisions are often inconsistent within a given jurisdiction.[64] Some courts have stated or implied that unambiguous exclusion clauses eliminate the need for a proximate cause analysis, even when dealing with all-risk policies.[65] Other courts apply a "direct cause" standard, although it is sometimes unclear how this differs in application from a proximate cause standard.[66] Most jurisdictions apply some form of proximate cause analysis.[67] Other than *Hirschmann* and one California decision, however, no court has applied this analysis in cases involving unambiguous exclusion clauses.[68]

2. The California Cases

California has a highly developed body of case law concerning the proximate cause test in multiple causation insurance cases.[69] California's first modern application of the proximate cause doctrine came in *Sabella v. Wisler.*[70] In *Sabella,* a building contractor constructed a house on uncompacted fill and negligently installed a sewer line.[71] The sewer line ruptured, causing water to saturate the ground around the insureds' house.[72] The plaintiffs' all-risk policy did not exclude negligence, but the policy did exclude damage to the house caused by earth movement.[73] The court concluded that " 'where there is a con-

64. *See, e.g.,* Litsey, *supra* note 2, at 416–17; *see also* R. KEETON & A. WIDISS, *supra* note 17, at 547–59; COUCH ON INSURANCE 2D §§ 74:705–721 (rev. ed. 1983).

65. *See, e.g.,* State Farm Fire & Casualty Co. v. Martin, 872 F.2d 319 (9th Cir. 1989) (applying California law); *Millar,* 804 P.2d at 826; Kane v. Royal Ins. Co., 768 P.2d 678 (Colo. 1989); Underwood v. United States Fidelity & Guar. Co., 118 Ga. App. 847, 165 S.E.2d 874 (1968); Bentley v. National Standard Ins. Co., 507 S.W.2d 652 (Tex. Civ. App. 1974).

66. *See, e.g.,* Campbell v. Insurance Serv. Agency, 424 N.W.2d 785 (Minn. Ct. App. 1988).

67. *See* Goodyear Rubber & Supply, Inc. v. Great Am. Ins. Co., 545 F.2d 95 (9th Cir. 1976) (applying Oregon law); Pan Am. World Airways, Inc. v. Aetna Casualty & Sur. Co., 505 F.2d 989 (2nd Cir. 1974) (applying New York law).

68. *See Millar,* 804 P.2d at 826.

69. *See, e.g.,* Garvey v. State Farm Fire & Casualty Co., 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989).

70. 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963). Although *Sabella* provides the current California test in multiple causation cases, California used a proximate cause analysis to resolve coverage disputes arising from the 1906 San Francisco earthquake. *See, e.g.,* Pacific Union Club v. Commercial Union Assurance Co., 12 Cal. App. 503, 107 P. 729 (1910).

71. *Sabella,* 377 P.2d at 891–92, 27 Cal. Rptr. at 691–92.

72. *Id.* at 892, 27 Cal. Rptr. at 692.

73. *Id.* at 894–95, 27 Cal. Rptr. at 694.

currence of different causes, the efficient cause—the one that sets the others in motion—is the cause to which the loss is to be attributed.' "[74]

For ten years following *Sabella,* California applied the proximate cause analysis in first-party[75] insurance claims involving multiple causation.[76] In 1973, the California Supreme Court fashioned a standard for concurrent causation cases that was even more favorable to insureds, but later ruled that this standard applied only to cases involving third-party coverage.[77] Thus, insurers are not liable in California if an excluded peril proximately causes the loss.[78]

The California Court of Appeals recently held that a property insurer may not enforce an unambiguous clause that excludes a specific peril regardless of the peril's importance in the chain of causation.[79] The court explicitly stated that insurers may not draft exclusions that circumvent the proximate cause analysis.[80] The California Supreme Court denied review of that case, but that court has not made such an explicit disavowal of unambiguous exclusion clauses. Nevertheless, it now appears that California will invalidate unambiguous clauses that deny coverage when an excluded peril plays any part in causing the loss.

74. *Id.* at 895, 27 Cal. Rptr. at 695 (quoting COUCH ON INSURANCE § 1466 (1930)).

75. A first-party claim involves loss or damage sustained by the insured. A third-party claim involves liability of the insured to another party. Garvey v. State Farm Fire & Casualty Co., 48 Cal. 3d 395, 770 P.2d 704, 705 n.2, 257 Cal. Rptr. 292, 293 n.2 (1989).

