

SIX BITS OR BUST: INSURANCE LITIGATION OVER THE 1906 SAN FRANCISCO EARTHQUAKE AND FIRE

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In 1906, California fire insurance policies excepted coverage of a variety of losses caused by earthquake. During and after their great tragedy of that year, San Francisco property owners wondered if their damages resulted from the uninsured quake or the insured fire. Citizens and leaders praised underwriters who paid claims in full, and condemned those who denied or compromised liability. Setting aside both the condemnation and the praise, one might reasonably ask what the policies legally covered. It was a vital question for policyholders and underwriters alike. While the sparks still flew and the firestorms still raged, British consul general Walter Courtney Bennett predicted, "If the insurance is not paid the city is ruined. If it is paid, many of the insurance companies will break."¹

A battle of words and images arose as soon as the battles against the flames died down. San Franciscans took elaborate care to refer to the "fire," not the "earthquake." Photographs were said to have been taken, destroyed, or doctored in ways that might support the contention that a building had been

¹Gordon Thomas and Max Morgan Witts, *The San Francisco Earthquake* (New York, 1971), 247.

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either severely toppled—or wholly unaffected—by the temblor.² Partly this was to convince the outside world that the losses were the result more of fire, a casualty to which many cities were subject and which is susceptible of prevention, than of an inscrutable act of God. But partly the words and photographs were intended as opening skirmishes in the coming fights with the insurance companies.

Many histories of the 1906 San Francisco earthquake and fire relate what might be called the physical, verbal, and economic aspects of the insurance issue. They state that some homeowners were said to have set their own quake-damaged structures on fire to perfect their insurance claims. They mention that some underwriters, notably Cuthbert Heath of Lloyd's, nobly offered to "pay all our policyholders in full irrespective of the terms of their policies," and paid "dollar for dollar" against adjusted losses. They record that other underwriters, particularly European firms, infamously offered 75-percent or "six-bit" compromises, denied coverage, or abandoned the California market altogether. Such narratives conclude triumphantly that after intense urgings from the press, the politicians, and policyholder organizations, San Franciscans wound up collecting some 90 percent of the face value of their fire insurance policies. These histories provide great detail and insight into what was done and what was said, but they fail to report who was proven right—who prevailed in court.³

One source that does address the subject states, boldly and incorrectly, "A number of disputed cases went to court, and in every case the insurer lost."⁴ Despite the hostile atmosphere, many of the insurance companies with the strongest

²Tom Graham, "Sunday Interview—Gladys Hansen," *San Francisco Chronicle*, April 14, 1996.

³The following histories discuss the insurance controversy without detailing the court decisions: Dennis Smith, *San Francisco Is Burning* (New York, 2005); Simon Winchester, *A Crack in the Edge of the World* (New York, 2005); Dan Kurtzman, *Disaster! The Great San Francisco Earthquake and Fire of 1906* (Waterville, ME, 2002); John C. Kennedy, *The Great Earthquake and Fire* (New York, 1963); Thomas and Morgan Witts, *The San Francisco Earthquake*; William Bronson, *The Earth Shook, The Sky Burned* (Garden City, NY, 1959). Gladys Hansen and Emmet Condon, *Denial of Disaster* (San Francisco, 1989), and Philip L. Fradkin, *The Great Earthquake and Firestorms of 1906* (Berkeley, CA, 2005), cite witness testimony from the state court *California Wine Association* case—but not the verdicts. An excellent summary of the San Francisco 1906 insurance issues and the modern cases on ensuing loss, though again not mentioning the litigation, is James S. Harrington, "Lessons of the San Francisco Earthquake of 1906: Understanding Ensnaring Loss in Property Insurance," *The Brief* (Summer 2008): 28.

⁴Risk Management Solutions, *The 1906 San Francisco Earthquake and Fire* (Newark, CA, 2006), 9.

defenses took their cases to the law, and the law heard them out. In the dusty law books and little-used sections of computer databases in law libraries, there are at least thirty reported federal, foreign, and California court decisions on this subject. (The known decisions are identified in the appendix.) While the insureds did win most of the judgments, the insurers won some cases—including jury verdicts in their favor in San Francisco courtrooms.

This article describes and analyzes the policyholder coverage court decisions and opinions arising from the 1906 San Francisco earthquake and fire, starting with a summary of the factual background and concluding with comments about their historic significance. By showing that policyholders could recover even under strict policy language, these cases helped to spur settlements by reluctant insurers and determined the pace at which the city's rebirth was completed in the years immediately following the disaster.

But these century-old cases are also important today. They are still relevant to the issue of "ensuing loss"—whether fires or other covered perils, stemming from earthquakes or other excluded perils, are nonetheless insured. This broader question is as current as Hurricanes Katrina and Sandy, and as imminent as the next calamity.

THE BACKGROUND

The Question at the Heart of the Bankroll

San Francisco lay in ruins on April 24, 1906. It was less than a week after the powerful April 18 earthquake, which had been followed by four days of devastating fire. The damage estimate approached \$500 million.⁵ Some 28,000 buildings had been destroyed, and 225,000 to 300,000 souls had been rendered homeless out of a population of about 410,000. Yet the city's Real Estate Board found time to convene a meeting on April 24 and to pass a resolution that "the

⁵This upper estimate of direct property damage was about the same as the entire United States federal budget or 1.8 percent of the gross domestic product in 1906. Munich Re, *The 1906 Earthquake and Hurricane Katrina* (Munich, 2006), 3; Kerry A. Odell and Marc D. Weidenmier, "Real Shock, Monetary Aftershock: The 1906 San Francisco Earthquake and the Panic of 1907," *Journal of Economic History* 64 (2004): 1002. It is equivalent to roughly \$10 billion in present dollars—once the country's greatest casualty loss in constant dollar terms but, depending on the inflation indices used, now approached or exceeded by those from 9/11, the *Deepwater Horizon*, and Hurricanes Katrina and Sandy.

calamity should be spoken of as 'the great fire' and not as 'the great earthquake.'"⁶

Mayor Eugene Schmitz similarly referred consistently to the "fire." A 1907 municipal report concluded, "The greatest destruction of wealth created by human hands was that which resulted from the fire which occurred in San Francisco on April 18, 1906, and the three days succeeding." The insurance industry journal *The Standard* noted with evident amusement that the insurance commissioner of California, E. Myron Wolf, after intense questioning, "admits that there was an earthquake."⁷

Why the fussiness over labels? Why the avoidance of the "E word"? Certainly one motive was to convince world opinion that the calamity was the kind of disaster that had from time to time beset other cities—like Baltimore in 1904 or Chicago in 1871—rather than a singular act of God visited upon a wild and degenerate town built along a major seismic fault. After all, San Francisco had weathered several severe fires in its infancy; the city seal with a phoenix rising from its ashes had been adopted in 1859, not 1906. Humans could cope with fires, through better building codes and water systems, more easily than they could combat forces of nature.⁸

There was, however, a more immediate and material reason for centering attention on the fire. For what was at stake was nothing less than "the heart of the bankroll that would rebuild the city."⁹ Even before that April, it was common knowledge that exculpatory language lurked in the fine print. Many policies of fire insurance procured by San Franciscans had exclusions for loss "caused directly or indirectly by earthquake" or "occasioned by or through earthquake," and for losses to "fallen buildings."¹⁰ Insurance for structural damage

⁶*San Francisco Chronicle*, April 25, 1906, <http://www.sfmuseum.org/1906.2/burnham.html>.

⁷Smith, *San Francisco Is Burning*, 234; Clifford W. Marsh, *Facts Concerning the Great Fire of San Francisco* (Bridgeport, CT, 1907); *The Standard*, July 7, 1906.

⁸Winchester, *A Crack in the Edge*, 319–24; Fradkin, *The Great Earthquake*, 231–34.

⁹Bronson, *The Earth Shook*, 110.

