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PERSPECTIVE

It's raining, it's pouring, your insurance policy clause is controlling

By Chinye Uwechue

Data shows a trend indicating a growth in the intensity of rainstorms.

For example, a 2008 article “Flood Fatalities in the United States,” published under the auspices of the American Meteorological Society (<https://journals.ametsoc.org/view/journals/apme/47/3/2007jamc1611.1.xml>) noted that: “According to a recent National Weather Service (NWS) assessment examining 10 years of weather-related fatality data ... floods - whether originating because of heavy rain, snowmelt, structural failure, or a combination of these factors - are the second deadliest (in comparison with heat) of all weather-related hazards in the United States.”

A January 2024 article “From California’s Extreme Drought to Major Flooding: Evaluating and Synthesizing Experimental Seasonal and Subseasonal Forecasts of Landfalling Atmospheric Rivers and Extreme Precipitation during Winter 2022/23” - <https://journals.ametsoc.org/view/journals/bams/105/1/BAMS-D-22-0208.1.xml>) noted: “California experienced a historic run of nine consecutive landfalling atmospheric rivers (ARs) in three weeks’ time during winter 2022/23. Following three years of drought from 2020 to 2022, intense landfalling ARs across California in December 2022 - Jan-



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uary 2023 were responsible for bringing reservoirs back to historical averages and producing damaging floods and debris flows.”; “However, a family of nine atmospheric rivers (ARs) ... and their associated extreme precipitation across California in late December 2022 and early January 2023 alleviated extreme and exceptional drought conditions across much of the state, while also causing an es-

timated \$5-\$7 billion in economic losses due to devastating floods, damaging winds, and debris flows ...”

As rainstorms become more frequent and severe, California homeowners need to take stock of the insurance coverage implications.

a) Typical exclusions in a standard homeowner’s policy
California Department of Insurance (CDI) has a list of risks typically cov-

ered by homeowners policies and those usually excluded (<https://www.insurance.ca.gov/01-consumers/105-type/95-guides/03-res/res-ins-guide.cfm#perilsgenerally>). The list of excluded risks includes the following:

- Flood
- Earthquake
- Earth movement
- Termites
- Insects, rats or mice

- Water damage caused by seepage or leaks
- Losses to house vacant for 60 days or more
- Mold
- Wear and tear or maintenance
- War
- Insurrection
- Tidal wave
- Neglect
- Nuclear hazard

A CDI factsheet (<https://www.insurance.ca.gov/01-consumers/140-catastrophes/upload/ConsumerFloodMudslideLandslideSink-holeFactSheetCSD01252018.pdf>) states: "In general, homeowner's insurance policies (HO) issued in California, while worded slightly differently by various insurers, provide coverage for accidental physical loss to property as described in the policy subject to exclusions and limitations. Standard exclusions include flood, earth movement, earthquake, landslide or mudflow, settling, cracking, shrinking, subsidence or sinkhole, erosion, sinking, rising, shifting, expanding or contracting of earth. However, most homeowner's policies will cover an ensuing fire or explosion resulting from earth movement."

b) How California courts have handled flood damage

Though direct flood damage is excluded from standard homeowners' insurance coverage, very often in life other events occur in conjunction with the flooding to cause loss. In the latter instance, there may be room for the law to find coverage under a homeowner's policy. The applicable rule is aptly addressed by the California Supreme Court in *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal. 4th 747, at page 750: "California Insurance Code section 530 provides that '[a]n insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.'" We have construed section 530 as incorporating into California law the efficient proximate cause doctrine, an interpretive rule for first-party insurance. (*Sabella v. Wisler* (1963) 59 Cal.2d 21, 31-33, 27 Cal.Rptr. 689, 377 P.2d 889 (*Sabella*)). Pursuant to

the efficient proximate cause doctrine, "When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss," but "the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate cause." (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131-1132, 2 Cal.Rptr.2d 183, 820 P.2d 285.)"

An illustration of a court's application of the efficient proximate cause doctrine is found in the Ninth Circuit case of *Safeco Ins. Co. of Am. v. Guyton* (1986) 692 F.2d 551, 552-553, where the facts are summarized as follows: "On September 10, 1976, record rains accompanying Hurricane Kathleen broke through flood control facilities and inundated parts of the City of Palm Desert, California. The appellants (the Policyholders) are property-owners who suffered extensive property damage from the floodwaters. Palm Desert, located in the Coachella Valley, is in an area historically vulnerable to flooding. Various measures have been taken to prevent floodwaters from invading inhabited areas. A channel and sand levee of unknown origin were built between 1939 and 1949 to keep run-off water in a natural flood channel to the east of Palm Desert. The state also built levees near Highway 74 to control floodwater. In addition, the Water District of Coachella Valley (the Water District) in 1955 constructed a sand dike south of Palm Desert. All these structures failed to halt flooding by Hurricane Kathleen. The Policyholders held 'all-risk home-owners' policies issued by various insurance companies (for convenience, referred to as 'Safeco'). The policies covered losses caused by third-party negligence. All the policies, however, contained an exclusion, printed in bold letters: THIS POLICY DOES NOT INSURE AGAINST LOSS: 1. CAUSED BY, RESULTING FROM, CONTRIBUTED TO OR AGGRAVATED BY ANY OF THE FOLLOWING: a. FLOOD, SURFACE WATER, WAVES, TIDAL-WATER OR TIDAL WAVE, OVERFLOW OF STREAMS OR OTHER BODIES OF WATER, OR SPRAY FROM ANY OF THE FOREGOING, ALL

WHETHER DRIVEN BY WIND OR NOT." The insurer "denied claims for losses incurred in the flood." *The Safeco Ins. Co. of Am. v. Guyton* court ruled: "The district court erred in concluding that the flood exclusion clause excluded the Policyholders' loss even if third party negligence was a proximate cause of the loss." (*Id.*, at page 555).