76. 770 P.2d at 708, 257 Cal. Rptr. at 296; *see, e.g.,* Gillis v. Sun Ins. Office, Ltd., 238 Cal. App. 2d 408, 47 Cal. Rptr. 868 (1965); Sauer v. General Ins. Co., 225 Cal. App. 2d 275, 37 Cal. Rptr. 303 (1964).

77. In State Farm Mut. Auto. Ins. Co. v. Partridge, 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973), the court ruled that a liability policy covers all damage where one of the causes is a covered peril even if that peril is not the proximate cause of the loss. *Partridge* involved a third-party claim. *Id.* Several California decisions applied that lenient standard to first-party claims. *See* Farmers Ins. Exch. v. Adams, 170 Cal. App. 3d 712, 215 Cal. Rptr. 287, 293–94 (1985); Premier Ins. Co. v. Welch, 140 Cal. App. 3d 720, 189 Cal. Rptr. 657, 662 (1983); *see also* Safeco Ins. Co. v. Guyton, 692 F.2d 551, 554–55 (9th Cir. 1982) (applying California law). The California Supreme Court later limited the concurrent causation rule to third-party cases, holding that first-party claims must still satisfy the proximate cause standard. Garvey v. State Farm Fire & Casualty Co., 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989).

78. *Garvey,* 770 P.2d at 715, 257 Cal. Rptr. at 303.

79. Howell v. State Farm Fire & Casualty Co., 218 Cal. App. 3d 1446, 267 Cal. Rptr. 708 (1990), *review denied,* No. S015345 (Cal., June 21, 1990) (LEXIS, Lexsee Service).

80. 267 Cal. Rptr. at 711.

II. JUSTIFICATIONS AND POTENTIAL PROBLEMS REGARDING THE PROXIMATE CAUSE TEST IN INSURANCE CASES

Washington and California have apparently reached the same conclusion about an insurer's ability to deny coverage when a non-excluded peril predominantly causes a loss. In neither state may an insurer deny coverage simply because an excluded peril was part of the causal chain producing the damage, even if the exclusion is unambiguous.[81] In both states, the finder of fact must identify one peril which was the predominant cause of the loss, and the court will find coverage if the predominant cause was a non-excluded peril. Questions remain, however, about the extent to which Washington and California have limited insurers' ability to exclude perils in multiple causation cases.

The Washington and California decisions are subject to two different interpretations. On the one hand, the courts may simply be stating that insurers can exclude a peril only if the exclusions section of the policy in some way describes the predominant cause of the loss. If so, insurers may be able to deny coverage by describing every peril that may act in combination with the peril they wish to exclude.[82] It is unclear whether courts will invalidate such combination exclusions as vague, overly complicated, or inconsistent with the nature of an all-risk policy.

The second interpretation of the Washington and California cases suggests that insurers may now be unable to rely on unambiguous exclusions in multiple causation cases. The courts may be completely disregarding policy language, choosing instead to mandate coverage that would otherwise be unavailable. There are, however, serious problems with such an approach.[83] If courts mandate earth movement coverage, for instance, some people may have difficulty obtaining affordable homeowner's insurance. Insurers may refuse to underwrite previously acceptable properties or may eliminate all-risk home-

81. *See supra* text accompanying notes 53 and 80.

82. Insurers have already drafted policies that enumerate perils that may act in combination with the peril that is the primary subject of the exclusion. For example, one policy addresses multiple causation cases by excluding earth movement and "[w]eather [c]onditions that contribute in any way with a cause or event excluded in this section to produce a loss. However, any ensuing loss not excluded or excepted in this policy is covered." Safeco Homeowner's Policy CHO-4203 2/86; *see also* Unigard Homeowner's Policy HO-3WA ed. 1-89. Thus, if rain was the proximate cause of a mudslide that damaged a house, the rain would be excluded. If rain damaged the house without operating in sequence with another excluded peril, the rain would not be excluded. Insurers hope that the courts will enforce such exclusions even though the peril that proximately caused the loss is generally not excluded.

83. *See infra* notes 103–05 and accompanying text.

owner's policies.[84] Insurers may also face financial difficulties if they are held liable for substantial losses for which they have failed to collect premiums.[85]

Courts can balance the interests of insurers and insureds by relying on policy language to determine the scope of coverage, while also holding insurers to high standards of clarity and notice to the insured. Washington should permit insurers to deny coverage when the policy at least conditionally excludes the peril that is the predominant cause of the loss. Other jurisdictions should continue to consider policy language before applying the proximate cause analysis.

