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First Comes Fire, Then Comes Rain

By Brian Kabateck and Frances Ma

While California is well-known for its sunny weather and beautiful beaches, it is also known for its fires -- fires that have the potential to destroy hundreds of thousands of acres every summer. According to the California Dept. of Forestry and Fire Protection, over 90,000 acres were destroyed by fires in 2009. In 2008 alone, an unfathomable 390,000 acres were destroyed that's almost one and a half times the five-year average. So what have homeowners done to protect themselves from California's fiery summers? Buy insurance, of course.

In general, insurance companies sell fire insurance coverage. Most all-risk insurance policies will provide coverage for damage or losses caused by fire with few exceptions. These policies, however, generally do not cover losses caused by earth movements such as earthquakes, landslides, or mudslides. Policyholders can purchase separate coverage for those unique perils. Most policies also often exclude damages caused by weather conditions such as heavy rains or high winds. The problem with these exclusionary provisions, especially in California, is that almost every winter following a summer fire, heavy rains inevitably fall.

Currently, several homeowners who were fortunate enough to survive the California fires face the possibility of losing their homes from landslides due to the winter rains. Will the insurance policies that they purchased years back help? The answer lies in the question: What really caused those landslides? Was it the rain or could it have been the fire that eradicated vegetation vital to the soil's stability? It's an important question to ask because it may mean the difference between losing a home and having the resources to rebuild.

It turns out that some homeowners may be able to find solace in their all-risk homeowner's insurance policies after all. While most insurance policies are not intended to cover landslides, the Supreme Court of California held in 1963 that insurers, in certain circumstances, can still be held liable for damages or losses regardless of the exclusions contained in their policies.

That case, *Sabella v. J.W. Wisler*, involved a builder, a homeowner and the homeowner's insurance policy. The builder was found liable for negligently constructing the house on top of improperly compacted soil. As a result, the house suffered damage when the ground began to sink beneath it. The insurance company that issued an "all physical loss" policy refused to cover the damage to the home because it contained a specific exclusionary provision for losses caused by settling, cracking, or shrinkage. The homeowner, however, argued that the damage was not directly caused by settling, but rather by the negligence of a third party, the builder, and this sort of peril *was* covered by the policy. 59 Cal.2d 21 (1963).

Taking the homeowner's argument to heart, the Supreme Court of California harmonized the conflict between California Insurance Code Sections 530 and 532. Section 530 states that an insurer is liable for a loss where a covered peril is the proximate cause of the loss but is not liable where the covered peril was only a remote cause of the loss. On the other hand, Section 532 states that if there is a loss, which would not have occurred but for the specially excepted peril, that loss is also excepted even if the immediate cause of the loss was a covered peril. The Court construed the "but for" clause in Section 532 to mean the "proximate cause" of a loss and the "immediate cause" to mean the cause closest in time to the damage. Consequently, when concurrent perils are involved, an insurer's liability depends on whether the efficient proximate cause of the loss is a covered peril. If it is, the insurer can be held liable even though an excluded peril contributed to the loss.

After *Sabella*, insurance companies began amending their policies to exclude coverage for certain perils regardless of their roles in the chain of causation. This movement was eventually cut short by *Julian v.*

Hartford Underwriters Ins. Co., 35 Cal.4th 747 (2005). In *Julian*, the Supreme Court of California clarified that if a policy exclusion conflicts with Section 530 or the efficient proximate cause doctrine, it will be rendered unenforceable. At this point it seemed that insurance companies were left scrambling for something to hold onto, but the court managed to balance the risks. In the end it provided a caveat to future insureds. Although insurance companies cannot conflict with the laws of California or public policy, they can still create provisions that exclude specific manifestations of a given peril as long as the policy makes clear which perils are or are not covered.

So how is the "efficient proximate cause" of a loss determined? Fortunately, for homeowners, this determination is one that has to be made by a jury. In other words, a court will not be able to dismiss a homeowner's case based simply on its determination that the proximate cause of the homeowner's loss was earth movement or weather conditions as opposed to fire. *See Garvey v. State Farm Fire and Casualty Co*., 48 Cal.3d 395, 412-13 (1989).

At least one California Court of Appeal has already hinted that a jury could find in favor of a homeowner whose house was damaged during a landslide that followed a season of fire and rain. In *Howell v. State Farm Fire and Casualty Co*., a fire destroyed almost all of the vegetation near a homeowner's house. 218 Cal.App.3d 1446, 1449 (1990). The following winter, heavy rains soaked the land and caused the soil to slip, resulting in a major landslide. In response to the insurance company's motion for summary judgment, the homeowner provided expert testimony to explain that if there had not been a fire that year, the landslide would not have occurred and that in previous years the land managed to stay intact despite even heavier rainfall. Based on this information, the Court of Appeal held that the fire could be found to be the efficient proximate cause of the loss and reversed the lower court's judgment in favor of State Farm.

What does this mean for California homeowners who have recently lost their homes to landslides and the attorneys who represent them? Well most importantly, it means that there still is hope. Homeowners who were denied coverage by their insurance policies may have a case if fires played a role in modifying the strength or stability of the soil. But attorneys should be warned to carefully read through their clients' policies to determine whether a *fire inducing landslide* is in fact excluded from coverage.

Brian Kabateck is a consumer rights attorney and founder of Kabateck Brown Kellner in Los Angeles. He represents plaintiffs in mass torts litigation, class actions, insurance bad faith, insurance litigation, and commercial contingency litigation. **Frances Ma** is a consumer rights attorney and associate of Kabateck Brown Kellner in Los Angeles. She represents plaintiffs in mass torts litigation, class actions, insurance bad faith, insurance litigation, and commercial contingency litigation.