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“Slip Slidin’ Away”—But Am I Covered?

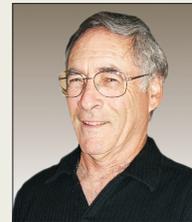
Timothy R. Sullivan

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BERNHARDT’S TAKE

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Roger Bernhardt

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FEATURED ARTICLES**“Slip Slidin’ Away”—But Am I Covered?**

Timothy R. Sullivan

Introduction

This winter’s anticipated El Nino offers tantalizing hope for relief from years of drought. In areas devastated by wild-fires, however, it poses the risk of mudslides. Will homes and buildings be covered by insurance if damaged by a mudslide? The answer is, of course, “It depends”—namely, on the type of policy as well as the nature and cause of earth movement involved.

Homeowners and Commercial Property Insurance Policies Exclude Coverage for “Earth Movement”

The ISO homeowners policy (HO 03), the AAIS base homeowners coverage forms (HO 0001–0006), and the AAIS “standard” cause of loss forms (CP-82, CP-83, and CP-85) for commercial property policies all exclude coverage for “earth movement.” Each of those policies defines “earth movement” to include earthquake, landslide, mudflow, and mudslide. The ISO standard language commercial property policies (CP10 10 10, CP10 10 20, and CP10 10 30) also exclude coverage for “earth movement,” but they do not define “earth movement.” Instead, the standard ISO commercial property policies provide a list of types of earth movement that are excluded, including earthquake and landslide, but do not expressly include “mudflow” or “mudslides” on that list. So does “earth movement” or a “landslide” include a mudslide or mudflow?

In an unpublished decision, the Third District Court of Appeal relied on a dictionary definition of “landslide” as “the rapid downward movement under the influence of gravity of a mass of rock, earth, or artificial fill on a slope.” *Parman v American Nat’l Fire Ins. Co.* (Jan. 11, 2002, C034737; not certified for publication) 2002 Cal App Unpub Lexis 4970, *19, citing Webster’s Third New International Dictionary (1981). The court noted that “the ordinary definition of landslide does not exclude wet movements of rock and earth”; thus, “in ordinary parlance, a rapid downhill movement of rock and earth, whether dry or wet, is a landslide.” 2002 Cal App Unpub Lexis 4970 at *22. The court reversed summary judgment for the insured and directed entry of judgment for the insurer, finding that the “debris torrent” that destroyed the insured’s ranch fell within the “Earth Movement” exclusion in the policy (which precluded coverage for damage caused by “landslide”). The *Parman* policy

also had a “Water” exclusion that precluded coverage for damage caused by “mudslide.”

Concurrent Causes and the ACC Clause

But what if the mudslide were caused by rain following a fire that burned trees and vegetation that would have otherwise prevented the mudslide? For property insurance claims, California follows the “efficient proximate cause” standard. If there are two separate or distinct perils, each of which could have independently caused the loss for which coverage is sought (even if they did not in fact occur independently), then the claim is covered if a covered peril is the “efficient proximate cause” of the loss. This is the case even when an excluded peril may have also contributed to the loss. *Julian v Hartford Underwriters Ins. Co.* (2005) 35 C4th 747, 750, reported at 28 CEB RPLR 139 (Sept. 2005); *Garvey v State Farm Fire & Cas. Co.* (1989) 48 C3d 395, 412, reported at 12 CEB RPLR 130 (May 1989). Alternatively, if all potential causes of the loss are excluded, then coverage does not apply and it is unnecessary to identify the efficient proximate cause of loss. *Brodkin v State Farm Fire & Cas. Co.* (1989) 217 CA3d 201, 218, reported at 13 CEB RPLR 77 (Apr. 1990).

The “efficient proximate cause” of loss is the “predominating cause of loss,” *i.e.*, the most important cause. *Garvey*, 48 C3d at 403. It need not be the “triggering” or “moving” cause, *i.e.*, the first to occur. Likewise, it need not be the “immediate cause,” *i.e.*, the last to occur. *Garvey, supra*. The “efficient proximate cause” inquiry is usually a question of fact. 48 C3d at 412. However, if the facts are undisputed, determining which peril was the “efficient proximate cause” may be a question of law. *Mission Nat’l Ins. Co. v Coachella Valley Water Dist.* (1989) 210 CA3d 484, 492, reported at 12 CEB RPLR 179 (Aug. 1989); *Berry v Commercial Union Ins. Co.* (9th Cir 1996) 87 F3d 387, 391 n8.