A. Justifications for the Washington Decisions

There are two potential justifications for the Washington decisions. First, exclusions that apply regardless of the substantiality of causation may be inconsistent with the nature of an all-risk policy. Such exclusions may apply even where the excluded peril plays only a minor role in the loss, yielding an unfair result to the insured. Second, such exclusions may be inconsistent with the reasonable expectations of the insured.

1. Exclusions That Apply Regardless of the Substantiality of Causation May Be Inconsistent With an All-Risk Policy

An all-risk policy that denies coverage through overly restrictive exclusions may be little more than a failed promise on the part of the insurer.[86] Insurers impliedly promise that all-risk policies cover virtually every peril that could damage policyholders' homes. Exclusions are meant to be exceptions to the general rule of coverage. Exclusions that apply regardless of the substantiality of causation may be too broad and overreaching to merit judicial enforcement.[87] Such exclusions seem to be inconsistent with all-risk policies, because these policies are intended to cover perils that are difficult to define.[88] In

84. *See infra* notes 126–31 and accompanying text.

85. *See infra* notes 132–34 and accompanying text.

86. *See, e.g.*, Meehan & Jelks, *The Battered Exclusion: Who Pays How Much For Landslides?*, 29 FOR THE DEFENSE 19, 26 (1987).

87. The Washington courts may be concerned that insurance policies will not cover losses when the excluded peril plays only a very minor role in the chain of causation. Courts should be able to prevent this result, however, without invalidating exclusions that apply even though the excluded peril is not the proximate cause of the loss. Courts can rule that a peril which plays an inconsequential role in a loss is not even a cause within the meaning of the policy. Moreover, in the Washington cases, the excluded peril played an important role in causing the damage. In all mudslide losses, the mudflow itself necessarily plays an important role in causing the loss.

88. *See, e.g.*, R. KEETON & A. WIDISS, *supra* note 17, at 19, 462–63.

Hirschmann,[89] for example, the insurer presumably intended to cover torrential rain damage because the policy generally did not exclude rain.[90] By issuing an all-risk policy that covered rain damage but excluded damage caused by both rain and mud, the insurer seemed to be promising coverage in one section of the policy while breaking that promise in another section.

The Washington courts may also be suspicious of insurers' marketing methods. Insurers will probably sell more policies by marketing them as all-risk.[91] Policies are not true all-risk policies, however, if overly broad exclusions restrict coverage. Without judicial constraints, insurers may be tempted to encourage consumers to expect all-risk coverage while providing limited coverage in disguise.[92] Courts and consumers have good reason to insist that if insurers promise an all-risk policy, insurers should deliver an all-risk policy.

2. *Exclusions That Fail to Name the Proximate Cause May Be Inconsistent With the Reasonable Expectations of the Insured*

By invalidating exclusions that apply regardless of the substantiality of causation, the Washington courts may be attempting to protect the reasonable expectations of all-risk policyholders.[93] Policyholders may reasonably expect coverage when the proximate cause of the loss is not specifically excluded. If an exclusion is unambiguous, however, courts should examine the justifications for the reasonable expectations doctrine before applying it in multiple causation cases.

There are three potential reasons for limiting exclusion clauses to protect an insured's reasonable expectations.[94] First, the expectations principle may permit insureds to make more informed choices about insurance coverage because courts will ensure that policies conform to

89. 112 Wash. 2d 621, 773 P.2d 413 (1989).

90. *See supra* text accompanying note 51.

91. Marketing is a vital consideration in the packaging and underwriting of insurance policies. *See, e.g.,* J. LAUNIE, J. LEE & N. BAGLINI, *supra* note 22, at 16.

92. Meehan & Jelks, *supra* note 86, at 20.

93. *See supra* notes 18–21 and accompanying text. Washington courts have expressly refused to adopt the reasonable expectations doctrine. *See, e.g.,* Keenan v. Industrial Indem. Ins. Co., 108 Wash. 2d 314, 322, 738 P.2d 270, 275 (1987); State Farm Gen. Ins. Co. v. Emerson, 102 Wash. 2d 477, 485, 687 P.2d 1139, 1144 (1984). The Washington Supreme Court has also stated that if it did apply the doctrine, the court would do so only when the policy is ambiguous. *Keenan,* 108 Wash. 2d at 322, 738 P.2d at 275. However, courts often apply the reasonable expectations doctrine without clearly identifying the doctrine as the basis for their decisions. Keeton, *supra* note 11, at 973.