¹⁰The majority of fire insurance policies did not have express exclusions for fire caused by earthquake. Albert W. Whitney, *On Insurance Settlements Incident to the 1906 San Francisco Fire* [San Francisco, 1907], 40. A more common defense, potent for improvements evidencing structural damage from the quake prior to the presence of fire, was the "fallen building" clause: "If a building, or any part thereof, fall except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease." Most policies also had notification and proof of loss requirements, which could be difficult if not impossible to satisfy after the destruction of so many records.

from quake, unaccompanied by fire, was not marketed. Some owners were said to have deliberately set fire during the chaos to their own quake-damaged houses, in an effort to perfect insurance claims.¹¹ The question must have been hanging ominously in the smoky air: would the 137 insurance companies and seventeen reinsurers that had underwritten over \$250 million of San Francisco property risks escape liability on the ground that the city's devastation had been caused by an excluded peril?¹²

The Quake and the Plural "Fires"

The San Francisco Fire Department of 1906 boasted a hydrant system with a water supply theoretically of thirty-six million gallons per day, but the supply lines from the remote freshwater reservoirs miles away on the San Francisco Peninsula were fragile, and the cisterns and equipment were in poor repair. The National Board of Fire Underwriters had praised the department's personnel but harshly criticized the system.¹³ Fire chief Dennis Sullivan had long argued for improving the system by making greater use of the abundant seawater and distributing larger cisterns throughout the city. Sadly, Sullivan was mortally injured in the quake when the chimney from an adjacent hotel crashed into his firehouse. He was scheduled to testify in support of these improvements that very day.¹⁴

The temblor struck shortly after five o'clock in the morning of Wednesday, April 18, and, in two surges, lasted about a minute. The shaking caused lamps, stoves and chimneys to topple, gas lines to break, fuel and chemical tanks to rupture, and electric wires to fall. Some immediate combustion must

¹¹An unidentified fireman observed citizens "firing their houses, as they were told that they would not get their insurance on buildings damaged by the earthquake unless they were damaged by fire." Letter from Capt. Leonard Wildman to Military Secretary of California, April 27, 1906, <http://www.sfmuseum.org/1906.2/arson.html>. Arson was alleged to be the source of the fire in the state court *California Wine Association* case described below.

¹²Bronson, *The Earth Shook*, 110-12; Thomas and Morgan Witts, *The San Francisco Earthquake*, 247.

¹³The latest report was issued in September 1905, concluding, "San Francisco has violated all underwriting traditions and precedents by not burning up" (Smith, *San Francisco Is Burning*, 50).

¹⁴Swiss Re, *A Shake in Insurance History: The 1906 San Francisco Earthquake* (Zurich, 2005).

have been inevitable.¹⁵ Yet the initial fires so caused appear to have been isolated. Severe structural damage beyond the common occurrence of toppled chimneys was focused on vulnerable filled land along the waterfront and on shoddy building practices throughout town, such as at City Hall. Official reports somewhat arbitrarily concluded that no more than 10 percent of the damage was caused by the quake and the immediate fires.¹⁶

The reference to “fires” in the plural is an important point for the later litigation. That morning saw the birth across the city of thirty to fifty individual fires, some of which bore names—for example, the Alcazar Theater Fire, the Chinese Laundry Fire, the San Francisco Gas and Electric Fire, and the Girard House Fire. Several of the fires involved the intervention of some human agency—arson, dynamiting, back-firing, or plain inadvertence and negligence. Years later, a senior partner at the Pillsbury, Madison & Sutro law firm (now Pillsbury Winthrop Shaw Pittman LLP), John A. “Jack” Sutro, Sr., well described the fire with the most colorful nickname:

In those days most homes had wood and coal stoves and brick chimneys and shake roofs. There were no electric or gas stoves in those days. The earthquake, if you recall, was about 5:15 a.m. in the morning. People were shook up, and rather than go back to bed, they decided to get up and have some coffee or something. So they started fires in their stoves, and the result was—the chimneys had all been knocked down off those buildings—that all the coals and hot embers went on to the roofs and set fires all over the place south of Market Street. . . . One of the fires started on [Hayes] Street just west of Gough, and it was

¹⁵Winchester vividly relates a scene from the 1936 film *San Francisco*: “[T]he moment [Clark Gable] reaches the surface, another pipe breaks, this time gushing town gas—and, as it snaps, a pair of falling power lines cross, there is a cannonade of sparks, the gas ignites, and a huge fountain of orange flame hurtles up into the air” (*A Crack in the Edge*, 292). His description of the flame is perhaps too vivid, as this is a black-and-white movie.

¹⁶Whitney, *On Insurance Settlements*, 7–10.



The insurance adjusters of the San Francisco “conflagration” stand in front of the ruins of the City Hall “destroyed by earthquake.” The battle over the “fire” and “quake” nomenclature is thus being waged even in the caption of this July 1906 photograph. (Courtesy of Bancroft Library, University of California, Berkeley, BANC PIC 1977.110:3-NEG)

memorialized as the “Ham and Eggs Fire.” It eventually burned over a very large area of the city.¹⁷

Several of these fires joined in a great fire that presented a wall of flame over a mile-and-a-half wide, with smoke up to five miles high, visible across the entire San Francisco Bay. The water mains had broken in some three hundred places, leaving a city surrounded by shore without the resources to quench the

¹⁷John A. Sutro, Sr., “A Life in the Law,” oral biography, University of California Regional Oral History Office (1986), 35 (in Bancroft Library, UC Berkeley). Jack Sutro was a San Franciscan infant at the time. The Ham and Eggs Fire was formally known as the Hayes Valley Fire.

Pillsbury’s offices in the Nevada Bank Building, at Market and Montgomery Streets, were themselves destroyed in the tragedy. Two of the firm’s partners relocated to 1155½ Washington Street in Oakland, while the other three decamped to 1860 Webster Street in San Francisco, a residence housing so many displaced lawyers that it was nicknamed the “Little Mills Building” after the fashionable Financial District office address (materials in Pillsbury Winthrop Shaw Pittman LLP Library, San Francisco).

blazes.¹⁸ Firefighters and soldiers often could only combat real or perceived looters and arsonists, watch buildings collapse, and dynamite houses in fumbling attempts to construct fire-breaks (sometimes setting new fires when they did). The fire largely burned itself out on April 21, thanks in part to repaired hydrants, seawater pumped by tugboats, and sheer human effort. A welcome rain arrived too late.

The Concessions and the Denials

Amid the stories in the literature surrounding the 1906 tragedy, one often repeated is the waiver of defenses by certain insurance companies and syndicates. Cuthbert Heath, the senior name on fire insurance at Lloyd's, is legendary in insurance industry lore for cabling his agent to waive all defenses: "Pay all our policyholders in full irrespective of the terms of their policies."¹⁹ Other insurers followed with similar "dollar for dollar" payments on adjusted losses. Thirty-five of them deferred to a central group of adjusters called the "Committee of Five"—the California Insurance Company, Ætna and the Hartford among them, although the Hartford conditioned cash payment on a 2 percent discount.²⁰

Fireman's Fund, the main California-based insurer, lost its headquarters building along with many of its records and other assets. The Fund paid all its reserves to claimants, then solicited new subscriptions from its shareholders, formed a new corporation, and caused the corporation to issue stock to claimants for their remaining losses.²¹ Observers hailed the company's reorganizing for the benefit of its policyholders, rather

¹⁸It has been estimated that the saloons and warehouses of the waterfront district, where many fires began, held over 45 million gallons of wine. This liquid might have been used to stop the fires early on, had the order not been given to close the bars (Smith, *San Francisco Is Burning*, 127).

¹⁹Archibald MacPhail, *Of Men and Fire* (San Francisco, 1948); Britton Wells, "Lloyd's Sees 1906 San Francisco Earthquake as a Turning Point," *Insurance Journal* (May 8, 2006): 50. In 2006, Lloyd's sponsored an event with the San Francisco Historical Society and a National Public Radio program, "The City Will Live," commemorating Heath's response.