Thus, if a fire—a covered peril—strips land of its trees and vegetation, and subsequent heavy rains cause a mudslide—an excluded peril—and the mudslide damages a house, would the damage be covered under a homeowners policy with an “Earth Movement” exclusion? In *Hoffman v State Farm Fire & Cas. Co.* (1993) 16 CA4th 184, 188 n1, reported at 16 CEB RPLR 277 (Aug. 1993), the court noted that the California Supreme Court has held that an earth movement exclusion “will not preclude coverage if the ‘efficient proximate cause’ of loss is a covered peril,” citing *Sabella v Wisler* (1963) 59 C2d 21, 25 (heavy rains combined with negligent construction caused settling of compacted fill beneath home), and *Garvey v State Farm Fire & Cas. Co.* (1989) 48 C3d 395, 401 (remanded for determination as to whether negligent construction or earth movement was “efficient proximate cause”).

The *Hoffman* court also noted that many insurers have since amended their policies in an attempt to avoid the results in those cases. *Hoffman, supra*. Such provisions are known as Anti-Concurrent Cause (ACC) clauses. A typical ACC clause states: “We do not cover loss to any property

resulting directly or indirectly from any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.”

Although no California court has declared an ACC clause to be unenforceable in all cases, the clause will not be given effect if the “efficient proximate cause” is a covered peril. For example, despite finding the ACC clause at issue was enforceable under the facts of the case, the California Supreme Court in *Julian v Hartford Underwriters Ins. Co.* (2005) 35 C4th 747, 754, nevertheless noted that “[p]olicy exclusions are unenforceable to the extent that they conflict with [Insurance Code] section 530 and the efficient proximate cause doctrine.”

Similarly, in *Howell v State Farm Fire & Cas. Co.* (1990) 218 CA3d 1446, reported at 13 CEB RPLR 136 (July 1990), a wildfire occurred near the insured’s property in the summer. After heavy winter rains, a resulting landslide damaged the property. The policy at issue provided coverage for fire damage, but not for water or earth movement damage. 218 CA3d at 1449. The trial court held that the insurer’s denial of coverage on that basis was proper. Applying the “efficient proximate cause” doctrine, the court of appeal reversed, holding that the landslide likely would not have occurred had there not been a fire. Thus, a reasonable juror could find that the fire was the “predominating” or “efficient proximate cause” of the loss. 218 CA3d at 1451.

In a recent case involving Arizona law, the Ninth Circuit applied a similar analysis to the issue of insurance coverage for mudslides following wildfires. In *Stankova v Metropolitan Prop. & Cas. Ins. Co.* (9th Cir 2015) 788 F3d 1012, flooding and mudslides destroyed the insureds’ home one month after a wildfire had destroyed all the vegetation on a nearby hillside. Their insurer denied coverage based on an earth movement exclusion. The district court granted summary judgment for the insurer; the insureds appealed. Although the “efficient proximate cause” doctrine is inapplicable under Arizona law, the Ninth Circuit nonetheless held that a reasonable juror could find that the fire was a direct cause of the damage under the “more limited analysis” required by Arizona’s “direct and proximate cause” test, as long as there was an “unbroken sequence” between the fire and the ultimate damage to the house. 788 F3d at 1016. Here, the insureds’ evidence that mudslides had never before occurred on the property, that wildfires commonly cause mudslides, and that the rains were not particularly heavy that year was sufficient to suggest that the fire ultimately caused the damage in question, as “otherwise water would not have caused the earth to move.” 788 F3d at 1017. The court further held that the policy’s ACC clause was inconsistent with Arizona’s standard fire insurance policy and thus unenforceable.

But what about a mudslide caused by heavy rain when there was no fire? In *Julian v Hartford Underwriters Ins. Co.* (2005) 35 CA4th 747, 754, heavy rains caused a slope failure, which led to a landslide, which then caused a tree to

crash into the insureds' house. The insureds' homeowners policy excluded coverage for "Earth Movement," including "landslide" and "mudflow." The policy also excluded coverage for acts, errors, or omissions in design and construction. A "weather conditions" exclusion further precluded coverage when weather conditions "contribute[d] in any way with" an excluded peril. The risk of weather conditions alone, however, was covered. The insurer denied coverage, arguing that any possible "efficient proximate cause" of the damage was excluded under the earth movement, third party negligence, or weather conditions exclusion. The insureds argued that the "weather conditions" exclusion violated the efficient proximate cause doctrine because the "contributes in any way" language allowed the insurer to deny coverage for covered causes (*e.g.*, weather conditions) by basing its denial on a remote cause (*e.g.*, the landslide). The trial court granted summary judgment in favor of the insurer.

