20 Forum 222

Forum
January, 1985

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FORTUITY: THE UNNAMED EXCLUSION

I. INTRODUCTION

In addition to the exclusions that are named in the policy itself, every 'all risk' contract of insurance contains an unnamed exclusion—the loss must be *fortuitous* in nature. This may be termed the fortuity doctrine. Even 'all risk' coverage extends only to *risks;* an insurance carrier simply does not undertake to reimburse its insured for loss that is certain or expected to occur.

The doctrine was first described at length by British and American courts shortly after World War I, in *British & Foreign Marine Ins. Co. v. Gaunt* [1] and *Mellon v. Federal Ins. Co.* [2] In the half-century since then, no decision has questioned its validity, and courts have recognized and accepted the rationales that underlie the doctrine. Allowing insurance coverage on a certainty would violate public policy and encourage fraud; an insurance policy is not a warranty of soundness, and the carrier's obligations do not extend to damage that is not occasioned by external or extraneous forces.

Fortuity is not, in fact, an exclusion, but something inherent in the concept of 'all risk' itself. As a result, the burden of proof with respect to a loss within coverage rests, as usual, on the shoulders of the insured. Thus, when testimony establishes that a dwelling was *certain* ***223** to settle and crack because of the nature of the underlying soils [3] or that an ore-processing plant was *certain* to collapse because of errors in its design, [4] this burden would seem to be an insurmountable one. The loss was a physical inevitability; the property insured contained within itself the seeds of its own destruction, and the loss was no more than the certain consummation of an in-dwelling fault. There was, in short, no 'risk.'

This has not proven to be the case, and the reasons are threefold. First, the doctrine has been always difficult to use as a 'defense' *in practice*. Fortuity has been more honored in the breach than in the observance. Since *Gaunt* and *Mellon*, courts have consistently paid lip service to the concept, while finding a variety of reasons to rule in favor of the insured. As Lord Summer stated in *Gaunt*, meeting the burden of proof and showing that a loss is fortuitous is 'easily done.' [5] Cases in which the courts have been convinced that particular loss was nonfortuitous in nature have been few and far between.

Second, judicial disfavor has increased in the last two decades, and recent decisions have effectively emasculated any assertion that a particular loss is nonfortuitous (and, therefore, noncompensable) by circumscribing the doctrine even further *in theory*. Courts increasingly analogize to contract law, which defines 'a fortuitous event' as one dependent on chance insofar 'as the parties to the contract are aware.' [6] This converts the doctrine from an objective standard ('Was the loss certain to occur?') into a subjective one ('Did the insured know that the loss was certain to occur when the policy was issued?'). A physical certainty, such as the settling and cracking of the dwelling or the collapse of the ore-processing plant, is *legally 'fortuitous*' so long as the insured was unaware that it was going to happen. Indeed, the present standard is arguably a *completely* subjective one. Even if the design defects which caused the collapse of the ore-processing plant would have been readily apparent to a reasonably competent engineer, the loss is still 'fortuitous' *so long as the named insured was unaware of the existence of any deficiencies*.

Third, any loss that could be shown to be nonfortuitous under the modern or 'standpoint-of-the-insured' rule might still be compensable because of the concurrent cause doctrine. The rule has developed that any loss caused by a covered peril (such as negligence in one of its many forms) remains compensable even though an excluded peril was a substantial, or even a predominant, contributory factor. California courts have gone one step further and allow recovery when negligence is merely *one of the concurrent causes* of loss; the insured need not demonstrate that negligence was the 'prime' of 'moving' cause. Even

***224** a genuinely nonfortuitous event under the modern rule would still be compensable if negligence figured in the chain of causation.

The subjective definition of 'fortuity' appears to be the modern rule, and decisions adopting it simply pass in silence over the fact that insurance coverage for certain and inevitable losses was never contemplated by the underwriter (or the knowledgeable insured) when the policy was issued. Such a coverage rationale negates the concept of risk taking, which forms the basis for all property and casualty insurance, transforming such insurance contracts into something more akin to the life insurance policy, which accepts the certainty of the loss, though not the timing of it. The developing modern rule and the adoption of the concurrent cause doctrine raise two important questions: (1) is anything left of the fortuity doctrine, and, if not, (2) what implications does its demise have for the insurance industry?

II. THE FORTUITY DOCTRINE

A. *Risk Versus Certainty*

Insurance is basically no more than an arrangement for transferring and distributing risk.[7] As a result, the concept of risk is central to the idea of insurance itself.[8] 'Risk' is difficult to define, for the word is an abstract term with no physical counterpart.[9] To say one is subject to a particular type of risk is somewhat akin to saying that no one knows whether he will suffer the loss.[10] It is clear, however, that the *opposite* of risk is *certainty*. If risk is central to insurance, then certainty is antithetical to it. The requirement that any loss be accidental in some sense in order to be compensable is implicit in the very nature of insurance.[11]

> There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. *The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen.*[12]

Even 'all risk' coverage, which represents the broadest type of policy available today, covers only risks and affords no coverage for loss that is certain to occur.[13] As Judge Augustus Hand observed over sixty years ago in *Mellon*, 'the perils insured against are risks.'[14]

***225** B. *Fortuitous Loss*

The concept of risk is expressed by the term 'fortuity.' To be compensable, the loss must be furtuitous, which is to say that it must be caused by a fortuitous event.[15] 'Fortuitous' has been defined as 'occurring by chance without evident causal need or relation or without deliberate intention.'[16]

A fortuitous event is one that is *not certain to occur*.[17] It results from a risk, as contrasted with being 'an ordinary and almost certain consequence of the inherent qualities and intended use of the property.[18]

'All risk' is not synonymous with 'all loss.'[19] As a North Carolina court has observed, 'the cases and commentators are unanimous in holding that 'all losses' are not included in the term 'all risks'.'[20] Thus, even under an 'all-risk' policy, coverage extends only to *fortuitous losses*.[21] A typical formulation of this rule is a variation on the language used by one well-known treatise, which states that an 'all risk' policy 'is to be considered as creating a special type of coverage extending to risks not usually covered under other insurance, and recovery under an 'all-risk' policy will, as a rule, be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage.'[22] As one commentator has noted:

> [T]he standard all risks policy does not purport to protect the insured against all the disasters and mishaps to which his property may be subject. It was never intended that this should be the scope of the coverage, as an examination

> of the historical antecedents of this type of insurance clearly demonstrates. Unless the loss is fortuitous, proceeding from a combination of accidental and unexpected circumstances over which the insured has no control, and against which he could not have protected ***226** himself through other forms of compensation, there can be no recovery under the policy. [23]

This principle is generally said to have originated in the *Gaunt* case. [24] As England's House of Lords observed:

Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty.

Footnotes

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[N]o one would contend that a policy of this kind would cover ordinary wear and tear or deterioration incidental to the transit of goods. There must be something in the nature of an accident to bring the policy into play. [25]

The term ‘all risk’ is sometimes said to require that four conditions be met. As enumerated by the Supreme Court of North Carolina in *Avis v. Hartford Fire Ins. Co.*, [26] these are as follows:

(1) The loss must be fortuitous;

(2) The loss or damage must not result wholly from an inherent quality or defect in the subject matter;

(3) The loss or damage must not result from the intentional misconduct or fraud of the insured; and

(4) The risk must be lawful. [27]

The second and third conditions are essentially ways of restating the first. *A ‘fortuitous' loss is one that does not result from (1) any inherent defect in the property insured, (2) ordinary wear and tear, or (3) intential misconduct by the insured.* [28]

A loss resulting from an inherent defect in the property insured is not fortuitous.

> The underwriter is not liable for that loss or deterioration which arises solely from a principle of decay or corruption inherent in the subject insured, or, as the phrase is, from its proper vice; as when fruit becomes ***227** rotten, or flour heats, or wine turns sour, not from external damage but entirely from internal decomposition. [29]

A loss resulting from ordinary or normal wear and tear is not fortuitous, for wear and tear is not an insurable risk, but rather a certainty. [30]

A loss resulting from intentional misconduct by the insured is not fortuitous, for it is occasioned by design rather than by chance. [31]

The types of losses enumerated above all spring from those causes that are either wholly inherent in the insured property or wholly attributable to the named insured. There were no external or extraneous factors that contributed to the damage sustained. As a result, 'fortuitous' may also be equated with the term 'external cause.' [32] A fortuitous loss is essentially the same thing as loss attributable to an external or extraneous cause. As the Fourth Circuit has noted:

> The addition of the phrase 'external cause' to the 'all risks' clause constitutes no real limitation on the scope of the latter. If the loss did not result from inherent defect, ordinary wear and tear, or intentional misconduct, its cause was necessarily external. [33]

If the loss was occasioned by an inherent defect in the property insured, then it did not result from an external cause. [34] The same thing is true of loss occasioned by normal wear and tear. [35]

***228** C. *The Genesis of the Doctrine*

The fortuity doctrine had its genesis in maritime law, for this is where all-risk coverage itself originated. As one commentator has explained:
In the early days of insurance, the greatest single hazard to property on land was fire, whereas the hazards to property being transported by sea were inexhaustibly many, *i.e.*, as it was stated then and is still stated, 'all the perils of the sea.' Insurance on property upon land was, for the most part, fixed as to locality and subject only to certain easily specified risks, the principal one then being fire. Consequently, this type of insurance developed along the lines of specified perils. On the other hand, property being transported by water, the then principal form of transportation, had no fixed place as to locality, and since it was subject to so many and unpredictable hazards, ocean marine insurance developed along the lines of 'all risks' coverage. [36]

Marine insurance policies have long afforded coverage against 'the adventures and perils of the seas,' together with 'all other perils, losses, and misfortunes' which could befall the vessel and its goods. [37] As a result, marine insurance cases first faced the question of whether language akin to the modern all-risk formulation encompassed loss by a nonfortuitous event, such as an inherent defect in the vessel itself or intentional misconduct by the master.

Two early American examples are *Newtown Creek Towing Co. v. Aetna Ins. Co.* [38] and *Gulf Transportation Co. v. Fireman's Fund Ins. Co.* [39] Both cases involved the loss of a vessel. The *Newtown* policy provided coverage against 'any accident caused by collision.' The insured property was a barge which was lost when the master of a tug attempted to force his vessel through an ice field with the barge lashed alongside, projecting some 45 to 50 feet beyond the tug's bow. The court held that this did not represent an 'accident caused by collision,' because it fell into the category of intentional misconduct by the insured. In the words of Chief Judge Harker of the New York Court of Appeals, ' w hen the master of the vessel insured designedly takes the chance of running into a perfectly apparent obstruction, although with the hope and expectation that the vessel will successfully meet the encounter, the contact is not a collision within the meaning of the term as employed in this contract.' [40]

***229** In *Gulf Transportation*, the insured vessel was a barge laden with oil that was proceeding down the Houston Ship Channel to Port Arthur, Texas. Some thirty minutes after leaving port, and while in smooth and placid waters, she began to gradually settle and leak oil, necessitating her grounding and abandonment. It was subsequently determined that the barge had hogged, and her seams had opened up under the weight of the cargo alone. The Mississippi Supreme Court held that there could be no recovery, for the loss was wholly occasioned by the constitutional infirmities of the vessel herself. In the words of Judge Stevens:

Certainly if the vessel broke under the weight of her own cargo, without encountering any perils of the sea, there can be no recovery. The testimony in the case justifies such a conclusion of the Chancellor; and, so, any presumptions or conjectures must yield to the proof.