²⁰Report of the Committee of Five to the "Thirty-Five Companies" on the San Francisco Conflagration (San Francisco, 1906).

²¹William Bronson, *Still Flying and Nailed to the Mast* (Garden City, NY, 1963); David W. Ryder, *They Wouldn't Take Ashes for an Answer* (San Francisco, 1948); Frank W. Todd, *A Romance of Insurance* (San Francisco, 1929). The company sponsored a centennial exhibition at the San Francisco Museum of Modern Art in 2006.

than “folding [its] tent for good.”²² The Fund’s recapitalization, it must be noted, was also spurred by the unusual exposure faced by its owners. California law at the time did not limit liability of shareholders to their paid-in capital for debts of insurance companies.²³ The insurance commissioner had threatened a receivership proceeding against the company, and an assignee for benefit of insureds could have sued the wealthiest and easiest to reach shareholders.²⁴ The much-admired rebirth of the Fireman’s Fund therefore sought to rope all shareholders into the recapitalization, as well as to do right by the policyholders.

It is noteworthy that none of these prominent companies appears to have used express earthquake exclusions for damages caused by fire.²⁵ Declaring that they would pay “irrespective of the terms of their policies” was widely lauded. But insurers facing claims involving buildings without known structural damage prior to any fire were in some cases waiving the sleeves off of their vests.

Unconditional vituperation and condemnation, on the other hand, were heaped by the press and politicians on some fifty-nine insurance companies that denied coverage in whole or in substantial part. Some of these firms were insolvent or withdrew from California or the United States altogether. Others cited their good faith uncertainty whether the exclusions applied and made offers to settle claims for a percentage, commonly 75 percent. Regardless of the facts or the contract language, the newspapers and civic leaders tended to believe that such “six-bit” proposals were “weaseling” or “welching” no less than would be an absolute denial.

Many of the vilified companies hailed from Europe. The Hamburg-Bremen Fire Insurance Company came in for special criticism based on its customer relations. It was reported that at the same time that the Hamburg-Bremen company was

²²Bronson, *The Earth Shook*, 113; John A. Bogardus, *Spreading the Risks: Insuring the American Experience* (Chevy Chase, MD, 2003) (thirty-seven insurers assessed their shareholders \$32 million to cover 1906 San Francisco liabilities).

²³Charles Eells, a partner in the law firm now known as Orrick, Herrington & Sutcliffe LLP, advised the Fireman’s Fund. *The Standard*, Nov. 24, 1906 (reporting Eells’s advice on California law); Whitney, *On Insurance Settlements*, 47 (describing “stockholders’ unlimited liability” under California law).

²⁴*The Insurance Press* (Nov. 28, 1906); Todd, *A Romance of Insurance*, 172 (quoting July 27, 1906 S.F. newspaper article citing “personal liability” of stockholders who are still “rich men”).

²⁵Compare George W. Brooks, *The Spirit of 1906* (San Francisco, 1921) (California Insurance offered to pay “dollar for dollar” and criticized “welcher and shaver” companies that offered six-bit compromises) with Whitney, *On Insurance Settlements*, 40 (California Insurance, along with Ætna, Hartford, and Fireman’s Fund, had no express earthquake exclusion clauses to waive).

denying claims in California on a wholesale basis, it was assuring prospective customers and investors in New York that funds were being sent to pay off the San Francisco holders. The principal study of the San Francisco insurance settlements states flatly, "Hamburg-Bremen . . . settled its claims at 75 per cent." The legal opinions involving the company described in this article show that these sentiments and statements are overbroad. In fact, the company paid 98 or 100 percent of some of the claims reported in the cases.²⁶

The National Association of Credit Men and a specially formed Policy Holders' League investigated and publicized which companies had paid, compromised, and denied liability. "Rolls of honor" and "box scores" were published.²⁷ Newspapers and magazines scolded the deniers,²⁸ Mayor Schmitz and a policyholder committee made separate trips to Europe in the fall of 1906 to urge payments,²⁹ lawsuits were filed in the courts of Germany and Austria,³⁰ and Congressman Julius Kahn delivered a rousing speech on the floor of the U.S. House of Representatives about "honest and dishonest insurance."³¹

²⁶Whitney, *On Insurance Settlements*, 32, 40; National Association of Credit Men, *Report of Special Committee on Settlements Made by Fire Insurance Companies in Connection with the San Francisco Disaster* (San Francisco, 1907), 10 (acknowledging that Hamburg-Bremen did pay more than 75 percent on some later claims).

²⁷National Association of Credit Men, *Report* (placing thirty-nine companies on a "Roll of Honor" and the other companies in successively lower tiers); Bronson, *The Earth Shook*, 112 (illustrating "box score" of companies).

²⁸In a backhanded compliment to corrupt union bosses, one commentator acknowledged, "[B]etween welching insurance companies and extortionate demands of the lumber men and purveyors of other materials necessary for the City's rehabilitation, there is not always very much for the smaller robbers to take." E.P. Erwin, "The Matter with San Francisco," *Overland Monthly* (Sept. 1906).

William Randolph Hearst's newspaper declaimed, "To say that [insurers] will not recognize as an obligation the destruction of a building by fire, which fire was the result of an earthquake, is to take a position hardly more reputable than that of an ordinary pickpocket." *San Francisco Examiner*, May 7, 1906.

An underwriter complained, "The San Francisco press, without exception, has abused and maligned the insurance companies from the start, without a single friendly or encouraging word." *The Standard* (July 7, 1906).

²⁹The trips were ineffectual. On his return, Mayor Schmitz was indicted for extorting bribes from restaurants and brothels. Smith, *San Francisco Is Burning*, 245.

³⁰James D. Phelan, "The Situation in San Francisco," *New York Evening Post*, June 1, 1907. One determined claimant pursued the Rhine & Moselle Fire Insurance Company and a succession of German governments through the 1950s and perhaps into the 1960s. Bronson, *The Earth Shook*, 187-88.

³¹Speech in U.S. House of Representatives (June 28, 1906).

Although historians duly record that the press and politicians loudly claimed that the “six-bit” companies were dishonest, there is evidence that sophisticated insurance customers had a far more measured reaction. The president of the Bohemian Club men’s organization explained matter-of-factly to his members that the club received 100 percent payment from solvent insurers that had no earthquake exclusions, and 75 percent payment from insurers that enjoyed such clauses. He did not express special gratitude to the 100 percent companies, because he acknowledged that they had no exclusions to waive, and he did not express special condemnation of those that limited their payouts. He concluded that “the insurance companies, as a rule, were exceedingly fair in their treatment of the Club, several making an exception in its favor in their settlements.”³²

The concessions were gallant indeed, particularly since many policies and other records of insureds and insurers alike had been destroyed.³³ For those companies remaining in business, these waivers also made good business sense, since litigation costs would be saved, and renewing policyholders attracted by the companies’ actions would replenish the underwriters’ capital.³⁴ Further, due to aggressive adjustment practices, “some of the ‘six-bit’ companies settled their claims quite as favorably as the ‘dollar-for-dollar’ companies.”³⁵

Credit and blame should not be based solely on concession and denial. With utmost respect for the claimants, many of whom had suffered grievous personal injury and loss of loved ones, the property insurers also had some minimum duties to

³²Frederick W. Hall, *Bohemian Club 1906–07 Annual Report* (San Francisco, 1907). One eccentric writer even exclaimed, “In spite of the carpings of the press and the mouthings of the blatherskites, the insurance companies furnished the money which has made the San Francisco workman more independent than any bloated bondholder in the country.” John Ball, *Spirits and the Destruction of San Francisco* (San Francisco, 1906), 16.