94. Abraham, *supra* note 17, at 1169.

the insureds' understanding.[95] Insurers might argue that this justification is less compelling in cases where the exclusion is unambiguous, such as *Hirschmann.*[96] If a consumer can understand the policy by reading it, the consumer can readily determine the scope of coverage and make an informed decision. In the case of homeowner's insurance, however, the insurance purchaser will probably not receive the contract until after buying the insurance and perhaps paying the first premium.[97] It is difficult to imagine how any policy language can aid a consumer's purchasing decision under such circumstances.

Second, the reasonable expectations principle may encourage fundamental fairness in the insurance transaction, because courts may require coverage where the insurer creates the expectation.[98] The volcanic eruption that caused the mudslide in *Graham*[99] was precisely the type of unpredictable event that should be covered by an all-risk policy.[100] An insured should expect a mudflow exclusion to apply in a case like *Hirschmann,* however, because rain is a predictable cause of mudslides. Mudslides always operate in combination with another peril that involves water. Earth movement exclusions will be virtually worthless unless contributing perils can also be excluded.

Finally, the reasonable expectations principle serves a risk-distributive function by spreading the cost of otherwise excluded losses among a large group of insurance consumers,[101] particularly where other insurance is not available to cover the loss. The *Hirschmann, Villella,* and *Graham* decisions may thus serve a risk-distributive function because earth movement insurance is not readily available from homeowner's insurance carriers.[102] However, the risk-distributive justification suggests that courts should mandate coverage that insurers

95. *Id.*

96. 112 Wash. 2d 621, 773 P.2d 413 (1989).

97. *See, e.g.,* Comment, *A Critique of the Reasonable Expectations Doctrine,* 56 U. CHI. L. REV. 1461, 1463–64 (1989).

98. Abraham, *supra* note 17, at 1169.

99. 98 Wash. 2d 533, 656 P.2d 1077 (1983).

100. Assuming, of course, that it is reasonable to consider a volcanic eruption an "explosion" within the meaning of a homeowner's policy. *See supra* text accompanying note 33.

101. Abraham, *supra* note 17, at 1169.

102. Telephone interview with Larry Kees, Executive Vice President, Independent Insurance Agents of Washington, in Bellevue, Washington (May 16, 1991) (notes on file with the Washington Law Review). Mudslide insurance is available to property owners in every state through the National Flood Insurance Program, a federal program offered by the Federal Insurance Administration and private carriers who choose to participate. Property owners seem indifferent to or unaware of the program, however, and the amount of flood insurance in force dropped about 25 percent from $151 billion in 1986 to $113.8 billion in 1987. INSURANCE INFORMATION INSTITUTE, INSURANCE FACTS 1988-89 PROPERTY/CASUALTY FACT BOOK 51 (1988).

choose not to offer and consumers may choose not to buy. Because of the adverse effects of this approach, even activist courts must carefully limit their decisions to mandate coverage.[103] Court-mandated coverage increases the possibility of adverse selection as insurers must include in the risk pool less desirable risks that would generally be avoided.[104] Insurers may increase premiums if a court expands the scope of a policy's coverage, and consumers who would prefer narrower but cheaper coverage must accept higher premiums and more insurance than they would otherwise purchase.[105]

The reasonable expectations doctrine also suggests that the insured must receive adequate notice of the exclusion. Insurers can draft policies that notify the insured that certain perils are excluded even though not the proximate cause of the loss.[106] The Washington cases involved policies that attempted to exclude losses in which the excluded peril played any role, regardless of the role played by the non-excluded perils.[107] The courts might have permitted the insurers to deny coverage if the policies expressly excluded mudslide when weather conditions caused or contributed to the mudslide.

B. Problems With the Washington Decisions

The Washington courts may have fashioned a rule that does not give sufficient weight to the policy language in each individual case. Washington's disregard of unambiguous exclusion clauses in multiple causation cases presents a number of analytic and practical problems. First, the *Hirschmann* court misapplied previous case law and failed to articulate any other basis for its decision. Neither *Villella, Graham,* precedent from other jurisdictions, nor principles of insurance law supports a complete disregard of unambiguous policy language in multiple causation cases. Second, the Washington view may harm insurance consumers by increasing premiums or reducing the availability of homeowner's insurance. Finally, the Washington view may leave insurers liable for potentially large losses for which they failed to collect premiums.