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Our duty in this case is to determine whether the misfortune is an extraordinary or fortuitous accident against which indemnity is given, or an ordinary event which is not contemplated by the policy. [41]

The decision which has been labeled as 'the leading case on this subject' [42] also arose in the marine insurance context. *British & Foreign Marine Ins. Co. v. Gaunt* [43] was decided in the English House of Lords in 1921. The plaintiff-insured was the purchaser of a portion of a clip of wool produced in the Patagonian region of South America. The wool was delivered in bales to an ocean-going vessel at Punta Arenas, Chile; the bales of wool were transported from the interior to Punta Arenas by small local steamers, and the merchandise was carried on the open decks of these vessels in accordance with the carrying trade in the district.

Upon arrival in England, it was discovered that the cargo had been badly damaged by fresh water *before* its arrival in Punta Arenas.

The policy provided that coverage was as follows:

> Including all risk of craft, fire, coasters, hulks, transhipment and inland carriage by land and/or water and/or risks from the sheep's back and/or stations while awaiting shipment and/or forwarding and until safely delivered into warehouse in Europe with liberties as per Bills of Lading. [44]

The court allowed recovery for the insured, but the opinions of Lords Birkenhead, Finley, and Summer provide the first comprehensive statement of the fortuity doctrine and its connection with the nature of all-risk coverage. In the words of Lord Birkenhead:

In construing these policies, it is important to bear in mind that they cover 'all risk.' These words cannot of course, be held to cover all damage ***230** however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies. There is little authority on this point, but the decision of Walton, J. in *Schloss Brothers v. Stevens*, on a policy in similar terms, states the law accurately enough. He said the words 'all risks by land and water' as used in the policy then in question 'were intended to cover all losses by any accidental cause of any kind occurring during the transit . . . There must be a casualty.' Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty. [45]

Lord Finley's opinion is in accord.

> I agree with the Master of the Rolls in thinking that there was sufficient evidence to justify the inference that this loss was due to something accidental. Of course, no one would contend that a policy of this kind would cover ordinary wear and tear or deterioration incidental to the transit of goods. There must be something in the nature of an accident to bring the policy into play. [46]

Finally, Lord Summer noted:

> There are, of course, limits to 'all risks.' There are risks and risks insured against. Accordingly, the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behavior of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally, the description 'all risks' does not alter the general law; only risks are covered which it is lawful to cover, and the onus of proof remains where it would have been on a policy against ordinary sea perils. [47]

The American analogue to *Gaunt* was written five years later by Judge Augustus Hand of the Southern District of New York. *Mellon v. Federal Ins. Co.* [48] involved damage to a pair of boilers on the steamship *El Mundo*. The port boiler burst during a hydrostatic test. The starboard boiler passed the test, but a serious leak was discovered in one of its circumferential butt straps some seven months later. The contract of insurance afforded coverage against 'the adventures and perils . . . of the seas, . . . and all other perils, losses and misfortunes which have or shall come to the hurt, damage or detriment of the said ship.' [49] Judge Hand allowed recovery only for the boiler which exploded; in the words of his opinion:

> The perils clause is an 'all risk' clause, and the libelant has discharged his burden when he has proved that the loss was due to a casualty and was caused by some event, as here by the hydrostatic test, covered by the general expressions of the policy. 'He is not bound to go further, and prove the exact nature of the accident or casualty which in fact occasioned ***231** his loss.' *British & Foreign Marine Ins. Co. v. Gaunt* [1921] A.C. 41. In the Inchmaree clause the casualty came within a specified risk.
> In the starboard boiler, the situation is different. The cracks in this boiler I have found not to be attributable to the bursting of the port boiler. I cannot regard them as brought within the terms 'bursting of boilers' in the Inchmaree clause. For some reason, whether from latent defects, wear and tear or inevitable depreciation I cannot determine, the starboard boiler developed fractures. I cannot say that they were fortuitous, or if they be regarded as due to latent defects, it has not been proven when such latent defects originated. I only know that they first became evident when the boiler was stripped in May, 1919. It must always be borne in mind that the policies are of *insurance* and not of warranty of soundness, and for that reason no liability arises under the perils clauses for damage to the starboard boiler. The words 'other causes of whatsoever nature' cover, in my opinion, 'all risks'; but the perils insured against are *risks*. [50]

D. *Procedural Ramifications*

One of the attractions of the fortuity doctrine has always been that insurance counsel electing to use it as a defense have received a pair of procedural advantages. First, fortuity *vel non* is a question of law, allowing disposition by way of motion for summary judgment in an appropriate case. Second, the burden of proving that a given loss falls within policy coverage (i.e., is fortuitous) rests on the shoulders of the insured.

The application of the fortuity doctrine to the facts of a particular case is a question of law for resolution by the court. As Judge Hand explained in *Mellon*, 'the characterization of a loss as 'fortuitous' is a legal conclusion to be distinguished from the facts upon which it is based.' [51] This is the generally accepted rule, [52] though there is at least one exception. In *Fireman's Fund Ins. Co. v. Hanley*, [53] the Sixth Circuit held that such a determination should be made by the finder-of-fact. The decision involved a lakeside home in St. Joseph, Michigan, which slid some 80 feet down a bluff into the water that it had been constructed to overlook. The insurance company contended that the dominant cause was long-continued erosion of the shoreline by wind and waves. According to the carrier, this condition made the loss *inevitable*. The trial court allowed this question to go to the jury, and the Court of Appeals held that this was the correct procedure.

> The testimony on this point raised a question of fact. We conclude that the jury was justified by ample evidence in finding that the destruction of plaintiffs' house was not inevitable, that if the unusually heavy rain had not occurred, the jetties and seawalls might have continued to arrest the erosion and protect the bluff. [54]

***232** Most courts also agree that the insured bears the burden of demonstrating that his loss has been 'fortuitous' in nature. [55] Only then does the burden of proof spring back to the insurance carrier. [56]

Unfortunately, however, practical experience demonstrates that this burden has proven remarkably easy for insureds to bear. In has been said, and justifiably so, that '[t]he burden of demonstrating fortuity is not a particularly onerous one.' [57]

Thus, it has been held that the insured does not bear the burden of demonstrating that the loss or damage was occasioned by an external or extraneous cause. [58] Indeed, under a line of cases beginning with the House of Lords' decision in *Gaunt*, the insured has no need to prove any cause of loss at all. As the judges explained in the 1921 case:

We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policy; but where all risks are covered by the policy and not merely risks of specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further, and prove the exact nature of the accident or casualty which, in fact, occasioned his loss.

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The claimant insured and averring a loss by fire must prove loss by fire, which involves that it is not by something else. When he avers loss by some risk coming within 'all risks', as used in this policy, he need only give evidence reasonably showing that the loss was due to a casualty, not to a certainty to inherent vice or to wear and tear. This is easily done. I do not think he has to go further and pick out one of the multitude of risks covered, so as to show exactly how his loss was caused. [59]

This is clearly the modern American rule as well. Courts that have considered the question have rejected the notion that the insured must show the precise cause of loss to demonstrate fortuity. [60]

Thus, for example, in *Texas Eastern Transmission Corp. v. Marine* ***233** *Office-Appleton & Cox Corp.*, [61] an underground storage cavern collapsed when construction was 97 percent complete. The exact mechanism of failure was never determined.

> The cavern collapsed in the middle of the night, at a time when no one was in it and the only persons known to be on the job site were two night security guards at the surface. There was no obvious earthquake, explosive sound or unusual phenomenon except popping and cracking of the tin shaft construction building and settling of the earth. After the collapse it was impossible to enter the cavern, and the shafts were so full of rock that not even a TV camera could be lowered to a point where it could provide a meaningful look at the damage. [62]

The carrier asserted that as a practical matter proof of cause of the loss was necessary in order to establish that the loss was caused by a fortuity. [63] The court rejected this contention.

When past experience indicated that this particular design would be satisfactory, and it was not for some reason which is uncertain, a fortuitous event occurred within the loss provisions of the contract, not excluded by the 'deficiency in design' clause. Texas Eastern and Fenix & Scisson met their burden of proof by showing a feasibility study, plans and specifications, their submission to the insurance company as a basis for the issuance of the policy, and a similarity to the previously constructed caverns which were satisfactorily completed. They presented evidence of several experts that this was a good cavern, to all appearances, shortly before the event and one which should not have collapsed. [64]

E. *Rationales and Applications*

Since *Gaunt* (1921) and *Mellon* (1926), no court has questioned the validity of the fortuity doctrine, and these two decisions and their progeny evidence a recognition and acceptance of the rationales which provide the basis for it. As indicated by the discussion on procedural ramifications, however, the practical reality has been of little comfort to insurance carriers, for the courts seldom find that a loss is nonfortuitous in nature.

The cases have articulated essentially four rationales for the fortuity doctrine; the first two may be said to be public policy justifications, while the second two spring from the very nature of property insurance itself.

(1) First, *it is said to be against public policy to allow insurance coverage on a certainty*. As Judge Simmons of the Western District of Pennsylvania explained in a recent opinion:

A non-fortuitous loss due to an inherent vice, defect or infirmity, is not covered by a contract of insurance, regardless as to the bargained-for ***234** exclusionary terms of the policy. Public policy requires that this be so, for insurance policies are designed to cover risks, and implicit in the concept of risk is change and uncertainty. If it is inevitable that there will be loss, whether by the insured's own misconduct or by the inherent nature and qualities of the object of the insurance, it is against public policy to insure against that inevitable loss. [65]

(2) Second, *allowing insurance on a nonfortuitous event would serve to encourage fraud*. In the language of Judge Simmons, '[t]he courts have recognized that it is contrary to public policy to permit insurance coverage for a nonfortuitous event and to do so would encourage fraud, deception and collusion.' [66] Any other rule would be 'an open invitation to fraud and collusion.' [67]

(3) Third, *an insurance contract does not represent a warranty of soundness with respect to the property insured;* as Judge Augustus Hand realized in 1926, 'the policies are of *insurance* and not of warranty of soundness [.]' [68] The insured receives 'indemnity against loss or damage from fortuitous and extraneous circumstance rather than warranty of the quality and durability of the chattels.' [69]

(4) Fourth, and finally, *property insurance applies only to a loss occasioned by external or extraneous forces*.

It takes explicit language indicating that purpose to extend the effect of insurance beyond damage arising from or contributed to by extraneous causes and make it cover loss from automatic deterioration alone. That rule is applied unequivocally to marine insurance. To apply any other here would make the policy cover natural disintegration, something clearly not intended. [70]

Despite the age of the fortuity doctrine and its relatively universal acceptance by the courts, however, there are few cases which hold that a particular loss is, indeed, nonfortuitous and, therefore, excluded from coverage for that reason. Moreover, even those cases which can be cited in support of any defense bottomed on the doctrine are often less than models of legal reasoning.

The leading decisions are *Chute v. North River Ins. Co.* [71] and *Greene v. Cheetham*. [72] The *Chute* case involved an effort to recover for a cracked fire opal. The Minnesota Supreme Court held that the damage to the gemstone was nonfortuitous in nature, *but the reason was* ***235** *largely that plaintiff admitted as much*. The complaint, with what the court characterized as 'commendable candor,' averred 'that said crack was due to an inherent vice in said opal and was not the result of outside force.' [73] Having surveyed the marine insurance cases which culminated in *Gaunt* and *Mellon*, the Minnesota court proceeded to apply the same rule. In the words of the court:

> Because the policy must be considered as one against damage from fortuitous and extraneous risks, it is not permissible to resort to a unilateral interpretation which will convert it into a contract of warranty against loss resulting wholly from inherent susceptibility to dissolution. [74]

The *Greene* case is more persuasive. The decision involved three shipments of frozen catfish fillets that were sent from Liverpool, England, to New York. Upon arrival in the United States, it was discovered that the fillets were unfit for human consumption, and they were condemned.