³³Winchester states that the contents of safes “often” spontaneously combusted when they were opened before being cooled down (*Crack in the Edge*, 286 n.*). Bronson states that this happened after the Chicago and Baltimore fires, but not in any great respect in San Francisco. *The Earth Shook*, 160.

³⁴Risk Management Solutions, *The 1906 San Francisco Earthquake*, 9. (“Some insurers, including Fireman’s Fund and Lloyd’s of London, saw [the political and newspaper denunciations] as an opportunity to market their generosity in settling claims.”) A London insurer reported with pride that the thirty-nine companies placed on the “Roll of Honor” received San Francisco premiums in 1907 that were 86 percent higher than the premiums those same companies had received in 1905, as rates were increased and owners abandoned the underwriters that had denied liability or withdrawn from the state. G.H. Marks, *The San Francisco Story* (London, 1909).

³⁵Whitney, *On Insurance Settlements*, 2.

their investors and other insureds, since the companies in many cases could be and, as it turned out, were bankrupted by payout.

Parties to commercial disputes "bargain in the shadow of the law."³⁶ Lost amid tales about the underwriters' responses and the public's reactions is the legal question for any claim: was this loss covered by this policy? If losses were covered, then Cuthbert Heath's waiver was not purely an act of altruism. If losses were excluded, then the Hamburg-Bremen company's denial was not purely an act of infamy.

THE OPINIONS

Despite the hounding of the press, politicians, and policyholder organizations, the determined insurance companies that employed earthquake exclusion clauses and that possessed the will to seek to enforce them allowed their denials of claims to be taken into court. The preceding background helps to explain the reported opinions in the policyholder lawsuits. The majority of the decisions were issued by federal courts, chiefly those then named the United States Circuit Court for the Northern District of California and the Circuit Court of Appeals for the Ninth Circuit. Many of these holdings squarely address the insurer's argument that the earthquake caused the loss. A handful of cases were reported from courts of sister states and foreign countries, and from California's new intermediate court of appeal.³⁷

Three, and only three, reported cases ultimately were heard by the California Supreme Court. The last and greatest of these decisions involved the California Wine Association. By the time that dispute reached the state's highest tribunal, the outcome would turn not on abstract notions of causation or close reading of policy language, but instead on the litigation tactics of the parties and their lawyers.

THE FEDERAL AND FOREIGN CASES

A Hospitable Federal Forum for Insurers

After submitting claims and having insurers deny them or make "six-bit" compromise offers, many policyholders brought

³⁶Robert H. Mnookin, "Bargaining in the Shadow of the Law," *Yale Law Journal* 88 (1979): 950.

³⁷This intermediate appellate court was approved by voters in November 1904, and justices had only been appointed to its bench in 1905 and 1906.

suit in state court, usually the Superior Court of California for the City and County of San Francisco. Insurers that were not California corporations regularly sought to remove these cases to federal court, usually the Northern District of California, on grounds of diversity jurisdiction (that is, because the plaintiff and the defendant were citizens of different states).

In *Baumgarten v. Alliance Assurance Company*, a Northern District court held that insurers from foreign countries were citizens of their home jurisdiction, not of California, where they conducted some or all of their American business. Judge John J. De Haven cited in passing decisions where foreign parties were said to have felt that federal courts would be “more impartial.”³⁸

Was the insurers’ preference for the federal courts justified? One piece of evidence is the Northern District’s reaction to a statute enacted by the state legislature, requiring a defendant insurance company to spell out in its initial court filings the details of any exclusionary clause in its policy on which it intended to rely. In *Board of Education of the City and County of San Francisco v. Alliance Assurance Company*, Judge William Cary Van Fleet held that, because the law imposed this requirement on insurers but not on insureds, and not on parties to other kinds of contracts, it violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. Such instances of invalidation by federal courts of state economic regulation were common in the era of the Supreme Court’s *Lochner* decision.³⁹

In any event, the policyholders won every reported decision at every level of California state courts, while the results in federal court were mixed. The insurance companies’ preference for federal court appears to have been prudent.

The Earliest Reported Coverage Decisions

An important early federal case described in the press was *Levi Strauss Realty v. Transatlantic Fire Insurance Company of Hamburg*, heard by a jury in the district court in Oakland on September 14, 1906, only a few months after the quake and fire. To avoid the appearance of bias, the judge, Edward Whitson, had been imported from the Eastern District of Washington, and jurors had been sought from throughout northern California.

The policy at issue, like most that had been issued for 1906, had no express earthquake exclusion whatever. Undaunted, the intrepid but unnamed defense counsel cited section 1511 of

³⁸153 Fed. 301 (N.D. Cal. 1907).

³⁹159 Fed. 994 (N.D. Cal. 1908); *Lochner v. New York*, 198 U.S. 45 (1905).

the *Civil Code*, which excuses non-performance of obligations due to an "irresistible, superhuman cause." Judge Whitson ruled that this statute furnished no excuse to performance of an obligation to pay money, and directed the jury to return a verdict for the policyholder in the sum of \$10,000 plus \$58.33 in interest.

The local press praised the decision as "admirable" and "clear-cut," and a warning to the "cold-feet," the "crooked," and the "welching." The San Francisco coverage omitted to mention that the victory was hollow, since the defendant had no assets in California. The insurance industry and the East Coast press noted that the plaintiff would need to file suit all over again in Germany.⁴⁰

The Williamsburgh City Loophole

A large number of federal and state decisions construed the awkwardly drafted clause used by the Williamsburgh City Fire Insurance Company of Brooklyn, New York ("Williamsburgh City") and its affiliates. Their policy stated,

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority; or for loss or damage occasioned by or through any volcano, earthquake, or hurricane . . . or when the property is endangered by fire in neighboring premises, or (unless fire ensues and in that event for the damage by fire only) by explosion of any kind. . . .

At first reading, the clause appears to provide a strong defense. Were not all the fires and ensuing damage caused "directly or indirectly" by the quake, or at least "occasioned" by the temblor? These companies "were advised by counsel that they were not liable to their [San Francisco] policy holders and that their stockholders could hold them legally responsible for any payments."⁴¹ This overconfident view was not borne out in the courts.

⁴⁰*San Francisco Argonaut*, Sept. 22, 1906; *The Standard*, Sept. 22, 1906; *New York Times*, Sept. 15, 1906. Another early trial was held in federal court in *Whitter-Coburn v. Alliance Assurance Co.*, <http://www.archives.gov/exhibits/sf-earthquake-and-fire/earthquake-fire.html>.

⁴¹Whitney, *On Insurance Settlements*, 40–41. Michael Cardozo, a prominent New York attorney and cousin of the famed jurist Benjamin N. Cardozo, issued such an opinion. *San Francisco Chronicle*, July 21, 1906. Some policyholders also complained that an earthquake clause was inserted without notice into policies only two years earlier. *San Francisco Chronicle*, July 8, 1906.

The official report in *Henry Hilp Tailoring Co. v. Williamsburgh City* consisted exclusively of a transcript of an oral jury instruction. Judge Van Fleet told jurors that if the quake caused a fire that spread from other property to the claimant's property, this policy exclusion applied and judgment should be entered for the insurer. Ominously for policyholders, he also cited section 2628 of the *Civil Code*, a maxim of jurisprudence that could be read to exclude all losses that would not have occurred but for the earthquake, even if not "immediate[ly]" caused thereby: "When a peril is specially excepted in a contract of insurance, a loss, which would not have occurred but for such peril is thereby excepted; although the immediate cause of the loss was a peril which was not excepted."⁴² Had this maxim been construed liberally, a "but for" causation test could have applied to all of the damage, wiped out most insurance coverage, and forestalled the rebirth of the city.⁴³

One week later in the same court, Judge Whitson interpreted the same policy more favorably to the policyholder. In *Baker & Hamilton v. Williamsburgh City*, he acknowledged that a quake might "indirectly" cause the inception of a fire. But he seized on the distinction in the policy drafting between the phrase "caused directly or indirectly by" for the civil unrest exclusions and the phrase "occasioned by or through" for the natural calamities. There must be a reason for the different phrases, he reasoned, and he proceeded to declare to exist what many contemporary readers would call a loophole: "[I]t was the intention of the defendant to exempt itself from liability [only] if an earthquake should be the immediate, proximate, and direct cause of a fire which destroyed the property."