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103. Abraham, *supra* note 17, at 1163.

104. *Id.* at 1187.

105. *Id.* at 1188.

106. *See supra* note 82.

107. *See supra* notes 32 and 51 and accompanying text. The policies excluded damage caused by the specified peril "directly or indirectly," or "in any sequence with a covered peril."

1. *Neither Case Law Nor Principles of Insurance Law Supports the* Hirschmann *Decision*

The *Hirschmann* court misapplied previous case law. As Chief Justice Callow observed, the *Hirschmann* court relied entirely on *Villella* for its rationale, offering no other basis for its decision.[108] *Villella* provided a questionable basis for the decision, however, because *Villella* involved different policy language than *Hirschmann.* In *Villella,* the policy merely excluded losses caused "directly or indirectly" by earth movement, even if the earth movement only "contributed to or aggravated" the damage.[109] However, the policy did not exclude losses caused by both earth movement and a different covered peril.[110] In *Hirschmann,* the policy excluded loss due to earth movement "whether occurring alone or in any sequence with a covered peril."[111] That language unambiguously excluded all losses in which earth movement played any role in causation. Perhaps the court overestimated the significance of *Villella* because that case was factually similar to *Hirschmann.*

Although principles of insurance law do not support the *Hirschmann* decision, the doctrine of construing ambiguities against the insurer supports the *Graham* and *Villella* decisions. Those cases involved ambiguous policy language.[112] Accordingly, the court construed the ambiguities against the insurers.[113] In *Hirschmann,* the policy was not ambiguous.[114] The policy clearly informed the insured that losses due to earth movement were excluded, regardless of the position of earth movement in the chain of causation.[115] If this warning was insufficient to protect the insured's reasonable expectations of coverage, the court should have indicated that the reasonable expectations principle supported the decision. The court failed to articulate a reasonable expectations rationale for its decision, however, and instead concluded that *Villella* was dispositive of *Hirschmann.*[116]

108. Safeco Ins. Co. v. Hirschmann, 112 Wash. 2d 621, 631–35, 773 P.2d 413, 418–20 (Callow, C.J. dissenting).

109. Villella v. Public Employees Mut. Ins. Co., 106 Wash. 2d 806, 808–09, 725 P.2d 957, 959 (1986).

110. *See Hirschmann,* 112 Wash. 2d at 634, 773 P.2d at 419 (Callow, C.J., dissenting).

111. *Id.* at 624, 773 P.2d at 414.

112. *See supra* text accompanying note 60.

113. In the *Hirschmann* dissent, Chief Justice Callow argued that *Graham* and *Villella* were decided merely on the relevant policy language and that "these cases do not explicitly rest on public policy grounds." *Hirschmann,* 112 Wash. 2d at 633, 773 P.2d at 418–19.

114. By failing to address the clarity of the policy language, the court seemed to concede that the policy was not ambiguous.

115. *Hirschmann,* 112 Wash. 2d at 624, 773 P.2d at 414.

116. *Id.* at 626, 773 P.2d at 415.

Principles of insurance law and decisions in other jurisdictions do not support Washington's disregard of unambiguous exclusion clauses in multiple causation cases. Commentators indicate that clear policy language may resolve coverage issues before the proximate cause analysis is used.[117] Courts generally require that any interpretation of a policy must comply with the policy language itself.[118] The relationship between the coverage clause and the occurrence is generally a threshold inquiry that denies coverage if the occurrence falls outside the scope of coverage.[119] If an earth movement exclusion unambiguously precludes coverage despite the operation of other causes, there is no need to consider whether earth movement is the predominant cause of the loss.

2. *The Invalidation of Unambiguous Exclusion Clauses May Harm Insurance Consumers*

In attempting to protect homeowners, the Washington Supreme Court has fashioned a rule that may eventually harm insurance consumers. If the courts mandate coverage in multiple causation cases regardless of policy terms, insurers will face four alternatives. First, insurers may simply do nothing and accept the increased potential liability. This is unlikely because insurers, like all corporations, seek to maximize their profits and minimize their exposure.[120] Second, insurers may eliminate all-risk homeowner's policies and substitute named peril policies in their place.[121] If insurers eliminate all-risk policies,

117. Policy language may deny coverage even when "there is a contributing cause that would otherwise be a basis for extending coverage." R. KEETON & A. WIDISS, *supra* note 17, at 549–50.