The parties stipulated that the condition of the fish remained unchanged from stowage on the vessel in Liverpool until condemnation in this country. The lower court ruled in favor of the insureds. The insuring agreement afforded protection 'against All and Every Risk whatsoever, howsoever arising . . . Including risks of condemnation by the Authorities under Pure Food Laws irrespective of percentage,' [75] and the trial judge held that the coverage was triggered because the policy specifically mentioned the risks of condemnation.

The Second Circuit reversed.

The underwriters may well have intended to cover all risks of loss arising from any event occurring while the insurance was in force. But the 'all risk' event so covered would not include an undisclosed event that existed prior to coverage, or an event caused by the consummation during the period of coverage of an indwelling fault in the goods that had existed prior to coverage. Otherwise the underwriters are in the position of either having to pay for undisclosed loss or damage actually caused prior to the time of coverage or uncontemplated loss or damage caused from deteriorating agents present within the goods when the goods were shipped.

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Fish designed for human consumption, if unfit for consumption when shipped, would inevitably be condemned. Hence there would be no insurable risk of loss but a certainty of loss. To hold otherwise would be to impose upon the insurer a guaranty of the good quality of the fish as and when packed by the shipper, which liability under the policy the insurer had not assumed. It makes sense to construe the contract so as not to cover the fish if they were bad when the insurance attached. [76]

The insurance policy covered both the overland transportation of the fillets (from Grimsby, England, to Liverpool) and trans-Atlantic ***236** shipment. As a result, the court of appeals remanded for evidence and additional findings concerning 'whether the fish were bad when shipped [from Grimsby] or went bad during the English overland transportation.' [77]

The only other such holding appears to be *Aetna Ins. Co. v. Sachs*, [78] a decision written with 'a spark of the humor of life.' [79]

Mr. and Mrs. Sachs were the proud owners of a French poodle named Andre, and their loss came about as follows:

> According to defendant, Andre was properly trained and 'broke' and life was pleasant for the defendant and his wife and peaceful for the plaintiff until defendant and wife went on a vacation and left Andre at a kennel for the duration. When they returned their first thoughts were of Andre and they promptly brought him back to their chateau, blissful in the reunion. But the home-like serenity was soon shattered, for madam soon spied Andre with his leg hoisted in masculine canine fashion and his purpose had been, and was being accomplished. Madam did not testify, but defendant said she told him of the occurrence and he promptly surveyed the living room, dining

> room and hall and found signs of Andre's misfeasance. The next step was to notify the insurance agent and make claim under the 'floater' provisions of the policy. [80]

The court held that this was nonfortuitous, and the reason was that the insured's conduct rose to the level of gross negligence!

While Andre might not be expected to know the terms and conditions of plaintiff's policy, it seems most fantastic that defendant should be able to contend that Andre's indiscretion was fortuitous. Judge Hand, in *Mellon v. Federal Ins. Co.*, D.C., 14 F.2d 997, loc. city. 1004, said: '. . ., even in an 'all risk' policy, there must be a fortuitous event—a casualty—to give rise to any liability for insurance.'
In the law, 'fortuitous' means 'by chance' and 'by accident.' It seems to me that it is just 'by accident' that Andre didn't do what he did, much before the alleged occurrence, and, if 'by chance' he didn't, it was just too much, and too often, to require plaintiff to pay for it.

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I would say that defendant, because of such gross negligence and indiscretion in permitting Andre to roam the house at will, hoisting his leg at random, probably yipping and yiping in his canine Utopia, should not be allowed to recover. [81]

Sachs and the *Newtown Creek Towing* case involved some form of intentional misconduct by the insured, but it is noteworthy that the balance of those decisions that hold a loss to be nonfortuitous in nature arise from damage occasioned by an inherent defect in the property insured, such as the structural weakness in the oil barge in *Gulf Transportation*, the preexisting flaw in the fire opal in *Chute*, and the undetermined source of contamination in the catfish fillets in *Greene*.

*237 III. THE DOCTRINE IN ECLIPSE

A. *Compagnie des Bauxites*

The difficulties involved in asserting a fortuity doctrine defense have redoubled in the past twenty years. No court has questioned the validity of the basic premise—'all risk' coverage extends only to losses which are fortuitous in nature [82] —but two new developments have expanded the term 'fortuitous' to the point where virtually any conceivable loss can pass muster. The doctrine has always been an invalid in practice, and these developments may well have sounded its death knell.

The first and most important of these is the growing tendency to analogize to contract law and define 'a fortuitous event' as one that is fortuitous *from the standpoint of the insured*. A dramatic and timely illustration is provided by *Compagnie des Bauxites de Guinée v. Insurance Co. of North America*. [83]

The plaintiff-insured was Compagnie des Bauxites de Guinée (CBG), a concern engaged in the mining, processing and selling of bauxite ore, which is used in the production of aluminum. CBG mined the ore in the Boke region of West Africa's Republic of Guinea and then shipped it by rail to Guinea's port of Kamsar for processing. At Kamsar, the insured constructed an ore-processing and ship-loading facility to handle the ore, and this included a 'tippler' building and a 'crusherhouse.' The 'tippler' lifted each railroad car and 'tippled' or emptied the ore into the pans of a conveyer system. The ore was then conveyed to a moving screen known as the 'wobbler,' and this separated out chunks of ore that were too large to ship. These were then conveyed to the 'crusherhouse' and broken up by 'hammers.'

The tippler/crusher plant became operational in 1974, and it suffered continual problems until the months of August and September of that year, when it experienced 'such serious structural failure, collapse, and deformation of its support beams that it had to be rebuilt, which reconstruction was accomplished in June or July 1975.' [84]

The cause of the problem was established by expert testimony. The engineers who designed the conveyer system had not followed CBG's specifications. The machinery was designed to accommodate the weight of crushed bauxite (84 pounds/cubic foot) rather than the weight of bauxite blocks (159 pounds/cubic foot). In addition, the ***238** structural engineers for the building and supports used an incorrect equation to compute the severe stresses to which the entire structure would be subjected. [85]

CBG carried $10 million worth of primary 'all risk' business interruption coverage with the Insurance Company of North America (INA); the insured also had a $10 million layer of excess coverage with a number of other carriers. CBG made claim against these insurers, asserting that it had suffered a business interruption loss *in excess of $22 million*.

After suit was filed, the defendant insurers moved for summary judgment, contending, *inter alia*, that 'the failure and collapse of the tippler and the crusherhouse cannot, as a matter of law, constitute the sudden fortuitous and accidental event which is required before coverage can attach under the terms and conditions' of the policies at issue. [86]

In January of 1983, Judge Simmons of the Western District of Pennsylvania granted the carriers' motion. Here, at last, was a decision involving a *major claim*—not merely a $2,000 gem [87] or several thousand dollars worth of frozen fish [88] —in which a court had held that the loss at issue was nonfortuitous in nature. After a lengthy and wellreasoned survey of the case law construing the fortuity doctrine, Judge Simmons held:

In the light of the defective design of the tippler/crusher, it was inevitable that it would not be able to withstand the stresses to which it was certain to be subjected and it was thus inevitable and certain that prior to the inception of the policy of insurance that there would be a business interruption. Such a loss cannot be accidental or fortuitous, for it was predictable and certain that a defectively designed building such as the one involved here would fail and collapse when subjected to forces in excess of those erroneously calculated. The collapse is an expected result of the design defect, and whether or not the design defect is inadvertently caused, the collapse is certain to happen. Under the circumstances herein, the concept of risk that is inherent in all policies of insurance is lacking.

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To allow coverage for a design defect such as the one involved here and to define such a failure due to a design defect as being 'fortuitous' is certainly contrary to public policy, would permit coverage where no risk exists and would be an open invitation to fraud and collusion. [89]

Insurance defense counsel's jubilation was to be short-lived, however. CBG took an appeal, and the Third Circuit reversed in December of the same year. The basis for the decision was CBG's contention that it had not been aware of the design defect in the 'tippler' building ***239** and 'crusherhouse' until after the damage occurred. The court of appeals predicted that Pennsylvania would adopt the modern rule. In the words of Chief Judge Seitz:

Having determined the appropriate standard of review, it remains to decide whether the District Court erred as a matter of law in holding that a loss arising from an unknown design defect is not caused by a fortuitous event. We hold that the District Court did err, because we believe that the definition of a fortuitous event that Pennsylvania would adopt is that found in the Restatement of Contracts:
A fortuitous event . . . is an event which *so far as the parties to the contract are aware*, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, such as the loss of a vessel, *provided that the fact is unknown to the party*.

Restatement of Contracts § 291 comment a (1932) (emphasis added). We believe for several reasons that Pennsylvania would adopt this definition of a fortuitous event. [90]

B. *The Modern Rule*

The older cases used an *objective* standard to gauge whether loss was fortuitous or not. If the loss was inevitable under every known physical and mechanical law, then it could not be deemed to be a 'risk' insured against. The knowledge or ignorance of the insured was irrelevant. As one court explained in 1920:

Whether the assured were ignorant of the unseaworthiness of the ship or not also makes no difference; if the ship was not, in fact, seaworthy at the outset of the adventure, either in the degree commensurate with her then risk, or for the voyage, as the case may be, that state of things never existed which was the foundation for the underwriter's promise, and he subsequently can never be bound thereby. [91]

Such a standard recognizes that the underwriter never intends to insure against certain loss when the policy is issued. When the contract of insurance is entered into and the premium is set, the insurer and the knowledgeable insured both recognize that there are many types of nonfortuitous damage which simply will not trigger liability. As one commentator has observed in the context of homeowners' insurance:

> [T]he point cannot be stressed too often that the present-day homeowner does not intend or wish, or at least he should not so intend or wish, to spread his certain and anticipated losses which arise and occur as night follows day from the mere ownership of the property. Thus, for example, there can be no protection under broad-form coverages against losses stemming from the fact that the roof must be replaced in fifteen or twenty years; that the foundation will settle; that plaster will crack; that doors will warp; that paint will fade, chip and peel; that certain metals will corrode and rust; that furniture will be scratched and marred; that ***240** draperies will fade and deteriorate; that clothing will wear out; that dogs and cats will be dogs and cats; that junior will be junior; that guests and members of the family will wear and tear the upholstered furniture and carpeting; that food at room temperature will decay; that, in short, everything he owns, including himself, wears out. If there be any in the insurance industry who would tell or seek to persuade an insured otherwise, they would be doing him a disservice. [92]

Judge Simmons recognized this as well in *Compagnie des Bauxites:*

> To hold that there is coverage within the insurance contract under the undisputed facts as presented here, where there has not been the occurrence of a sudden, unexpected and fortuitous event, *would be to eliminate all concepts of risk taking inherent in insurance policies. Such a situation was certainly not in the contemplation of the parties at the time of the making of the contract of insurance*[. [93]

The modern rule, however, ignores any 'concept of risk taking' that was in the underwriter's mind. It matters not whether loss was a physical certainty, but only *whether the insured was aware that that loss would occur*. Moreover, as the fate of Judge Simmons's opinion on appeal demonstrates, this is a *completely* subjective standard. The court's inquiry is limited to the knowledge of the named insured at bar; it makes no difference whether a reasonable and prudent insured would have been aware that loss was imminent.