Thus, without the company's saying it, it was as if the policy had read that only fires "immediately, proximately and directly" caused by the quake were excluded. If the fire that destroyed the insured's property did not start inside that building due to the quake, or was a fire involving human agency such as arson or dynamiting, a policyholder like Baker & Hamilton would likely recover. Judge Whitson rejected the defendant's objection to the complaint, which was a victory of sorts for the insured. No report was found of further proceedings or settlement.⁴⁴

After these district court opinions, the Ninth Circuit decisively entered the picture. In *Williamsburgh City v. Willard*, the policyholder received a directed verdict in the Northern District, and Judge William Ball Gilbert affirmed the judgment

⁴²Now codified, with revisions, at *California Insurance Code* §532.

⁴³157 Fed. 285 (N.D. Cal. 1907). The jury's verdict in this case is not reported.

⁴⁴157 Fed. 280 (N.D. Cal. 1908) (overruling defendant's demurrer).

on appeal. He cited Judge Whitson's *Baker @ Hamilton* opinion and agreed that, since the insurer used the phrase "caused directly or indirectly by" for one set of perils, the phrase "occasioned by or through" for quakes must mean something different—and here should be confined in its effect to fires caused "directly" by a quake. Since in Willard's case the quake "did not produce a fire on the insured premises," it was at most an indirect cause, and coverage was not excluded.

What of section 2628, the ominous maxim of jurisprudence? According to Judge Gilbert's reading, "[T]he 'peril specially excepted' here is fire directly caused by earthquake. . . . To [hold] that the insurance company, although it has specially provided for exemption of liability for loss by fire directly caused by earthquake, is entitled to an exemption wider than that which it stipulated for, is to hold that the intention of the statute is to deny to the contracting parties the power to make the contract which they made. . . ."45

He also noted that section 3268 of the *Civil Code* subordinated section 2628 and similar rules to the intention of the parties, who may waive them unless such a waiver would contravene public policy. So construed, section 2628 ceased to be relevant to the remaining *Williamsburgh City* decisions or the other 1906 policyholder cases. The U.S. Supreme Court declined to hear an appeal from the Ninth Circuit's decision.⁴⁶

Victories in San Francisco for the Insurance Companies

There are several reported decisions where the unpopular insurance companies enjoyed favorable trial court results in

⁴⁵164 Fed. 404, 408–09 (9th Cir. 1908). *San Francisco Chronicle*, Nov. 8, 1908 (after the Ninth Circuit's decision, "about five hundred thousand dollars in claims against the Williamsburgh City Insurance Company, the Norwich Union and the Insurance of New York remain unsettled").

⁴⁶The U.S. Supreme Court decision regarding *Willard* was reported in the *San Francisco Chronicle* on January 19, 1909. This insurer group featured in many other 1906 cases. *Pacific Heating @ Ventilating Co. v. Williamsburgh City*, 158 Cal. 368, 111 Pac. 4 (1910), is described below with the other California Supreme Court opinions. A \$2,500 federal judgment for Frank and Minerva Marston against the Williamsburgh City was reported in the *San Francisco Chronicle* on August 28, 1909. In the final reported coverage judgment dealing with this clause, *Norwich Union Fire Ins. Soc'y v. Stanton*, 101 Fed. 813 (2d Cir. 1911), the Second Circuit deferred out of comity to the Ninth Circuit's decision in *Willard* and affirmed a judgment in the Southern District of New York in favor of the policyholder. *Rosenthal Shoe Co. v. Williamsburgh City* was described in the press as "the first of the insurance cases involving the earthquake clause," but there is no reported decision. *New York Times*, Aug. 15, 1906. Nine lawsuits against the Williamsburgh City were earlier reported to be pending in state court. *San Francisco Chronicle*, July 21, 1906.

the California federal courts. The first victory raised an issue not of causation but of prompt notice. In *San Francisco Savings Union v. Western Assurance Company of Toronto*, the policy required proof of loss to be submitted within sixty days after the fire, but the plaintiff inexplicably delayed making the submission for 180 days. The policyholder made no argument for waiver, consent, estoppel, prevention, impracticability or other potential excuse. The plea must have been that the notice clause was only a covenant and that the defendant had not been prejudiced by the delay. Judge Van Fleet construed the sixty-day requirement as an absolute condition, not a covenant, and had no difficulty finding for the insurance company.⁴⁷

A San Francisco jury verdict was obtained by an insurance company in *Richmond Coal Company v. Commercial Union Assurance Company*. The policy in question excluded "loss caused directly or indirectly by . . . earthquake, . . . or (unless fire ensues, and, in that event, for the damages by fire only) by explosion of any kind." The Northern District judge instructed the jury that, if the earthquake caused a fire and that fire eventually reached and destroyed the plaintiff's property, then the entire loss was excluded.⁴⁸ The insurer recorded a clear victory at trial.

Unfortunately for the insurer, this victory was reversed on appeal. Judge Erskine M. Ross for the Ninth Circuit rejected the verdict, saying that the instruction had forced the jury not to "give any consideration" whether "new or intervening causes" had interrupted the chain of causation from the earthquake-caused fires. These intervening causes might have included "explosion, back-firing, dynamiting, the course or force of the winds" or other "attending circumstances." Thus, the insurer's victory was short-lived because the case was remanded for retrial.

This opinion drew a lengthy and heated dissent from Judge Gilbert. He stressed that any concern over omitting these causes from the jury instruction was purely hypothetical in the case at bar: "We have no evidence that any such causes intervened to disturb the causal relation between the fires which were started and the destruction of the [Richmond Coal] insured property. . . . There is no suggestion anywhere in the record in this case that there was back-firing or dynamiting or

⁴⁷57 Fed. 695 (N.D. Cal. 1907) (sustaining defendant's demurrer).

⁴⁸*Richmond Coal Co. v. Commercial Union Assurance Co.*, 159 Fed. 985 (N.D. Cal. 1909) (report of jury instruction), rev'd, 169 Fed. 746 (9th Cir. 1909). These decisions helpfully pinpoint the origin of eight fires in the waterfront district that were apparently agreed among counsel and judges as having been "earthquake-caused fires."

that there was a wind. There was no request for an instruction on those subjects, nor was any specific exception taken to the charge for want of such instruction."

It is difficult to reconcile the *Richmond Coal* majority appellate opinion with the other 1906 coverage decisions. In particular, the fact that an earthquake-caused fire spread to the insured property by "the course or force of the winds" would not be relevant to the other analyses.⁴⁹

In the third reported insurer trial victory, *German Savings & Loan Society v. Commercial Union Assurance Company*, the policy language was the same as that considered in *Richmond Coal*. At trial in the Northern District, the defendant introduced evidence that a fire "caused by said earthquake shock" reached and destroyed the insured property. The plaintiff introduced evidence that an explosion occurred nearby, at a time when the earthquake-caused fire was not close at hand, and that an independent fire caused by that explosion caused the plaintiff's damage. In rebuttal, the defendant introduced evidence that the explosion came after, or was itself the result of, the earthquake-caused fire.

After this exchange of testimony, the unidentified trial judge instructed jurors that an explosion could interrupt the chain of causation from the earthquake-caused fire only if a separate fire was "originated by and ensuing upon explosion." If the earthquake-caused fire triggered the explosion, he explained, the exclusion would still apply. The jury then returned a verdict for the insurance company.