c) Mudslide v. Earth Movement

The term "earth movement" is typically defined in policies to include: "earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide; mudflow; earth sinking, rising or shifting..." (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal. 4th 747, 751); "...aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting," and losses caused "by settling, cracking, shrinkage, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings..." (*Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal. 3d 395, 399-400.)

d) How California courts have handled earth movement

The "efficient proximate cause doctrine" stated above also applies here. In *Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal. 3d 395, homeowners (who had an "all risk" policy) filed a lawsuit against their insurer after their home "began to pull away from the main structure." The excluded losses "included those '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,' and losses caused 'by ... settling, cracking, shrinkage, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings.'" (*Id.* at page 399-400.) The *Garvey* court ruled: "Our courts have long struggled to enunciate principles that determine whether coverage exists when excluded and covered perils interact to cause a loss. Initially, the courts attempted to reconcile section 530 (which provides for coverage when a peril insured against was the "proximate cause" of loss) with section 532 (which provides,

that "If a peril is specifically excepted in a contract of insurance, and there is a loss which would not have occurred but for such peril, such loss is thereby excepted [from coverage] even though the immediate cause of the loss was a peril which was not excepted")... We reasoned that sections 530 and 532 were not intended to deny coverage for losses whenever "an excepted peril operated to any extent in the chain of causation so that the resulting harm would not have occurred 'but for' the excepted peril's operation..." (*Sabella, supra*, 59 Cal.2d at p. 33, 27 Cal. Rptr. 689, 377 P.2d 889.) Rather, we explained that when section 532 is read along with section 530, the "but for" clause of section 532 necessarily refers to a "proximate cause" of the loss, and the "immediate cause" refers to the cause most immediate in time to the damage. (*Id.*, at pp. 33-34, 27 Cal. Rptr. 689, 377 P.2d 889.)" *Garvey v. State Farm Fire & Cas. Co.*, *supra* at pages 706 - 707.

In *La Bato v. State Farm Fire & Cas. Co.* (1989) 215 Cal. App. 3d 336, 337-39, the homeowner had an "all-risk" homeowner's insurance policy that stated: "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 are covered. 3. Water damage, meaning: a. flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind; b. water which backs up through sewers or drains; or c. natural water below the surface of the ground, including water which exerts pressure on, or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure." The policy was in place in January 1982 "when a very heavy rainstorm had been going on for some time. At about 2:00 a.m., La Bato was awakened by a loud sound. At about 3:00 a.m., he turned on the floodlights in the back of his house to illuminate his backyard, got an umbrella, and went out to investigate. The water in Las Trampas Creek sounded much closer than it had before, and he could see that the creek had changed its course. The

bank of the creek was now closer to the house, and part of La Bato's backyard simply was not there anymore. Further investigation, after daylight, revealed no further change in the course of the creek. Both La Bato's house and the connected deck were intact and in place, although the back of La Bato's house was now about seventeen feet from the creek bank and the deck now extended to within two or three feet of the creek bank. La Bato has not lost any more area from his lot since January 1982." *La Bato v. State Farm Fire & Cas. Co.*, *supra* at page 339.

The *La Bato* court reversed the judgment and remanded the case to the trial court after noting that: "La Bato does not contend that the departure of a portion of his backyard was not earth movement, within the meaning of that term as used in his homeowner's insurance policy. Under La Bato's theory of recovery, the earth movement and water damage exclusions of the policy did not apply because there were numerous other concurrent proximate causes for the loss which were not excluded from coverage. These other concurrent

proximate causes included rain, high water in Las Trampas Creek, a tree toppling into Las Trampas Creek, erosion of the creek bank debris in the creek bed, changes in the rate of flow of the creek water, and urbanization." (*Id.* at pages 340 - 341); "If La Bato's loss was a departure of a portion of his backyard, there can be no coverage, because the policy does not insure against loss of land. If the departure of a portion of his backyard did, as he argued in the trial court, leave his deck in a damaged condition, through the presence of a void where supporting earth should have been, earth movement caused that void." (*Id.* at page 344)

In *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal. 4th 747: "Insureds brought action against homeowners' insurer to recover for damage to house from landslide as a result of heavy rain and alleged negligence of developer." The *Julian* court noted: "This case calls on us to decide whether an insurer may, consistent with section 530 and the efficient proximate cause doctrine, deny coverage for a loss resulting from a rain-induced landslide by invoking, among other exclusions

within a form policy, a provision that excludes coverage for losses caused by weather conditions that "contribute in any way with" an excluded cause or event such as a landslide. It is undisputed that losses proximately caused by weather conditions that do not "contribute in any way with" another excluded cause or event are covered under the policy." *Julian v. Hartford Underwriters Ins. Co.*, *supra* at page 750. The *Julian* court concluded: "Plaintiffs contend that section 530 and the efficient proximate cause doctrine prohibit their insurer from invoking this exclusion where the weather condition of rain causes a landslide. We reject this argument as an improper conflation of the covered peril of weather conditions alone with the distinct, excluded peril of a weather condition (rain) that induces a landslide, and hold that the insurer may, consistent with section 530 and the efficient proximate cause doctrine, rely on the exclusion to deny coverage for losses proximately caused by the latter peril." *Julian v. Hartford Underwriters Ins. Co.*, *supra* at pages 750 - 751.

Conclusion

Ordinarily, losses caused solely by floods or earth movements are excluded under the standard homeowners policy, however, when the cause of the loss includes a covered risk in addition to an excluded risk (such as floods or earth movement), California courts have found coverage when the covered risk is the efficient proximate cause of the loss.

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