The rule flows from the definition of 'a fortuitous event' that is found in comment (a) of section 291 of the *Restatement of Contracts* (1931), [94] but it was first enunciated in 1962 in *Millers Mutual Fire Ins. Co. v. Murrell* [95] without reference to the *Restatement*. Mr. and Mrs. Murrell's dwelling suffered damage when earth beneath the house swelled and expanded, causing the walls, floors, ceilings and foundations to buckle and partially collapse. [96] All expert testimony demonstrated that the loss was certain to occur, but the court nonetheless held it to be fortuitous in nature.

> [The insurer] argues that it was certain from the day the house was built that this damage was going to happen, and that there was therefore no 'risk' as that term is commonly understood. We cannot agree. It is ***241** true that all the expert witnesses, who, after the damage, examined the underlying structures of the earth, noted the capacity of the soil to absorb water and saw evidences of earth movement, said that damage similar to that which occurred was inevitable. We are not told who, at the time the insurance contract was executed, had certain knowledge that this damage was inevitable. [97]

Three years later, another Texas court came to the same conclusion in *Employers Casualty Co. v. Holm*. [98] Plaintiff's home suffered water damage because a tile shower enclosure had been constructed with no shower pan beneath the floor. The parties *stipulated* that the absence of the shower pan made it 'inevitable' that the water which passed into the cement beneath the shower would then pass laterally into the wood and cork flooring of the dwelling. [99]

It was also stipulated, however, that this condition 'constituted an inherent defect unknown to either party[.]' [100] In the opinion of the court, this made the loss a legally 'fortuitous' event.

In the *Murrell* case the insurance company argued that it was certain from the day the house was built that the damage in question would happen and hence the risk was not fortuitous but was inevitable, and therefore no 'risk' as that term is commonly understood, existed. The Court did not agree. The same argument is made in the instant case by appellant. We also do not agree. It is true that when the cause of damage to the floor was finally discovered, it then became apparent that the initial defect was such that water would inevitably pass through the floor and/or drain into and onto the cement base of the shower stall and pass laterally into and under the wood and cork flooring of the insured's house. The parties stipulated, however, that neither the insurer nor the insured knew at the time the contract of insurance was made that there was no shower pan beneath the shower floor. Under these circumstances we are of the opinion that the damage was not inevitable in the sense that the peril was not a risk but a certainty that could not be insured against. Furthermore, the policy does not exclude damage because it was not fortuitous but inevitable.
In one sense, the damage was fortuitous since neither party knew or contemplated that there was any defect of any kind in the shower stall or that any damage would result therefrom to the flooring of appellee's house. So far as the parties were aware at the time the policy was issued, any loss such as that sued for herein, would be dependent upon chance. We quote from Restatement of the Law, Contracts, Sec. 291 'a' as follows: 'A fortuitous event within the meaning of the present and subsequent Sections is an event which so far as the parties to the contract are aware, is dependent on chance. . . .; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties.' [101]

Commentators have frequently advocated such a rule, [102] and subsequent ***242** decisions in a number of jurisdictions have also adopted the *Restatement* definition. [103]

C. *Rationales and Applications*

The rationales that underlie the subjective standard have not been articulated as clearly as those which led to the older, objective rule. In the main, the decisions which adopt the modern rule would seem motivated by concern that a finding of nonfortuity would somehow be 'unfair' to the insured. As such, these cases are merely one more manifestation of the general judicial trend toward expanded insurance coverage. [104]

First, courts note that it would be 'inappropriate' to cause a forfeiture by what is characterized as hindsight. As the Third Circuit has observed:

We also disagree with the district court's definition of fortuitousness because the court determined what was 'certain' based on knowledge gained through hindsight.

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We think it inappropriate to cause the insured to suffer a forfeiture by concluding, with the aid of hindsight, that no fortuitous loss occurred, when at the time the insurance took effect only a risk was involved insofar as the parties were aware. [105]

Second, it has been said that 'a fortuitous event' is essentially analogous to the insurance policy term 'accident.' [106] Judicial construction of 'accident' emphasizes *the unplanned and unintentional nature* of the damage rather than its physical certainty; even an inevitable ***243** loss resulting from an unknown design defect, like the collapse of CBG's 'tippler' building and 'crusherhouse,' is clearly unplanned and unintentional. [107]

Third, courts look to whether the loss is predictable. An inevitability is nonetheless fortuitous if no one can predict whether loss will occur during the particular insurance policy period at issue. [108]

Finally, at least one court has emphasized detectability. The loss is nonfortuitous only if the inherent defect which brought it about was an *undetectable* one. In *Essex House v. St. Paul Fire & Marine Ins. Co.*, [109] the brick facing on plaintiff's seven-story apartment building detached from the back-up block and fell to the street below. The court's findings of fact and conclusions fo law make it clear (1) that the loss resulted from a number of factors, including temperature differentials and negligence in design and construction of the building in several respects, including the placement of the windows, the departure from the bonding pattern called for in the plans, the use of undersized bolts supporting the ledge angles and the placement of the holes in such ledge angles as well as in the masonry itself, and (2) that these errors in design and construction were all 'visible and apparent' and 'discoverable during construction.' [110]

The carrier argued that the loss was nonfortuitous in nature, citing *Chute* and *Greene*, but the Southern District of Ohio distinguished both decisions because the inherent defects in each case were non-observable.

> Both *Greene* and *Chute* appear at first glance to provide strong support for the defendant in our case. However, both are distinguishable on the ground that in both cases the loss was brought about by a non-observable flaw in the insured goods. As such, the cases are not analogous and do not compel a denial of recovery for the Essex House loss. A more appropriate analogy would be between, say, the *bricks* of Essex House and the fish and gem in *Greene* and *Chute*. Surely the respective insurance companies would not have written the policies if the fish were observed to have green mould on their gills or the opal was visibly cracked. These would operate as signals to a potential insurer that something was wrong with the goods. In our case the window placement and noticeable lack of headers would amount to the same sort of red flag. Had the header bricks been found to contain too much sand, for example, and were thus inherently weak, *Greene* and *Chute* would be more persuasive. But no evidence whatsoever was introduced to show that the headers—or any other component of the Essex House—broke because of the 'consummation of an in-dwelling fault.' Unlike the fish and the opal, the ***244** bricks did not carry within themselves the seeds of their own destruction. [111]

These decisions emphasize everything *but* the physical certainty of loss, which was the central concept behind the fortuity doctrine in the first place; there is no 'risk' when the loss is certain to occur. Instead the modern rule emphasizes such factors as suddenness and unpredictability.

Compagnie des Bauxites and *Essex House* also illustrate the different directions in which courts have moved when seeking to justify the modern rule. Taken together, the cases eliminate most possibilities that a loss can ever be nonfortuitous. If the damage is certain to occur and the parties are unaware of it, then the loss will be fortuitous. If the damage is certain to occur because of a detectable defect, however, like the 'red flag' window placement in *Essex House*, then the carrier will probably decline to write a contract of insurance in the first place.

The modern rule cases are on firmer ground when they critique the older decisions. *Gaunt* and *Mellon* and their progeny have been criticized as unpersuasive because (1) many merely mention fortuitousness without any helpful analysis of the meaning of this requirement; (2) others involve a finding of nonfortuitousness that is based on the insured's 'own gross negligence or deliberate risk-taking'; (3) the doctrine is frequently mentioned in dicta unnecessary to the holding of a case; and (4) the decisions emanate from a period in which policy coverage was construed narrowly and strictly, as opposed to the broad construction which is the rule in virtually every jurisdiction today. [112]

Given the subjective emphasis on the knowledge of the insured rather than the objective emphasis on physical inevitability, it is not suprising that *virtually any loss can be held to be fortuitous under the modern rule*. Simply stated, the particular mechanism of failure is not the determinant any more; if the standard is whether the insured is unaware that loss will occur, *then the type of peril which brings that loss about is no longer the focus of the court's inquiry*.

Under the old rule, loss whose exact cause cannot be determined could still be fortuitous in nature. [113] This is, of course, still the case. [114] ***245** Fortuitous loss has been said to be loss that does not result from (1) an inherent defect in the property insured, (2) ordinary wear and tear, or (3) intentional misconduct by the insured. [115] Loss caused by an inherent defect that made the damage inevitable has nonetheless been held to be fortuitous under the modern rule, [116] however, as has wear and tear insofar as it can be characterized as 'excessive.' [117] The collapse of a home due solely to earth movement that was inevitable, given the nature of the underlying soils, has also been held to be fortuitous, [118] as has loss caused by defective design. [119]

D. *The Concurrent Cause Doctrine*

If cases espousing the modern rule can be characterized as digging the grave of the fortuity doctrine, then a collateral development may in fact bury it. Even if a particular loss could be shown to be nonfortuitous, the carrier would still face an uphill battle, and the reason lies in a second development of even more devastating significance for the insurance industry as a whole. This is known as the concurrent cause doctrine. [120]

It has long been the rule that 'where a policy expressly insures against direct loss and damage by one element but excludes loss or damage caused by another element, the coverage extends to the loss even though the excluded element is a contributory cause.' [121]

Courts in most jurisdictions still look to the *proximate cause* of loss to determine if the policy affords coverage. When two or more causes combine to cause a loss, one of which is insured while the other is not, the loss is not insured *unless the covered cause is the predominant efficient cause of the loss*. [122] Thus, in *Dickson v. United States Fidelity & Guaranty Co.*, [123] a crane was damaged while pulling 'H' beams out of the ground on a highway project. The crane contained a defective weld where a cross-brace was attached to a longitudinal member of the boom. There was no dispute that the defective weld was an excluded peril—it was, in fact, that rara avis, a true latent defect. The court nonetheless allowed recovery, and the reason lies in the fact that there was substantial evidence that the mechanism of failure was as follows:

***246** (a) earth, collapsing on the 'H' beam which was being removed from the ground, caused a sudden stoppage of the hoist;

(b) this sudden stoppage caused an abrupt increase in load on the boom structure; and

(c) this abrupt increase in load or impact caused both the breakage of the weld and the collapse of the boom. [124]

In other words, the court found *that the proximate cause of loss was an included peril*—the collapsing earth.
[F]or the purposes of insurance litigation, the responsible cause of a loss is that which is the 'direct, violent and efficient cause of the damage.' Even if the defective weld is regarded as a contributing cause of the boom's collapse, the latent defect was not an efficient cause, but merely an inert condition contributing to the final result. There is no evidence whatsoever that the weld would have failed in the absence of the external cause. Neither is there evidence that, absent the external force, a broken weld would have brought on the boom's collapse. The only cause shown by the record that is direct, violent and efficient is the collapse of earth onto the 'H' beam. The trial court properly ruled that this was the responsible cause of the loss. [125]

Loss caused by common or garden variety negligence is clearly fortuitous in nature; this principle was recognized and accepted by the *Gaunt* case, and it has been recognized and accepted ever since. [126] As a result, courts have frequently found coverage when the damage resulted from a combination or concurrence of causes and *one of these was negligence*.

Some decisions involve the kind of analysis mandated by *Dickson*, and find coverage only when the 'direct, violent and efficient cause of the damage' was the included peril (negligence). All too often, however, the courts have simply asked whether negligence entered into the chain of causation in any fashion at all; if so, the insured wins.

This is the concurrent cause doctrine:

> This theory, with its genesis in third-party liability principles, is that all potential concurrent proximate causes of a loss must be identified; if ***247** any of these causes is not specifically excluded, coverage is available. Under this theory, an insured may recover on an all-risk homeowners policy even when the cause of loss is specifically excluded, so long as there is present some other contributing cause which is not specifically excluded. [127]

As the commentator points out, 'the concurrent cause standard so often resolves into the syllogism 'loss negligence coverage." [128]

A recent California example is *Safeco Insurance Company of America v. Guyton*. [129] The insureds were homeowners who suffered damage when record rains accompanying Hurricane Kathleen broke flood control facilities and inundated parts of the city of Palm Desert, California, in September of 1976. The Safeco policies contained an exclusion against loss 'caused by, resulting from, contributed to or aggravated by . . . 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.' [130] The insureds nonetheless made claim, asserting that their losses were proximately caused by the water district's negligence in maintaining flood-control structures, as a result of which the policies afforded coverage as a loss caused by third-party negligence.