118. Even when broadly construing coverage, courts are limited to interpretations "that may be fairly made of the language in an insurance policy." *Id.* at 556.

119. Whether an insurance policy covers an occurrence "is a matter of contract construction. Once that question is answered, then the causal question arises whether that occurrence gives rise to legal responsibility." McDowell, *Causation in Contracts and Insurance,* 20 CONN. L. REV. 569, 576 (1988).

120. *See generally* J. LAUNIE, J. LEE & N. BAGLINI, *supra* note 22, at 8–10 (describing the underwriting purposes of generating profits and avoiding improper risk selection). In the case of earth movement exclusions, insurers soon responded to California's concurrent causation doctrine by modifying policies and seeking legislation that prevented the doctrine from being applied in the case of earthquake. INSURANCE INFORMATION INSTITUTE, ISSUE PAPER: CONCURRENT CAUSATION (April 1985).

121. Insurers may gradually be replacing all-risk policies with named peril homeowner's policies. In response to the California cases, the Insurance Services Office, an influential organization that provides technical services to the insurance industry, eliminated the term "all-risk" from homeowner's policies to clarify the insurers' intention to exclude some perils regardless of their role in causation. INSURANCE INFORMATION INSTITUTE, *supra* note 120.

insureds will be deprived of the benefits of those policies.[122] Third, insurers may raise rates. Many insureds will have to pay a higher price for more coverage than they wish to purchase. Fourth, insurers may be more selective in underwriting. Insurers may refuse to issue homeowner's policies when they have doubts concerning the potential for loss due to the peril they wish to exclude. Some people may thus be deprived of the opportunity to purchase standard homeowner's insurance at a reasonable cost.

Judicial invalidation of policy exclusions makes the pricing and underwriting of insurance policies particularly difficult.[123] Every exclusion exists because the insurer would face added exposure without it.[124] Earth movement exclusions like those presented in *Graham, Villella,* and *Hirschmann* address the concern of adverse selection. People who live in geologically unstable areas[125] are more likely than most homeowners to suffer loss due to mudslides and earthquakes. By forcing insurers to cover damage caused in part by earth movement, the Washington Supreme Court has stripped insurers of an important tool in avoiding adverse selection. If damage due to earth movement may not be categorically excluded, people living in geologically unstable areas will be a part of the general homeowner risk pool.

If Washington courts completely disregard policy language in multiple causation cases, homeowners may have to pay higher premiums to cover damage suffered by people who pose a much higher than average risk due to earth movement.[126] If those decisions increase claims, insurers must raise premiums to continue underwriting all-risk poli-

122. For example, insureds may no longer be indemnified when neither party foresees a peril that causes damage. Policyholders would also assume the burden of proof rather than insurers when difficulties arise in proving the source and cause of the damage. R. KEETON & A. WIDISS, *supra* note 17, at 463.

123. One underwriting text describes judicial decisions as the most elusive and uncertain legal hazard that an insurer must consider. R. HOLTOM, UNDERWRITING PRINCIPLES AND PRACTICES 253 (1973). Legal doctrines may require an insurer to raise rates or deny coverage. *Id.* at 253–54.

124. J. LAUNIE, J. LEE & N. BAGLINI, *supra* note 22, at 131.

125. Examples of geologically unstable areas and increased risk of loss include the following: A building located on low land poses a higher risk of flood loss; a building on a steep hillside poses a higher risk of loss due to landslide; and a structure built on filled land poses a higher risk of earthquake damage. *Id.* at 59.

126. Earth movement losses are generally quite expensive. Meehan & Jelks, *supra* note 86, at 24. While the average fire loss is under $10,000, many slide repair projects cost three to five times the value of the house. In particularly bad years, the total loss from landslides in California may approach 25 percent of homeowner's insurance premiums paid in that state. *Id.* Earth movement damage in the United States approaches $5 billion per year. *Id.* at 20.

cies.[127] The proximate cause doctrine may also increase insurers' administration and legal costs, which will be passed along to policyholders in the form of higher premiums.[128]

Some property owners would suffer considerable hardship if insurers chose not to underwrite properties in geologically unstable areas. Judge-made doctrines have created insurance availability problems in other areas of coverage.[129] When insurers are unable to predict the risk and magnitude of loss, they often refuse to underwrite the risk.[130] Insurers may also decline to cover a risk if they are unable to collect adequate premiums.[131] The proximate cause doctrine creates considerable uncertainty regarding the insurer's exposure to future loss. If insurers choose not to underwrite high-risk properties, those properties will become far less desirable, because all mortgage companies require the applicant to obtain homeowner's insurance before making a home loan.