Judge Charles E. Wolverton for the Ninth Circuit saw no error in this instruction. He distinguished in passing *Richmond Coal* and affirmed the jury verdict:

[T]he court did leave the question to the jury as to whether an explosion was an independent cause of the fire which destroyed plaintiff's property, or whether it was the result of an earthquake-caused fire. The distinction, we think, was clearly made between the explosion as a controlling and predominating cause of the fire which destroyed plaintiff's property, and the explosion as merely an incident to the fire which produced the loss, and the jury, we must assume, fully understood it.

⁴⁹Alfred Sutro personally—not on behalf of either party, any other client, or even his law firm—was listed as the sole "amicus curiae" (friend of the court) before the Ninth Circuit in *Richmond Coal* (169 Fed. at 746). It is possible that Sutro made the argument on appeal attacking the omissions from the jury instruction, which had not been objected to by the plaintiff's own counsel at trial.

Judge Ross, possibly stung by criticism of his decision in *Richmond Coal*, wrote a short concurrence emphasizing that “the instructions of the court below were in strict accord” with that august prior ruling.

Finally, there is a mysterious comment in a state court appellate opinion, the *Pacific Union Club* case described in detail below. In that case, the court’s decision favored the policyholder. Somewhat defensively, Court of Appeal justice Norton Parker Chipman noted that there were “numerous” other federal and state cases upholding a similar construction of the policy language. More intriguingly, he stated, “A number of cases have quite recently been tried in the United States Circuit Court for the United States—Judge Deitrich [sic] presiding—in which the insurance companies made successful defense where they were able to show that the fire was directly traceable to the earthquake.”

Perhaps the fires in these cases were caused by fallen electric wires coming in contact with broken gas lines, inside or adjacent to the structure in question. Perhaps even the Hamburg-Bremen company’s position was further vindicated in one of these unreported and uncitable actions. But no reference has been found to 1906 policyholder decisions of Judge Frank S. Dietrich, who was appointed to the federal bench in 1907.⁵⁰

Victory in Germany for an Insured

While the suits proceeded in California, a judgment was entered in Germany by the General Court of Hamburg against a German insurance company. This judgment is known because a translation of the decision was filed with a brief in another case heard by the Maryland Court of Appeals. The Maryland tribunal cited the German opinion with approval in upholding a lower court’s ruling on payouts by Security Fire Insurance Company of Baltimore, a company that became insolvent after the 1906 San Francisco claims.⁵¹

In *Borgfeldt v. North German Fire Insurance Company*, the policy excluded “loss caused directly or indirectly” by various types of civil unrest, “or [unless fire ensues, and, in that event, for the damage by fire only] by explosion of any kinds or from any cause or the bursting of a boiler, or earthquake, or hurricane. . . .” The Hamburg court found, “[T]he defendant has,

⁵⁰12 Cal. App. at 514; David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891–1941* (Berkeley, CA, 1994).

⁵¹*McEvoy v. Security Fire Ins. Co. of Baltimore*, 110 Md. 275, 73 Atl. 157 (1909).

without perhaps sufficiently considering the without [sic] consequences, introduced into the clause taken from the standard policy the words, 'bursting of a boiler, earthquake, hurricane.' By so doing it has effected the result that the contents of the parenthesis apply also to these causes."

Thus, destruction of Borgfeldt's San Francisco property by a fire, even one directly caused by the quake, was held to be covered by the policy.⁵² In this particular case, the claimant had a Germanic surname.⁵³ But the Hamburg tribunal, said by the Maryland court to consist of a law judge and two lay or business judges, must have known that their decision would favor policyholders of all nationalities against the insurance companies of their countrymen.

The Vilified Hamburg-Bremen Company

With all the opprobrium that San Franciscans directed towards the Hamburg-Bremen Fire Insurance Company, it is interesting to see evidence in the cases of that firm fully honoring its obligations. In *Haas Bros. v. Hamburg-Bremen Fire Insurance Company*, the insurer paid the plaintiff 75 percent of the adjusted claim in return for a receipt marked "in full." The plaintiff alleged the existence of an oral promise by the insurer to pay 98 percent if it paid other claimants at that rate, then alleged, "Since the settlement and payment [Hamburg-Bremen] has paid to other San Francisco creditors 98 percent of the face value of their claims as adjusted." The Northern District judge refused to admit evidence of this oral promise. Judge William Morrow for the Ninth Circuit

⁵²Similarly, the Maryland court found that the Baltimore insurer appropriately paid its San Francisco policyholders even if their fires were caused directly or indirectly by the quake. The parties cited a number of San Francisco coverage cases, including *Baker & Hamilton*, *Henry Hilp*, *Richmond Coal*, *Board of Education of S.F.*, and *Willard*, but the court distinguished the language in the policies from that at bar. 73 Atl. at 161.

⁵³He was likely Christoph J. Borgfeldt, whose later litigation was most unseemly. This Borgfeldt made promissory notes to the Swiss-American Bank of Locarno, then transferred his quake-damaged properties to his wife, Anna, "in consideration of love and affection" the day after the 1906 fire destroyed his grocery and liquor business. The California Court of Appeal found that the transfers were made in contemplation of insolvency, and voided them as fraudulent against a purchaser of the notes. Borgfeldt confessed that he was only trying to make a fresh start in a mining venture. *Borgfeldt v. Curry*, 25 Cal. App. 624, 144 Pac. 976 (1914).

reversed, holding that the “in full” receipt was not a fully integrated contract.⁵⁴

Evidence of the Hamburg-Bremen company's 100 percent payment of a small claim appears in a criminal case. In *People v. Di Ryana*, the defendants were alleged to have forged a proof and an assignment of a 1906 fire policy claim. On presentation of these documents, Hamburg-Bremen “paid the defendants the insurance money,” the full \$1,000 against the \$1,000 that had been claimed.⁵⁵

The Federal Court California Wine Association Case

The largest individual verdicts in all of the reported 1906 policyholder cases were won by the California Wine Association, in a series of federal decisions that unfortunately were not published in the official reports. The California Wine Association itself is described in detail with respect to the published California Supreme Court decision discussed below. The federal cases involved the strict exclusion, in the policies of the Commercial Union Assurance Company of London and its affiliates, of “losses caused directly or indirectly by . . . earthquake . . . or (unless fire ensues, and in that event, for the damage by fire only) by explosion of any kind.”

The California Wine Association filed thirty separate complaints for thirty policies issued by Commercial Union companies in San Francisco Superior Court in March 1907, and they were promptly removed to the Northern District in May. There the cases languished for three years before going to trial before Judge Van Fleet; the trial began in May 1910, and the verdicts were issued June 12, 1910. Otto Irving Wise and H.B.M. Miller represented the insurer, and the California Wine Association was

⁵⁴181 Fed. 916 (9th Cir. 1910). Judge Morrow was the president of the San Francisco chapter of the American Red Cross in 1906 and a prominent community leader during the relief efforts. The infamous Hamburg-Bremen company was represented by Page, McCutchen & Knight, the predecessor to today's Bingham McCutchen LLP.

⁵⁵8 Cal. App. 533, 96 Pac. 919 (1908).

represented by Alfred Sutro of the Pillsbury, Madison & Sutro law firm.⁵⁶ The insurance press reported, with evident perplexity,

A jury of the United States Circuit Court has returned a verdict against contesting insurance companies, the policies with interest aggregating \$268,446. Seven of the policies were in favor of the California Wine Association against the Commercial Union amounting to \$55,758. Eighteen, in favor of the same company against the Palatine for \$151,939; and five, same company against the Alliance for \$34,767. Smaller policies with different parties made up the balance. *The insurance companies were of the opinion that they had a very strong case.*⁵⁷

The Federal Court Pacific Union Club Case

There was a trio of reported verdicts in favor of the Pacific Union Club, a men's organization formed in 1889 by the merger of two older clubs; after its 1906 loss, it moved to the repaired Flood mansion atop Nob Hill.⁵⁸ When the Pacific Union Club submitted its claims under multiple policies, several insurers denied coverage, citing exclusions "for loss caused directly or indirectly by earthquake." The reason given was that the quake broke the city's water mains, making it impossible to stop the fire before it reached and damaged the club's premises.