The district court held that the flood itself was the 'efficient' proximate cause of loss and entered judgment for the insurers.

On appeal, the Ninth Circuit reversed and remanded. The court of appeals held that the district court had applied an improper test, citing *State Farm Mutual Automobile Ins. Co. v. Partridge* [131] for the following proposition.

> Although there may be some question whether either of the two causes in the instant case can be properly characterized as *the* 'prime,' moving' or 'efficient' cause of the accident, we believe that coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries. [132]

According to the *Guyton* court, the *Partridge* doctrine of 'concurrent proximate cause' was equally applicable to first-party property insurance loss situations. [133]

The concurrent cause doctrine has had relatively little impact on the fortuity defense thus far, and the reason is that the modern or ***248** 'STANDARD-OF-THE-INSURED' RULE IS GENerally sufficient in and of itself to establish that any particular loss is legally 'fortuitous.'

In at least one recent decision, however, the court held a loss brought about by a combination of earth movement and negligence or 'human failure' would not be fortuitous precisely because *the concurrent causation itself made it impossible to say that loss was certain to occur*. In *Mattis v. State Farm Fire & Casualty Co.*, [134] the insureds' dwelling was built into the side of a hill. After a termite inspector discovered cracks in a basement wall, the insureds arranged for a structural inspection and learned that extensive repairs and replacements were called for. Damage was occasioned by a combination of factors, including consolidation of backfill adjacent to the basement wall and 'inadequate or improper design or construction of the dwelling at the particular site.' [135]

The court found that this very combination of causes made loss uncertain, and hence 'fortuitous.'

The evidence established that *a* proximate cause of the loss was settlement and consolidation of backfill material placed adjacent to the north basement wall some four years previous. We have concluded that *a* proximate cause of loss was inadequate or improper design or construction of the dwelling at the particular site. The cause of loss was a combination of natural and human failure. It is possible to conclude that but for this interaction and contribution of causes, the event may never have occurred. But it is not possible to conclude that absent one cause the other cause would have by itself brought about the loss. It is this that makes the loss fortuitous and, therefore, an insurance risk. See *Vormelker v. Oleksinski* (1972), 40 Mich.App. 618, 199 N.W.2nd 287. Having found the existence of a non-excluded or non-excepted insurable risk, and in light of State Farm's agreement to insure all risks to physical loss except those excluded or excepted, we conclude that the plaintiffs have a compensable loss. We are satisfied that plaintiffs met their burden of proof of a loss within the perils insured against. [136]

IV. CONCLUSIONS AND RECOMMENDATIONS

As the foregoing discussion indicates, the fortuity doctrine remains a rationally valid one, but it has ben emasculated by the courts. Objective certainty is no longer the test. Under the modern rule, even a physically inevitable loss is legally 'fortuitous' if the named insured is unaware that it will occur. Moreover, the presence of negligence or 'human failure' in the matrix of causation may make the loss uncertain and, therefore, fortuitous as well.

The doctrine's demise as a defense raises two questions for the property and casualty insurance industry as a whole. First, what implications does this have for the interpretation of existing policy language. The classic definition of 'nonfortuitous loss' included such ***249** phenomenon as an inherent defect in the property insured and ordinary or normal wear and tear, [137] but these perils are also the subject of specific exclusions in a typical contract of insurance. Will the 'standpoint-of-the-insured' rule work any change in the interpretation of exclusions, such as those for 'latent defect,' 'inherent vice,' or 'wear and tear'? Does acceptance of the concurrent cause doctrine in effect make 'all risk' coverage into 'all loss' coverage?

Second, what implications does the modern rule have for the underwriter? Should the property and casualty carrier be making changes in policy language in response to this judicial alteration in the concept of risk?

A. *Exclusions*

After reversing Judge Simmons's decision granting summary to the insurance carriers for CBG's ore-producing plant, the court of appeals went on to note that even though the collapse of the facility was legally 'fortuitous,' it might nonetheless be noncompensable due to the named exclusions in the policies at issue. In the words of Judge Seitz:

> We note that our holding does not mean that the event causing CBG's loss is within the coverage of the policy, since a loss can be caused by a fortuitous event and still fall within a contractual exclusion from coverage. See *Goodman v. Fireman's Fund Insurance Co.*, 600 F.2d 1040 (4th Cir. 1979). In their answer to CBG's complaint, the insurers stated defenses based on the policy exclusions for inherent vice, latent defect, wear and tear and gradual degradation. Nothing in the rule of fortuitousness which we adopt today bars the District Court from addressing the possible applicability of such exclusions during the proceedings on remand. [138]

It is universally accepted that all risks coverage will not extend to a fortuitous loss where the policy contains a specific provision expressly excluding the loss from coverage. [139] But how realistic is Judge Seitz's statement? Could INA and the other carriers who insured the plant in Guinea really demonstrate that its collapse was attributable to 'inherent vice' or 'latent defect' or 'wear and tear'? What effects does the 'standpoint-of-the-insured' rule have on the continued viability of defenses bottomed on these exclusions? Finally, what is left of the exclusions with the expansion of the concurrent cause rule?

The fact of the matter is that the modern rule will inevitably weaken defenses based on named exclusions as well. This is clearly true procedurally, because the insurer bears the burden of proof that loss is not compensable because it falls within an exception or an exclusion in the policy. [140] When fortuity was a viable defense, the carrier faced with a loss occasioned by an inherent defect in the property, ***250** for example, could place the burden of proof on the policyholder. Now, the same carrier must bear that burden himself; in effect insurance counsel has lost the first line of defense (loss caused by an inherent defect is nonfortuitous) and must fall back to a second position (loss caused by an inherent defect is excluded as 'latent defect' or 'inherent vice'), and a procedural penalty must be paid for this retreat. [141]

More importantly, however, it may be true substantively as well. Before the courts adopted the *Restatement* definition of 'a fortuitous event,' it could always be argued that there was *no need* to exclude 'inherent vice' or 'latent defect' or 'wear and tear.' These were already excluded by the term 'all risks,' for loss occasioned by inherent defects in the property insured or ordinary wear and tear is certain to occur. Therefore, the exclusion of wear and tear, for example, must mean something *other* than 'ordinary' or 'normal' wear and tear. In effect, an exclusion must mean precisely that species of 'wear and tear' that is accelerated, abnormal, unexpected, extraordinary, unusual, or unanticipated.

Any other construction would render this particular exclusion a nullity. An 'all risk' insurance policy, like any other contract of insurance, must be read in its entirety and construed so as to give meaning to each and every provision; any interpretation that gives effect to a contract term is always preferable to one which renders that term as mere surplusage. [142] The purpose of an exclusion or an exception in the ***251** policy is to take something out of the contract that otherwise would have been included in it. [143] 'Excessive' wear and tear is fortuitous, [144] but the exclusion removes *any* wear and tear (regardless of its speed or degree) from coverage. [145]

It is difficult to determine exactly what effect the modern rule will have on those exclusions that deal with the classic varieties of nonfortuitous loss, however, and the reason is that *insurers have had as little success with defenses bottomed on policy exclusions such as 'inherent vice' and 'latent defect' as they have had with defenses bottomed on the fortuity doctrine itself*. Virtually no carriers have successfully resisted a claim by relying on exclusionary language barring loss by 'latent defect,' 'inherent vice' and 'wear and tear'!

The 'latent defect' and 'inherent vice' cases are illustrative. [146] While parties have stipulated to the existence of such a condition, no court has apparently come to that conclusion on its own, because all of the requisite elements are never present.

First, the 'defect' or 'vice' at issue must be *undiscoverable by any known or customary test*. [147]

Second, the 'defect' or 'vice' must *reside within the property insured*. The term is confined to 'a loss entirely from internal decomposition or some quality which brings about its own injury or destruction. The vice must be inherent in the property for which recovery is sought.' [148] Thus, for example, in *American Home Assurance Corp. v. J. F. Shea* ***252** *Co., Inc.*, [149] a subway 'transition cut' or trench had to be repaired during construction after inward or lateral movement of the sidewalls of the

trench occurred, threatening collapse of the entire structure. The design criteria for the support-of-excavation system anticipated a certain range of lateral pressures, but the pressures encountered during construction proved to be greater than anticipated. No one knew why this was the case. Testimony by the insurer's expert posited 'a faulty slippage plane in the earth some distance away from the construction site.' [150]

The 'faulty slippage plane' was undetectable. The expert testified that 'the chances of finding it were one in a hundred, and if the slippage were in the soil, the chances would become a minuscule one in a million.' [151] The court nonetheless held that no 'inherent vice' was involved, because the insured property did not contain its own seeds of destruction but rather was threatened by an outside natural force. [152]

Third, the 'defect' or 'vice' *must be in existence when the policy of insurance is issued*. [153]

Fourth, and finally, faulty workmanship or construction is not 'latent defect' or 'inherent vice.' [154] *Components* of the insured property must suffer from some sort of constitutional infirmity; they must contain 'the seeds of their own destruction.' [155] If the property suffers a loss occasioned by faulty design, then this is not the case, for design defects are an *external cause*. As the Eighth Circuit has explained:

> [W]e are persuaded that the design errors must be considered external causes of loss to the insured. First, the loss resulted neither from the negligence of the owner nor wholly as a result of normal wear and tear. This is clearly not a case where the insured property internally deteriorated or decomposed. Rather, the loss resulted from a design error, a cause which does not fit within any of the areas generally intended to be excluded from coverage under the 'external cause' requirement. [156]

As a result, examination of those few cases involving a finding of inherent defect always discloses that the parties stipulated as much. The defective weld in the crane boom in *Dickson* and the absence of a shower pan in the shower enclosure in *Holm*, for example, constituted a 'latent defect' and an 'inherent vice' respectively, but only ***253** because there was no dispute between plaintiff and defendant on this issue. [157] Moreover, the insured recovered in both cases. In *Dickson*, it was because of the application of the concurrent cause doctrine, while the *Holm* policy's exclusions did not apply to ensuing loss.

B. *Cause Versus Event*

The demise of the fortuity doctrine as a viable defense is but one part of a broader trend—the judicial expansion of insurance coverage into realms that the policy draftsmen never contemplated. An 'all risk' underwriter never intends to extend coverage to each and every loss that may possibly befall the property insured. In the words of one well-known treatise, [158] the policy limits coverage with both 'exclusions' and 'exceptions.'

[A]n 'exclusion' is distinguished from an 'exception' not on the basis of where it appears or the heading under which it appears in the policy form but rather on grounds concerned with the kind of condition of liability it imposes. An 'exception' is a provision limiting the insurer's liability in terms of a cause of the insured event; the cause to which it refers is an 'excepted cause'. An 'exclusion' (aside from exclusions of certain persons or of certain kinds of property) is a provision limiting the insurer's liability in terms of an event; the event to which it refers is an 'excluded event'.

FN***

[An exclusion] states a criterion *conclusive* against liability—a purging criterion. If its requirements are satisfied in relation to a claim, there is no coverage under the policy for that claim, regardless of what the other circumstances may have been.