3. *The Invalidation of Unambiguous Exclusion Clauses May Expose Insurers to Large Losses for Which They Failed to Collect Premiums*

The *Hirschmann* decision may have consequences in Washington that extend beyond damage caused by mudflows. The Washington Supreme Court's refusal to observe unambiguous exclusion clauses and the unpredictability of the proximate cause doctrine may be particularly disastrous in the case of earthquakes, which often initiate chains of causation that produce enormous damage.[132] Washington

127. R. HOLTOM, *supra* note 123, at 17. Property insurance rates are dependent upon the insured's risk of exposure to forces of nature. *Id.* at 240.

128. Proximate cause is confusing and unpredictable in specific circumstances. *See, e.g.*, Comment, *Autopsy of a Plain English Insurance Contract: Can Plain English Survive Proximate Cause?*, 59 WASH. L. REV. 565, 566–67 (1984). This uncertainty may increase litigation of individual claims, thereby increasing insurers' legal and claims investigation costs. *See, e.g.*, Litsey, *supra* note 2, at 417; McDowell, *supra* note 119, at 585. Administrative and litigation costs are significant factors in insurance premiums. Berger, *The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and Its Potential Solutions*, 37 AM. U.L. REV. 285, 317–18 (1988).

129. For example, the rise of the judicial doctrine of strict liability was a major factor in the current availability crisis in products liability insurance. Berger, *supra* note 128, at 298.

130. *Id.* at 303.

131. *See* R. HOLTOM, *supra* note 123, at 134.

132. For example, the Loma Prieta quake that shook northern California on October 17, 1989 caused insured losses of $600 million. The quake damaged 105,000 houses and 3,500 commercial buildings. Sixty-seven people died and 3,700 were injured. Only about 20% of homeowners in California had earthquake insurance at that time. INSURANCE INFORMATION INSTITUTE, DATA BASE REPORTS 2 (Feb. 1991). In the past 30 years, several quakes have caused property damage of $300 million or more. INSURANCE INFORMATION INSTITUTE, *supra*

homeowners generally do not buy earthquake insurance.[133] Insurers may therefore be liable for huge losses for which they failed to collect premiums. In the absence of legislation that protects insurers from this unfair and potentially catastrophic result,[134] the Washington courts should permit insurers to exclude all damage related to earthquakes and other natural disasters.

III. CONCLUSION

Washington, like California, has decided that an insurer may not deny coverage simply because an excluded peril contributed to the loss in a multiple causation case. However, it is unclear whether the Washington courts will completely disregard unambiguous policy language in the future. The Washington courts should take the narrowest possible view of the latest decisions. Washington should permit insurers to conditionally exclude perils by describing those perils generally in the exclusions section of the policy. Courts in other jurisdictions should not follow the Washington and California multiple causation insurance decisions. Rather, those courts should continue to first examine the relevant policy language before applying proximate cause analysis. Only by looking first to the policy language may courts protect the reasonable expectations of the parties, permit insurers to apportion premiums based upon risk exposure, and observe the established principles of insurance law.

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note 102, at 78. Estimates of property losses in the event of a major earthquake in a population center run to $60 billion or more. INSURANCE INFORMATION INSTITUTE, DATA BASE REPORTS, *supra*, at 5.

133. Although earthquake insurance "is generally available, relatively few property owners have taken advantage of the protection it offers." INSURANCE INFORMATION INSTITUTE, *supra* note 102, at 78.

134. Insurers doing business in California feared that the doctrine of concurrent causation could result in courts holding insurers liable for billions of dollars in unanticipated earthquake losses. No premiums had been collected for such losses. INSURANCE INFORMATION INSTITUTE, *supra* note 120. In return for agreeing to offer earthquake protection to all homeowners in California, property insurers have received legislative protection from earthquake-related claims based on concurrent causation. *See* CAL. INS. CODE §§ 10081, 10088 (West 1991). Section 10088 provides that courts may not find coverage where an earthquake partially causes a loss if the policy excludes the peril of earthquake.