⁵⁶E.S. Pillsbury, a Civil War veteran, began practice in California in 1866 and moved to San Francisco in 1874. He later took into partnership his son Horace D. Pillsbury, Frank D. Madison, and the brothers Oscar and Alfred Sutro. (These brothers were sons and nephews of the founders of the Sutro & Co. banking house, and remote cousins of Mayor Adolph Sutro of Mt. Sutro and Sutro Baths fame.) The name of Pillsbury, Madison & Sutro had just become fixed in 1905. Alfred "had broad and successful experience both in business fields and [in] litigation" and was "a man of great culture"; the Sutro Reading Room at Hastings College of the Law is named after him and contains his collection of books about the law (materials in Pillsbury Winthrop Shaw Pittman LLP Library, San Francisco).

⁵⁷*The Adjuster*, June 1910, 197-98 (emphasis added); *San Francisco Chronicle*, June 13, 1910 (the "smaller policies" were in favor of M.T. MacDonald, Mt. Shasta Mineral Spring Co. and Baker & Hamilton against Palatine Ins. Co., and in favor of Baker & Hamilton against Commercial Union Assurance Co. and Commercial Union Fire Ins. Co. of N.Y.).

⁵⁸The Flood residence (National Historical Landmark 66000230) is the only grand mansion left on Nob Hill from before the quake and fire.

One of the club's suits against Commercial Union Assurance Company landed in federal court.⁵⁹ The club's counsel was Alfred Sutro of Pillsbury. The defense counsel was Thomas C. Van Ness, litigating against the very club of which he was a member and had served as president.⁶⁰

An unnamed Northern District judge ruled for the club, and the Ninth Circuit affirmed in an opinion by Judge Ross. The judge rejected the water main argument, on the ground that the policy did not make the existence of such a water supply an express condition.⁶¹

THE CALIFORNIA LOWER COURT CASES

The Pacific Union Club saga continued with two additional cases brought in San Francisco Superior Court and, for some reason, not removed to federal court. In one case, in the courtroom of James M. Seawell against Commercial Union again, the club won a trial verdict in the princely sum of \$1,765. The parallel trial verdict was a victory against the Palatine Insurance Company, an affiliate of Commercial Union.⁶² The decisions were affirmed in two opinions by Norton Parker Chipman, the presiding justice of the Third Appellate District in Sacramento.⁶³

Sutro argued that an insurer cannot make the absence of an "extrinsic saving power," like an intact water main, the cause

⁵⁹Removal from San Francisco Superior Court occurred June 12, 1910. It is unclear why the litigants were in federal rather than state court for one and only one of the three cases.

⁶⁰T.C. Van Ness was insurance company counsel in most of the 1906 coverage cases discussed in this article. He was the son of a mayor of San Francisco, James Van Ness, after whom was named the city thoroughfare that later became the crucial firebreak in 1906. *The Bay of San Francisco* (San Francisco, 1892), 1:585–86. T.C. and his own son, T.C. Van Ness, Jr., later became affiliated with the Chickering & Gregory law firm.

⁶¹*Commercial Union Assurance Co. v. Pacific Union Club*, 169 Fed. 776 (9th Cir. 1909). Shortly after the Ninth Circuit's decision in *Pacific Union Club*, Judge Van Fleet of the Northern District entered judgment for the policyholders in twenty-four additional cases, aggregating over \$277,000. *San Francisco Chronicle*, May 28, 1909.

⁶²*Pacific Union Club v. Commercial Union Assurance Co.*, 12 Cal. App. 507, 107 Pac. 728 (1910); *Pacific Union Club v. Palatine Ins. Co.*, 12 Cal. App. 515, 107 Pac. 733 (1910).

⁶³There was a First Appellate District in San Francisco, but the appeals from the *Pacific Union Club* verdicts in San Francisco Superior Court were heard by the Third Appellate District in Sacramento. By contrast, the appeal of the San Francisco Superior Court verdict in *Pacific Heating*, discussed below, was heard by the First Appellate District.



Alfred Sutro (1869–1945) was a founding partner in the law firm of Pillsbury, Madison & Sutro, and the lawyer for the California Wine Association and other clients in the 1906 insurance cases. (Courtesy of Pillsbury Winthrop Shaw Pittman LLP)

of an otherwise insured loss. Van Ness, now joined as counsel by Wise, cited what the court politely called “quite a number” of cases in response. Typical of these citations was *McAfee v. Crofford*, where the defendant had “carried off and frightened away” the plaintiff’s slaves from a plantation shortly before a flood; without his slaves, the plaintiff could not rescue his cordwood and crops. This strange case went all the way to the U.S. Supreme Court, which held the thief (or abolitionist?)

liable for the flood damage. Justice Chipman found the “tor-tious acts” in this non-insurance ruling to be irrelevant to the succession of events in the 1906 insurance cases.⁶⁴

The court tested Van Ness with hypothetical questions based on a parade of other possible extrinsic causes. What if the quake had simply made the streets impassable for the firefighters? What if, instead of a quake, a riot had impeded them in their duties? What if a foreign enemy had invaded the city and kept the firefighters from reaching the blaze? Justice Chipman held that the lack of an “extrinsic saving power” not expressly mentioned in the insurance policy, namely a functioning water main, was too remote a cause to invalidate a covered cause of loss. The only exclusion he recognized is an earthquake “when operating as a direct or indirect force in causing or starting the fire.” In a flourish, he cited the venerable canon that ambiguities in policy language are to be construed in favor of the insured.⁶⁵

The other known court of appeal decision is the intermed-iate victory of the Pacific Heating & Ventilating Company in the Supreme Court case described below. A handful of other case filings and decisions in San Francisco Superior Court have also been identified. They include an \$850 “test case” against the judgment-proof Transatlantic Fire Insurance Com-pany of Hamburg in favor of an assistant city attorney, A.S. Newburgh,⁶⁶ and each of the trial decisions for policyholders affirmed by the California Supreme Court as described below.

THE CALIFORNIA SUPREME COURT CASES

It is remarkable that in the aftermath of the greatest disaster in California history, only three reported cases made their way to the state’s own highest tribunal. As noted above, the insur-ers’ clamor for removal of cases to federal court appears to have been very strong.

The Early Cases

The earliest supreme court case, *Clayburgh v. Agricultural Insurance Company of Watertown, N.Y.*, construed a “fallen

⁶⁴54 U.S. (13 How.) 447 (1851); 12 Cal. App. at 507.

⁶⁵This canon was often cited in the 1906 policyholder cases, usually after the statement of the decision. See, e.g., *Pacific Heating & Ventilating Co. v. Williamsburgh City*, 158 Cal. 367, 111 Pac. 4 (1910).

⁶⁶Described as “the first [earthquake coverage] decision to be rendered in the Superior Court.” *New York Times*, Oct. 9, 1906.

building" clause: "If a building, or any part thereof, fall except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease." Justice Marcus C. Sloss for the court confirmed that this clause applies to partial damage only if that damage substantially impaired the structural integrity of the building.⁶⁷

Pacific Heating & Ventilating Company v. Williamsburgh City was the single *Williamsburgh City* case reported from the state court system. The San Francisco Superior Court, the court of appeal and the supreme court all construed the peculiarly drafted clause consistently with the Ninth Circuit's decision in *Willard*. They held that the fire that destroyed the plaintiff's property had not been "directly" caused by the quake. In a per curiam or unsigned opinion, the supreme court further endorsed the Ninth Circuit's reading of *Civil Code* section 2628 as not modifying the express policy language.⁶⁸

The Supreme Court California Wine Association Case: The 1908 Trial

The California Wine Association state court lawsuit is the most colorful of the 1906 policyholder coverage decisions. The well-preserved trial transcript consists of more than three thousand pages in six buckram-bound volumes. The wine association lawsuits are of interest partly because their large size justified the production of more than two hundred witnesses, whose testimony on the origins and progress of individual fires has long been consulted as a historical reference. But the well-preserved documents also provide insights into both the legal argumentation and the courtroom tactics that were critical to victory.