FN***

[An exception] states a criterion that is itself *inconclusive* of liability. It merely states that the facts specified in the clause are themselves insufficient to support liability—that they do not supply an affirmative basis for liability. This kind of clause does not foreclose the possibility of coverage under some other clause of the policy that supplies the affirmative basis for liability. [159]

Loss occasioned by an inherent defect in the property insured or wear and tear is an *excluded event*. With the phrase 'all risk' (and with the typical policy language excluding loss occasioned by 'latent defect,' 'inherent vice' and 'wear and tear'), the underwriter intends to state 'a criterion conclusive atainst liability.' If an ore-processing plant is *certain* to fail in practice because of deficiencies in the original ***254** design, then its collapse is nonfortuitous in nature. There is no 'risk,' the event necessary to trigger the carrier's liability in the first instance.

Courts have shown a marked disfavor for the 'excluded event.' [160] This disfavor has been manifested in two ways. One is to convert the 'exclusion' into an 'exception.' The 'excluded event' becomes no more than an 'excepted cause;' the court then finds that other, non-excepted causes either contributed to the insured's loss or represent the 'efficient,' proximate cause of that loss. The result is coverage. The *Guyton* case is an excellent example. [161] The policy excluded loss 'caused by, *resulting from, contributed to or aggravated by* . . . flood,' [162] but the court nonetheless chose to treat the peril of flood as an excepted cause rather than an excluded event. Since third-party negligence also figured in the matrix of causation, judgment for the insurers was reversed.

The fortuity doctrine has received a different treatment. No court questions the validity of its basic premise; even under an 'all risk' policy, the loss must be fortuitous in nature. Loss occasioned entirely by inherent defects in the insured property, for example, is simply not a 'risk,' and it remains an excluded event even under the most recent decisions. What the courts have done, however, is to *circumscribe that event*. It is not enough to demonstrate that a loss was certain to occur. The courts seem to have fastened an additional requirement onto the doctrine. The carrier must also show that the loss was nonfortuitous from the standpoint of the insured, and this requirement is on that is difficult to satisfy in practice.

C. *Implications for the Insurance Industry*

Legal research and practical experience might validly lead to the conclusions that:

(1) there is little left of the fortuity doctrine as an unnamed exclusion under 'all-risk' policies, both from a procedural as well as from a substantive standpoint;

(2) the subjective nature of the modern rule renders the doctrine difficult if not impossible to apply in any given fact situation; and

(3) the exclusions contained in 'all risk' policies, while technically viable and enforceable, are subject to attack by an ever-expanding acceptance and application of the concurrent cause doctrine.

Perhaps equally pernicious is the abandonment by the courts of the ambiguity rule in two ways: either finding clear policy language to ***255** be ambiguous, or, if not, applying a reasonable expectation gloss to clear and precise policy terms.

Thus, it may be legitimately argued that even were one to preface exclusionary language by terms such as 'directly or indirectly,' or 'caused by, resulting in, resulting from, contributed to or aggravated by,' the result in the courts would nevertheless be the same.

The industry must, therefore, go back to the drawing board in two ways:

(1) It must make a concerted effort to rewrite the 'all risk' forms of coverage in light of the present state of judicial interpretation and application; or

(2) It must carefully assess the viability, from a bottom-line viewpoint, of continued underwriting of 'all-risk' forms of policies.

Given the overcapacity in the industry and the present state of price competition which it has engendered, it is unlikely that the second course will be the option exercised.

A task force must therefore be formed to rewrite the coverages, and gain acceptance of such rewritten coverages from risk managers and insurance commissioners, before issuing new policies and preparing for the inevitable judicial attack.

Unless such an effort is made one may validly predict that 'all risk' will become 'all loss,' and the only application of the risk doctrine in insurance underwriting of this form of coverage will be the ledger balance between premiums earned and claims paid.

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1 [1921] 2 A.C. 41.

2 14 F.2d 997 (S.D.N.Y. 1926).

3 Millers Mutual Ins. Co. v. Murrell, 362 S.W.2d 868 (Tex. Civ. App. 1962).

4 Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 554 F.Supp. 1080 (W.D. Pa.), *rev'd*, 724 F.2d 369 (3d Cir. 1983).

5 British & Foreign Marine Ins. Co. v. Gaunt, [1921] 2 A.C. 41, 58.

6 RESTATEMENT OF CONTRACTS § 291, comment (a) (1931).

7 KEETON, INSURANCE LAW § 1.2(a) at 2 (1971).

8 As Judge Simmons of the Western District of Pennsylvania observed in Compagnie des Bauxites de Guinée v. Insurance Company of North America, 554 F.Supp. 1080, 1084 (W.D. Pa.), *rev'd*, 724 F.2d 369 (3d Cir. 1983), 'the concept of risk . . . is inherent in all policies of insurance[.]'

9 KEETON, *supra* note 7, § 1.2(b) at 3.

10 *Id.*

11 *Id.* § 5.4(a) at 288.

12 ARNOULD ON MARINE INSURANCE, ¶812 (9th ed.) (emphasis added), *quoted in* Mattis v. State Farm Fire & Casualty Co., 118 Ill.App.3d 612, 73 IllDec. 907, 454 N.E.2d 1156, 1163 (1983) and Gulf Transportation Co. v. Fireman's Fund Ins. Co., 121 Miss. 655, 83 So. 730, 733 (1920).

13 British & Foreign Marine Ins. Co. v. Gaunt, [1921] 2 A.C. 41, 57.

14 Mellon v. Federal Ins. Co., 14 F.2d 997, 1002 (S.D.N.Y. 1926) (emphasis in original).

15 Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545, 548 (1973).

16 *Id.*, quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 895 (1961). *See also* BLACK'S LAW DICTIONARY at 783 (rev. 4th ed. 1968), where the term is variously defined as '[h]appening by chance or accident,' '[o]ccurring unexpectedly or without known cause,' and '[a]ccidental, undesigned, adventitious.'

17 Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545, 548 (1973).

18 Glassner v. Detroit Fire & Marine Ins. Co., 23 Wis.2d 532, 127 N.W.2d 761, 764 (1964).

19 Indeed, the term 'all risk' has been said to be 'somewhat misleading,' Mattis v. State Farm Fire & Casualty Co., 118 Ill.App.3d 612, 73 Ill.Dec. 907, 454 N.E.2d 1156, 1162 (1983); and it is frequently labeled a 'misnomer.' Aetna Casualty & Surety Co. v. Yates, 344 F.2d 939, 940 (5th Cir. 1965); Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978, 987 (S.D. Ohio 1975). This is not to say that the term is deceptive, however, but merely to realize that 'all risk' is a term of insurance art which has been judicially recognized and dealt with as such. *Id.*

20 Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545, 547 (1973).

21 Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1042 (4th Cir. 1979); Redna Marine Corp. v. Poland, 46 F.R.D. 81, 87 (S.D.NY. 1969); Mattis v. State Farm Fire & Casualty Co., 118 Ill.App.3d 612, 73 Ill.Dec. 907, 454 N.E.2d 1156, 1162 (1983); Annot., *Coverage Under 'All Risks' Insurance*, 88 A.L.R.2d 1122, 1125 (1963).

22 13 COUCH ON INSURANCE 2D § 48:141 at 139 (footnote omitted). *See, e.g.*, Dow Chemical Co. v. Royal Indemnity Co., 635 F.2d 379, 386 (5th Cir. 1981); Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978, 987, 993 (S.D. Ohio 1975); Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545, 547 (1973).

23 Gorman, *All Risks of Loss v. All Loss: An Examination of Broad Form Insurance Coverages*, 34 NOTRE DAME LAW. 346, 353 (1959) (footnotes omitted).

24 As the Fourth Circuit observed in Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1042 (1979), '[s]ince British & Foreign Marine Co. v. Gaunt, [1921] 2 A.C. 41, all risk policies have been construed as covering all losses that are 'fortuitous."

25 [1921] 2 A.C. 41, 47, 52.

26 283 N.C. 142, 195 S.E.2d 545 (1973).

27 195 S.E.2d at 548-49. *See also* Hoey, *The Meaning of 'Accident' in Boiler and Machinery Insurance and New Developments in Underwriting*, 19 THE FORUM 467, 477 (Spring 1984).

the *Avis* four-part test is essentially a restatement of the requirements first laid down by Lord Summer in British & Foreign Marine Ins. Co., Ltd. v. Gaunt, [1921] 2 A.C. 41, 57 where the court observed as follows:

there are, of course, limits to 'all risks.' They are risks and risks insured against. Accordingly, the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behavior of that subject-matter, being what it is in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally, the description 'all risks' does not alter the general law; only risks are covered which it is lawful to cover[.]

28 Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1042 (4th Cir. 1979).

29 ARNOULD ON MARINE INSURANCE, ¶778, (11th ed.), *quoted in* Chute v. North River Ins. Co., 172 Minn. 13, 214 N.W. 473, 474 (1927). *See also* Greene v. Cheetham, 293 F.2d 933, 937 (2d Cir. 1961) ('But the 'all-risk' event so covered would not include an undisclosed event that existed prior to coverage, or an event caused by the consummation of an in-dwelling fault in the goods that had existed prior to that coverage.'); Glassner v. Detroit Fire & Marine Ins. Co., 23 Wis.2d 532, 127 N.W.2d 761, 764 (1964) ('An 'all-risk' policy . . . is not a promise to pay for loss or damage which is almost certain to happen because of the nature and inherent qualities of the property insured.').

30 Contractor's Realty Co., v. Insurance Co. of North America, 469 F.Supp. 1287, 1293 (S.D.N.Y. 1979).

31 *See*, Aetna Ins. Co. v. Sachs, 186 F.Supp. 105, 108 (E.D. Mo. 1960) ('An insurer is not liable for reckless and inexcusable negligence.'); Finkelstein v. Central Mutual Ins. Co., 8 Misc.2d 261, 166 N.Y.S.2d 989, 993 (N.Y. Misc. 1957) ('Only fraud or intentional wrongdoing or gross negligence, such as deliberate disregard or plainly foreseeable consequences, would defeat recovery.')

32 The insuring agreement of an 'all risk' policy frequently recites that coverage is provided 'against all risks of physical loss or damage *for any external cause.' See, e.g.*, Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1041 (4th Cir. 1979).

33 *Id.* at 1042. *See also*, Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545, 549 (1973) ('[T]he damage must result from at least one extraneous cause.'); Glassner v. Detroit Fire & Marine Ins. Co., 23 Wis.2d 532, 127 N.W.2d 761, 764 (1964) ('An 'all-risk' policy is a promise to pay for loss caused by a fortuitous and extraneous happening.'); Chute v. North River Ins. Co., 172 Minn. 13, 214 N.W. 473, 474 (1927) ('Plaintiff purchased and defendant finished indemnity against loss or damage from fortuitous and extraneous circumstance[.]').

34 *See* Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 554 F.Supp. 1080, 1083 (W.D. Pa.), *rev'd on other grounds*, 724 F.2d 369 (3d Cir. 1983) ('The damage or loss must therefore result from an extraneous cause, and not wholly from an inherent defect in the subject matter or from the inherent deficient qualities, nature and properties of the subject matter insured.'); Contractor's Realty Co. v. Insurance Co. of North America, 469 F.Supp. 1287, 1293 (S.D.N.Y. 1979) ('[T]he limitation of the policy to external causes excludes from coverage losses resulting from the internal decomposition or deterioration of the insured property.').

35 *See* Contractor's Realty Co. v. Insurance Co. of North America, 469 F.Supp. 1287, 1293 (S.D.N.Y. 1979) ('The requirement of external cause . . . precludes recovery for losses resulting from normal wear and tear[.]').

36 Gorman, *supra* note 23, at 348.

37 A typical insuring agreement might provide:

touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition or quality so ever, barratry of the master and mariners, and of all others perils losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, etc., or any part thereof.

gilmore & BLACK, THE LAW OF ADMIRALTY, § 2-9 at 71 (2d ed. 1975).