The California Supreme Court affirmed, holding that "an insurer is not absolutely prohibited from drafting and enforcing policy provisions that provide or leave intact coverage for some, but not all, manifestations of a particular peril." 35 Cal4th at 759. The court further noted that the relationship between rain and landslides is sufficiently well-known that any reasonable insured would readily grasp the difference between a loss caused by rain alone and a loss caused by a rain-induced landslide. Here, there was no evidence that the rain caused any damage apart from contributing to the landslide and therefore fell under the "weather conditions" and "earth movement" exclusions. *Julian v Hartford Underwriters Ins. Co.*, *supra*.

Optional Coverages

To obtain coverage for mudslides (and avoid potential application of an ACC clause), a prudent insured should consider coverage in addition to that provided by a standard homeowners or commercial property policy.

The ISO offers an optional Flood Endorsement Coverage (CP 10 65), which adds "flood" (including mudslide or mudflow) to the list of insured perils. However, that endorsement is not intended to be used in place of a National Flood Insurance Program (NFIP) Flood Policy, in that its conditions essentially require an NFIP Policy when the insured is eligible for the protection, unless a waiver is allowed and attached by the underwriter. However, it may offer higher limits and a broader definition of "flood."

The AAIS offers an optional Flood Endorsement (CO 1223). It is not available with AAIS "standard" commercial property policies, but only as an attachment to the Commercial Output Program policy forms. This AAIS endorsement does not require an underlying NFIP Flood Policy. Notably, however, it does *not* include "mudslide" or "mudflow" in the definition of "flood."

Difference In Conditions

Commonly called a "Difference In Conditions" (DIC) policy, a DIC policy typically (but not always) includes cov-

erage for landslide, mudflow, earthquake, and/or flood. While some insurers offer DIC endorsements to commercial property policies, DIC policies are typically only available as a stand-alone policy through a surplus lines insurer. DIC policies may also be used to provide excess limits over flood and earthquake coverage that may be provided by endorsement to a commercial property policy or through a flood insurance policy.

There is no standard DIC coverage form, although the ISO and AAIS offer DIC policy forms. While this offers insurers flexibility in drafting coverage, it may also create potential coverage gaps. For example, "mudslide" or "mudflow" may be excluded in an earth movement exclusion as well as in a flood exclusion. It is advisable to review the commercial property policy and the DIC policy side-by-side to ensure coordination of the policy language. Unanticipated exclusions may be recognized and the insurer may agree to delete them.

Flood Insurance

For purposes of the NFIP, "flood" is defined to include "mudslides" and "mudflows" that are proximately caused by flooding. See National Flood Insurance Act of 1968 (42 USC §§4001–4129); 44 CFR §9.4 ("Definitions"). The National Flood Insurance Act mandates that coverage under the term "flood" include "inundation from mudslides which are proximately caused by accumulations of water on or under the ground." 42 USC §4121(b). See also 42 USC §4001(f) (noting Act's purpose to make available "protection against damage and loss resulting from mudslides that are caused by accumulations of water on or under the ground"). Federal regulations governing the NFIP define a mudslide or mudflow as a "condition where there is a river, flow or inundation of liquid mud down a hillside usually as a result of a dual condition of loss of brush cover, and the subsequent accumulation of water on the ground preceded by a period of unusually heavy or sustained rain." 44 CFR §59.1.

Federal flood insurance is available for homeowners, renters, and business owners. NFIP flood policies can be purchased directly from the federal government or through FEMA-authorized insurance companies and agents. The average NFIP policy for a homeowner costs roughly \$700 per year, according to the NFIP. For homeowners, the maximum amount of coverage available from the federal flood program is \$250,000 for damage to a dwelling's structure and \$100,000 for damage to contents. See https://www.floodsmart.gov/floodsmart/pages/residential_coverage/policy_rates.jsp.

Conclusion

Standard homeowners and AAIS commercial property insurance policies exclude coverage for "earth movement," which includes mudslides or mudflows. Damage due to a mudslide or mudflow may be covered if the "efficient proximate cause" was a fire that damaged trees and vegetation, but disputes may arise regarding the efficient proximate

cause of the damage. Prudent property owners should consider optional coverages, such as DIC coverage or a flood policy, if they fear a landslide (or mudslide) could “bring them down” (as Fleetwood Mac said).