38 163 N.Y. 114, 57 N.E. 302 (1900).

39 121 Miss. 655, 83 So. 730 (1920).

40 Newtown Creek Towing Co. v. Aetna Ins. Co., 163 N.Y. 114, 57 N.E. 302, 302 (1900).

41 Gulf Transportation Co. v. Fireman's Fund Ins. Co., 121 Miss. 655, 83 So. 730, 733 (1920).

42 Gorman, *supra* note 23, at 351.

43 [1921] 2 A.C. 41.

44 *Id.* at 42.

45 *Id.* at 46-47.

46 *Id.* at 52.

47 *Id.* at 57.

48 14 F.2d 997 (S.D.N.Y. 1926).

49 *Id.* at 1001.

50 *Id.* at 1002.

51 Redna Marine Corp. v. Poland, 46 F.R.D. 81, 87 (S.D.N.Y. 1969).

52 Morrison Grain Co., Inc. v. Unica Mutual Ins. Co., 632 F.2d 424, 430 (5th Cir. 1980); Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 554 F.Supp. 1080, 1082 (W.D. Pa), *rev'd on other grounds*, 724 F.2d 369 (3d Cir. 1983); Millers Mutual Fire Ins. Co. v. Murrell, 362 S.W.2d 868, 869-70 (Tex. Civ. App. 1962).

53 252 F.2d 780 (6th Cir. 1958).

54 *Id.* at 784.

55 Morrison Grain Co., Inc. v. Utica Mutual Ins. Co., 632 F.2d 424, 430 (5th Cir. 1980); Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 564 (10th Cir. 1978); Atlantic Lines Ltd. v. American Motorists Co., 547 F.2d 11, 12 (2d Cir. 1976); Glassner v. Detroit Fire & Marine Ins. Co., 23 Wis.2d 532, 127 N.W.2d 761, 764 (1964); 13A COUCH ON INSURANCE, SECOND, § 48:142 at 143.

even here, there are exceptions. *See, e.g.*, Redna Marine Corp. v. Poland, 46 F.R.D. 81, 87 (S.D.N.Y. 1969), where the Southern District of New York observes:

the policy in suit is an ‘all risks' policy. Such a policy provides coverage which insures against any loss without putting upon the insured the burden of establishing that the loss was due to a peril falling within the policy's coverage. *Although there may be exceptions to such coverage, as for a defect inherent in the subject of the insurance, it is incumbent upon the underwriter to demonstrate that the exception applies.* (Emphasis added.)

56 Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 564 (10th Cir. 1978); 13A COUCH ON INSURANCE, SECOND, § 48:142 at 143.

57 Morrison Grain Co., Inc. v. Utica Mutual Ins. Co., 632 F.2d 424, 430 (5th Cir. 1980).

58 *Id.*; Atlantic Lines Ltd. v. American Motorists Ins. Co., 547 F.2d 11, 12 (2d Cir. 1976).

59 British & Foreign Marine Ins. Co., Ltd. v. Gaunt, [1921] 2 A.C. 41, 47, 58.

60 Morrison Grain Co., Inc. v. Utica Mutual Ins. Co., 632 F.2d 424, 431 (5th Cir. 1980); C. H. Leavell & Co. v. Fireman's Fund Ins Co., 372 F.2d 784, 789 (9th Cir. 1967); Federal Ins. Co. v. Tamiami Trail Tours, Inc., 117 F.2d 794, 796 (5th Cir. 1941); Redna Marine Corp. v. Poland, 46 F.R.D. 81, 87 (S.D.N.Y. 1969); Mellon v. Federal Ins. Co., 14 F.2d 997, 1002 (S.D.N.Y. 1926).

61 579 F.2d 561 (10th Cir. 1978).

62 *Id.* at 563.

63 *Id.* at 564.

64 *Id.* at 565.

65 Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 554 F.Supp. 1080, 1085 (W.D. Pa.), *rev'd*, 724 F.2d 369 (3d Cir. 1983).

66 *Id.* at 1083.

67 *Id.* at 1085.

68 Mellon v. Federal Ins. Co., 14 F.2d 997, 1002 (S.D.N.Y. 1926) (emphasis in original).

69 Chute v. North River Ins. Co., 172 Minn. 13, 214 N.W. 473, 474 (1927). *See also* Greene v. Cheetham, 293 F.2d 933, 937 (2d Cir. 1961); Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 554 F.Supp. 1080, 1083 (W.D. Pa.), *rev'd on other grounds*, 724 F.2d 369 (3d Cir. 1983).

70 Chute v. North River Ins. Co., 172 Minn. 13, 214 N.W. 473, 474 (1927). *See also* Gulf Transportation Co. v. Fireman's Fund Ins. Co., 121 Miss. 655, 83 So. 730, 733 (1920).

71 172 Minn. 13, 214 N.W. 473 (1927).

72 293 F.2d 933 (2d Cir. 1961).

73 Chute v. North River Inc. Co., 172 Minn. 13, 214 N.W. at 473.

74 214 N.W. at 474.

75 Greene v. Cheetham, 293 F.2d 933, 936 (2d Cir. 1961).

76 *Id.* at 936-37.

77 *Id.* at 937.

78 186 F.Supp. 105 (E.D. Mo. 1960).

79 *Id.* at 106.

80 *Id.* at 106-107.

81 *Id.* at 108.

82 *See* Annot. *supra* note 21, at 1125, 1127-28, where the commentator observes:

no case has been found denying the above proposition, and most of the cases included in the annotation support its essential tenor by some implication.

* * *

although there is little authority expressly supporting the position that recovery cannot be permitted under an 'all risk' policy unless the loss is fortuitous in nature, rather than the result, for example, of an inherent or latent defect, or natural

deterioration or death, no case has been found denying it, and there is little doubt that the great majority, if not all, of the courts would so affirm, if presented with the question.

83 554 F.Supp. 1080 (W.D. Pa.) *rev'd*, 724 F.2d 369 (3d Cir. 1983).

84 554 F.Supp. at 1082.

85 724 F.2d at 371.

86 554 F.Supp. at 1082.

87 Chute v. North River Ins. Co., 172 Minn. 13, 214 N.W. 473 (1927).

88 Green v. Cheetham, 293 F.2d 933 (2d Cir. 1961).

89 Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 554 F.Supp. 1080, 1084, 1085 (W.D. Pa.), *rev'd*, 724 F.2d 369 (3d Cir. 1983).

90 724 F.2d at 372.

91 ARNOULD ON MARINE INSURANCE, ¶688 (9th Ed) *quoted in* Gulf Transportation Co. v. Fireman's Fund Ins. Co., 121 Miss. 655, 83 So. 730, 733 (1920).

92 Gorman, *supra* note 23, at 350-51.

93 Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 554 F.Supp. 1080, 1085 (W.D. Pa.), *rev'd*, 724 F.2d 369 (3d Cir. 1983).

94 Chief Judge Seitz's opinion in Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 724 F.2d 369, 372, n.2 (3d Cir. 1983), summarizes the provisions of the *Restatement* at some length. In the words of the decision:

section 291 of the first Restatement notes that an aleatory promise is one based on a fortuitous event, and defines an aleatory promise indirectly by defining a fortuitous event. This provision was substantially carried over into the second Restatement. Like the first, the second Restatement provides that an aleatory promise is one based on a fortuitous event. *Restatement of Contracts*, Second, § 7 comment c. Language almost identical to [comment a to § 291 of the first Restatement] is used as the definition of an aleatory promise. *Id.* § 379 comment c. Thus the difference between the first and second Restatements is that the latter defines an aleatory promise directly, rather than indirectly by defining a fortuitous event. Second Restatement also notes that an insurance policy is a typical aleatory promise. *Id.*

95 362 S.W.2d 868 (Tex. Civ. App. 1962).

96 *Id.* at 869.

97 *Id.* at 869-70.

98 393 S.W.2d 363 (Tex. Civ. App. 1965).

99 *Id.* at 365.

100 *Id.*

101 *Id.* at 367-68.

102 *See, e.g.*, Keeton, *supra* note 8, at 290, where the treatise writer states that '[t]he meaning of 'fortuitous,' 'accidental,' or like terms should be determined from the point of view of the person whose interest is protected by the policy.'

103 Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 724 F.2d 369, 372 (3d Cir. 1983); U.S. Industries, Inc. v. Aetna Casualty & Surety Co., 690 F.2d 459, 461 (5th Cir. 1982); Morrison Grain Co., Inc. v. Utica Mutual Ins. Co., 632 F.2d 424, 430-31 (5th Cir. 1980); Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 564 (10th Cir. 1978); Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978, 989 (S.D. Ohio 1975); Mattis v. State Farm Fire & Casualty Co., 118 Ill.App.3d 612, 622, 73 Ill.Dec. 907, 914, 454 N.E.2d 1156, 1163 (1983).

104 *See*, Cozen, *Property Insurance Law—A Decade of Change*, FOR THE DEFENSE 12, 20 (September 1981) where it is noted:

there exists a genuine fear within the insurance industry that for too long a period, the courts have treated the industry as an additional arm of the income redistribution system of our society. Thus, the argument has arisen that our courts, in response to what they see as 'social needs,' have extended the boundaries of the first-party contract beyond the realm of realistic intent. There is some evidence of that occurrence.

105 Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 724 F.2d 369, 372 (3d Cir. 1983). *See also* Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978, 990 (S.D. Ohio 1975) ('The Court rejected the temptation to use hindsight.'); Mattis v. State Farm Fire & Casualty Co., 118 Ill.App.3d 612, 73 Ill.Dec. 907, 454 N.E.2d 1156, 1164 (1983) ('Although State Farm's expert testified that plaintiff's loss could have been predicted had he conducted tests and analysis, we de not think that hindsight provides an adequate basis to remove the loss from the ambit of fortuity as contemplated by the all risk policy.').

106 Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 724 F.2d 369, 372 (3d Cir. 1983). *See* Hoey, *supra* note 27 and Cyclops Corp. v. Home Ins. Co., 352 F.Supp. 931, 935 (W.D. Pa. 1973) for a good discussion of the meaning of the term 'accident.' Some definitions are remarkably similar to the definition of fortuity (see note 17 and accompanying text, *supra); Black's Law Dictionary* uses the word 'fortutious' as a synonym for 'accidental.'

107 Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 724 F.2d 369, 372 (3d Cir. 1983).

108 Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978, 990 (S.D. Ohio 1975). ('[O]ne of defendant's claims is that the face brick was bound to collapse within the policy time limits [but] even the defense experts were unable to state that it could be predicted with certainty when the loss would occur.').

109 404 F.Supp. 978 (S.D. Ohio 1975).

110 *Id.* at 983, 984-85.

111 *Id.* at 991 (emphasis added). *See also* Mattis v. State Farm Fire & Casualty Co., 118 Ill.App.3d 612, 73 Ill.Dec. 907, 454 N.E.2d 1156, 1162 (1983) ('In *Essex House*, the court found that brick failure of the insured's apartment building was caused by a combination of poor workmanship, design defects and natural causes, and that some of the causes were detectable and some were not.')

112 Compagnie des Bauxites de Guinee v. Insurance Co. of North America, 724 F.2d 369, 373 (3d Cir. 1983). *See also* Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978, 989 (S.D. Ohio 1975). As discussed above, a number of these criticisms seem well taken. With one or two exceptions, the fortuity doctrine has usually appeared in dicta, and few cases consider it in any detail.

113 British & Foreign Marine Ins. Co., Ltd. v. Gaunt, [1921] 2 A.C. 41.

114 Texas Eastern Transmission Corp. v. Marine Office—Appleton & Cox Corp., 579 F.2d 561 (10th Cir. 1978) (collapse of underground storage cavern); Atlantic Lines Ltd. v. American Motorists Ins. Co., 547 F.2d 11 (2d Cir. 1976) (mysterious disappearance of cargo containers and chassis).

115 *See* notes 27 to 30 and accompanying text, *supra*.

116 Employers Casualty Co. v. Holm, 393 S.W.2d 363 (Tex. Civ. App. 1965).

117 Redna Marine Corp. v. Poland, 46 F.R.D. 81 (S.D.N.Y. 1969).

118 Millers Mutual Fire Ins. Co. v. Murrell, 362 S.W.2d 868 (Tex. Civ. App. 1962).

119 Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 724 F.2d 369 (3d Cir. 1983); Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978 (S.D. Ohio 1975).

120 *See generally* Jordan, *Proximate v. Concurrent Cause: The California Syndrome* TEX. INS. L. RPTR. 81 (April 1984); Brewer, *Concurrent Causation in Insurance Contracts*, 59 MICH.L.REV. 1141 (1961).

121 Fireman's Fund Ins. Co. v. Hanley, 252 F.2d 780, 785 (6th Cir. 1958); *see also* General American Transportation Corp. v. Sun Insurance Office, Ltd., 369 F.2d 906, 908 (6th Cir. 1966).

122 Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1042 (4th Cir. 1979) (emphasis added).

123 77 Wis.2d 785, 466 N.W.2d 515 (1970).

124 *Id.*

125 *Id.*

126 As Lord Summer observed in British & Foreign Marine Ins. Co., Ltd. v. Gaunt, [1921] 2 A.C. 41, 57:

'all risks' has the same effect as if all insurable risks were separately enumerated; for example, it includes the risk that when it happens to be raining the men who ought to use the tarpaulins to protect the wool may happen to be neglecting their duty. This concurrence is fortuitous; it is also the cause of loss by wetting.

see *also* Morrison Grain Co., Inc. v. Utica Mutual Ins. Co., 632 F.2d 424, 431 (5th Cir. 1980) ('[A] loss may be fortuitous even if it is occasioned by the negligence of the insured.'); Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1042 (4th Cir. 1979) ('[L]oss due to the negligence of the insured or his agents has generally been held to be fortuitous and, absent express exclusion is covered by an all risks policy.'); J. Ray McDermott & Co., Inc. v. Fidelity & Casualty Co. of New York, 466 F.Supp. 353, 361 (E.D. La. 1979) ('Even if the loss results from negligence of the assured, there is coverage under an All Risks Policy.'); Redna Marine Corp. v. Poland, 46 F.R.D. 81, 87 (S.D.N.Y. 1969) ('It is well-established that where negligence, even on the part of the employees of the insured, causes a loss, that loss is fortuitous and within the coverage of all risks insurance.').

127 Jordan, *supra* note 120, at 83.

128 *Id.* at 85.

129 692 F.2d 551 (9th Cir. 1982).

130 *Id.* at 552-53.

131 10 Cal.3d 94, 109 Cal.Rptr. 811, 514 P.2d 123, (1973).

132 514 P.2d at 130, 109 Cal.Rptr. at 818 (emphasis in original).

133 The concurrent cause doctrine is enjoying a vogue in California courts (*see* Jordan, *supra* note 121), but language in decisions from other jurisdictions seems to forecast its spread. *See, e.g.*, Mattis v. State Farm Fire & Casualty Co., 118 Ill.App.3d 612, 73 Ill.Dec. 907, 454 N.E.2d 1156, 1159 (1983) ('[T]he court applied the principle that if more than one cause creates a loss with one cause covered, but other causes not covered, the loss will be within the coverage of an all risk policy.').

134 118 Ill.App.3d 612, 73 Ill.Dec. 907, 454 N.E.2d 1156 (1983).

135 454 N.E.2d at 1159.

136 454 N.E.2d at 1164 (emphasis in original).

137 See notes 28 to 30 and accompanying text, *supra*.

138 Compagnie des Bauxites de Guinée v. Insurance Co. of North America, 724 F.2d 369, 373-74 (3d Cir. 1983).

139 See note 22 and accompanying text, *supra*.

140 13A COUCH ON INSURANCE SECOND, § 48:142 at 143; Annot. *supra* note 22, at 1129-31.

141 It is worth remembering, however, that the procedural advantages of the fortuity doctrine were always somewhat greater in theory than they have proved to be in practice. See notes 57 to 64 and accompanying text, *supra*.

furtherm re, at least one court has speculated that even under the old rule, the carrier *might* bear the burden of proof with respect to non-fortuitous perils *which were also named as exclusions in the policy* (such as wear and tear or deterioration). As the Supreme Court of Wisconsin noted in Glassner v. Detroit Fire & Marine Ins. Co., 23 Wis.2d 532, 127 N.W.2d 761, 764 (1964):

t]he policy also expressly excludes losses from cause [sic] which might be considered not to be 'risks' at all, but almost certain consequences, *e.g.*, loss by wear and tear, deterioration, mechanical breakdown. Here it might be argued whether the burden is on the insured to prove that the loss did not result from wear and tear, deterioration, and mechanical breakdown because he has the burden of proving that he has suffered a fortuitous loss, or whether the burden is on the insurer to prove that the loss did so result because it has treated these causes in its policies as if they were excluded risks.

142 These canons of construction are universally followed. In Pennsylvania, for example, it is well established that insurance policies must be read in their entirety and construed so as to give effect to each and every provision. Treasure Craft Jewelers, Inc. v. Jefferson Insurance Company of New York, 431 F.Supp. 1160, 1163 (E.D. Pa. 1977), *aff'd*, 583 F.2d 650 (3d Cir. 1978); Masters v. Celina Mutual Ins. Co., 209 Pa.Super. 111, 115, 224 A.2d 774, 776 (1966); Newman v. Massachusetts Bonding & Ins. Co., 361 Pa. 587, 590-92, 65 A.2d 417, 418-419 (1949). An interpretation which gives effect and meaning to a term is always preferable to one which makes such a term surplusage or without effect, Consolidation Coal Co. v. Liberty Mutual Ins. Co., 406 F.Supp. 1292, 1298 (W.D. Pa. 1976); '[c]ontract terms will not be construed in such a manner as to render them meaningless.' Girard Trust Bank v. Life Insurance Co. of North America, 243 Pa.Super. 152, 158, 364 A.2d 495, 498 (1976); Stern Enterprises, Inc. v. Pennsylvania State Mutual Ins. Co., 223 Pa.Super. 410, 412-13, 302 A.2d 511, 513 (1973). Indeed, the court has 'no right to add anything to the insurance contract or to give it a construction that renders any part of it useless and unnecessary, if it can be reasonably construed just as written and without any change, addition or elimination.' Quigley v. Western & Southern Life Ins. Co., 136 Pa.Super. 27, 31, 7 A.2d 70, 72 (1939).

143 American Casualty Co. of Reading, Pennsylvania v. Myrick, 304 F.2d 179, 184 (5th Cir. 1962).

144 Redna Marine Corp. v. Poland, 46 F.R.D. 81, 87 (S.D.N.Y. 1969).

145 This argument finds some support where the policy exclusion uses the term 'wear and tear,' rather than '*normal* wear and tear.' Normal or ordinary wear and tear is clearly nonfortuitous (*see* note 31 and accompanying text, *supra*). Recent California decisions note that an exclusion for 'settling' excludes 'any and all loss occasioned by settling' regardless of degree, while an exclusion for 'normal settling' is far more limited in scope. *See* New Zealand Ins. Co. v. Lenoff, 315 F.2d 95 (9th Cir. 1963); Sabella v. Wisler, 59 Cal.2d 21, 27 Cal.Rptr. 687, 377 P.2d 889 (1963); Prickett v. Royal Ins. Co., Ltd., 56 Cal.2d 234, 14 Cal.Rptr. 675, 363 P.2d 907 (1961).

it should also be noted, however, that the *leading* decision on wear and tear defines the term to 'mean simply and solely that *ordinary and natural* deterioration or abrasion which an object experiences *by its expected contacts* between its component parts and outside objects during the period of its natural life expectancy'; the court goes on to observe that it does not find 'that the modifiers 'ordinary' or 'natural' add anything to the commonly understood meaning of 'wear and tear.'" Cyclops Corp. v. Home Ins. Co., 352 F.Supp. 931, 936 (W.D. Pa. 1973) (emphasis added).

146 The terms 'latent defect' and 'inherent vice' are essentially fungible. *See* Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978, 992 (S.D. Ohio 1975) ('There does not seem to be any significant distinction between 'inherent vice,' 'latent defect' and 'inherent or latent defect' and defendant has not drawn our attention to one.')

147 *See* General American Transportation Corp. v. Sun Ins. Office, Ltd., 369 F.2d 906, 908 (6th Cir. 1966) (defective welding discoverable by radiography); Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978, 992 (S.D. Ohio 1975) (negligence in design and construction discoverable by visual inspection); Plaza Equities Corp. v. Aetna Casualty & Surety Co., 372 F.Supp. 1325, 1331 (S.D.N.Y. 1974) (defect in building complex design discoverable by normal weight distribution and stress calculations); Mattis v. State Farm Fire & Casualty Co., 118 Ill.App.3d 612, 73 Ill.Dec. 907, 454 N.E.2d 1156, 1162 (1983) (defect in design and construction of basement wall discoverable by proper scientific testing).

148 Employers Casualty Co. v. Holm, 393 S.W.2d 363, 367 (Tex. Civ. App. 1965).

149 445 F.Supp. 365 (D.D.C. 1978).

150 *Id.* at 367.

151 *Id.*

152 *Id.* at 368.

153 Redna Marine Corp. v. Poland, 46 F.R.D. 81, 87 (S.D.N.Y. 1969).

154 Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978, 991 (S.D. Ohio 1975); Plaza Equities Corp. v. Aetna Casualty & Surety Co., 372 F.Supp. 1325, 1331 (S.D.N.Y. 1974); Mattis v. State Farm Fire & Casualty Co., 118 Ill.App.3d 612, 73 Ill.Dec. 907, 454 N.E.2d 1156, 1162 (1983).

155 Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978, 991 (S.D. Ohio 1975). *See also*, Plaza Equities Corp. v. Aetna Casualty & Surety Co., 372 F.Supp. 1325, 1331 (S.D.N.Y. 1974) ('A latent defect within the meaning of this policy exclusion is an imperfection in the materials used which could not be discovered by any known and customary test.')

156 N-Ren Corp. v. American Home Assurance Co., 619 F.2d 784, 788 (8th Cir. 1980).

157 In a subsequent opinion which refused to find 'inherent or latent defect,' a court even criticized the *Holm* insured's willingness to admit to loss by 'inherent vice.' *See* Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp. 978, 990 (S.D. Ohio 1975) ('Why the parties were so apparently willing to stipulate to this cannot be ascertained from the reported facts, but the reason the point was not pressed by the plaintiff is probably that he had a good chance of recovering under the policy's ensuing loss provision.')

158 PATTERSON, ESSENTIALS OF INSURANCE LAW (2d ed. 1957).

159 KEETON, *supra* note 7, § 5.5(a) at 306-307, 308 (emphasis in original).

160 *Id.* at 316. ('In general, the relevant precedents display a strong judicial tendency to favor construing a clause as, in Patterson's terminology, an exception rather than an exclusion.')

161 *See* notes 129 to 133 and accompanying text, *supra*.

162 *See* note 130 and accompanying text, *supra*.

20 FORUM 222

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