In its heyday before Prohibition, the California Wine Association was the great accumulator and distributor of California wine. It controlled large quantities produced in the Napa, Sonoma, and San Joaquin valleys. At the time of the earthquake, it held twelve million gallons stored in very large warehouses across San Francisco. Almost all was lost, with the notable exception of two million gallons kept in barrels at Third and Bryant Streets. When these barrels burst, they filled a concrete cellar that was so solidly constructed that it became a veritable swimming pool. The enterprising wine association somehow obtained equipment and hoses and pumped the wine through a pipe along Third Street to

⁶⁷155 Cal. 708, 102 Pac. 812 (1909).

⁶⁸158 Cal. 367, 111 Pac. 4 (1910) (per curiam); *San Francisco Chronicle*, July 27, 1909 (reporting court of appeal affirmance by Justice J.A. Cooper).

the waterfront and waiting barges, which sped off to the city of Stockton, where the wine was distilled. On its inevitable return, this brandy must have helped to steady the nerves of an unsettled city.⁶⁹

The wine association carried approximately \$5 million in insurance coverage for its San Francisco property.⁷⁰ It tendered claims in the millions of dollars for building damage and loss

⁶⁹Ernest P. Peninou and Gail G. Unzelman, *The California Wine Association and Its Member Wineries, 1894–1920* (Santa Rosa, CA, 2000) (hereinafter *CWA & Member Wineries*), 98. See, generally, Robert A. James, “The California Wine Association Lawsuits: Was San Francisco’s 1906 Damage from the Insured Fire or the Uninsured Earthquake?” *San Francisco Argonaut* (Winter 2010), 74 (portions of present article published by San Francisco Museum & Historical Society).

⁷⁰*California Wine Association v. Commercial Union Fire Ins. Co. of N.Y.* (S.F. Superior Court) trial transcript (hereinafter *CWA trial transcript*), vol. 4, 2421 (Bancroft Library, UC Berkeley). The single San Francisco building with the largest insured loss was the Palace Hotel, at \$1.5 million, but this loss apparently was covered by numerous policies with dollar-for-dollar companies and does not appear to have been embroiled in litigation.



In the Lachman cellar, a California Wine Association property in San Francisco, only the metal hoops of the wine barrels remain in June 1906, two months after the fire. (Courtesy of the California History Room, California State Library, Sacramento, California)

of inventory, and eventually some of the insurers paid up. Its charismatic chairman, Percy Morgan, hung photographs of their checks on his wall, like the stuffed-head trophies of a big-game hunter. But several insurers denied coverage or offered "six-bit" compromises based on a percentage of the claimed loss. Morgan issued a classic rejection of a settlement offer: "Either you owe us money, or you don't. If you do, we want it all, with interest."⁷¹

Sutro filed a large number of separate suits on behalf of the wine association, one on each policy and totaling about \$300,000, against Commercial Union Fire Insurance Company of New York in San Francisco Superior Court. One case involving one of these policies was tried to a jury for three months, from January 27 to April 16, 1908, before Judge Frank J. Murasky. Justice in his courtroom was a little rough and ragged.

The insurer, represented by Van Ness and Wise, again had used the strong version of the exclusionary clause: "loss caused directly or indirectly by . . . earthquake . . .; or (unless fire ensues, and in that event, for the damage by fire only) by explosion of any kind." The lawyers did not rely solely on the argument based on the broken water mains, as they seem to have done in the *Pacific Union Club* cases.⁷² Perhaps they felt that the fires that destroyed the wine warehouses were, in the words of Justice Chipman in the *Pacific Union Club* state court opinion, "directly traceable" to the quake. For whatever reason, in the *California Wine Association* cases, these lawyers argued that each of the fires in question was started by the quake and "continuously and uninterruptedly" reached and destroyed the plaintiff's property.⁷³

Sutro argued that the damage to the wine association's property had been caused by one or more "incendiary fires" (in other words, fires deliberately set, by arson, a firebreak, or gunpowder) or by an explosion. He also alleged fraud or estoppel, in that this insurer was a New York corporation and New York insurance law required a policy labeled as "Standard Fire

⁷¹Peninou and Unzelman, *CWA v. Member Wineries*, 101; Christopher Carlsmith, "Percy Tredegar Morgan (1862–1920): Portrait of a Stanford Trustee," *Sandstone v. Tile* 28:3 (Fall 2004): 5.

⁷²The *Insurance Law Journal* editor, and perhaps other members of the defense bar, suggested with some delicacy that this theory was likely doomed to fail. See *Insurance Law Journal* 39 (1910): 729 ("in most of the so-called earthquake cases [the 'peculiar feature' of an argument based on loss of water supply] was at most, a subordinate point").

⁷³*California Wine Ass'n v. Commercial Union Fire Ins. Co. of N.Y.*, 159 Cal. 49, 51, 112 Pac. 858 (1910).

Insurance" to use standard language that did not include an earthquake exclusion.⁷⁴

At the end of the trial, Sutro convinced Judge Murasky to require the jury to answer twenty-seven "special issues, as the law terms them, or special questions of fact," in the form of special verdicts. While the general verdict form asked simply whether the plaintiff should recover, the special verdicts specifically addressed separate aspects of the insurer's legal argument. One asked whether of all the fires begun on April 18, there were some fires that were "not caused directly or indirectly by the earthquake." Two others collectively asked whether it was only one of these latter fires that reached and destroyed the wine association's warehouses.

The insurer apparently did not object to the form or content of these special verdicts. The legal issues associated with causation, even "indirect" causation, were thus encapsulated in the specific questions, factual in form, that were put to the jury. The jury returned all of these general and special verdicts in favor of the California Wine Association.

The trial verdict was received with great glee in the local press. The *Chronicle* proclaimed, "DECISION HITS WELCHERS HARD. Vast Sum Involved in Judgment Against an Insurance Company. TWO MILLIONS AT STAKE. Many Policy Holders Interested in Result of the Legal Battle." The paper stated that the "victory . . . is regarded by attorneys who represent persons holding claims against the so-called 'earthquake' companies as of far-reaching importance to the city," and that "the result of this case practically disposes of claims that may reach a million or two and means so much more money for property owners who carried insurance in the welching British companies."⁷⁵

*The Supreme Court California Wine Association Case:
The 1910 Affirmance*

The appeal to the California Supreme Court did not produce an opinion for two-and-a-half years. Van Ness and Wise sought to contest the special verdicts, by which the jury found that the fires that damaged the wine association's property were not "directly or indirectly" caused by the quake. When Sutro origi-

⁷⁴See c. 488, N.Y. Stats. of 1886; c. 690, N.Y. Stats. of 1892. Sutro proposed to introduce into evidence a telegram from the secretary of state of New York in Albany to prove the content of these laws. CWA trial transcript, vol. 3, 1087 (March 2, 1908).

⁷⁵*San Francisco Chronicle*, April 17, 1908.

nally had moved to include the special verdicts in the judgment roll, the trial judge had ruled they were not necessary, given the general verdict. Sutro moved again in the supreme court to add them to the transcript on appeal, and Van Ness and Wise now strenuously objected. Justice Henshaw held that the jury was required to answer the special verdicts, that section 670 of the *Code of Civil Procedure* declares that "the verdict" is automatically part of the roll, and that these special verdicts were "verdicts" for purposes of the statute.⁷⁶

This procedural nuance all but dictated the outcome of the appeal. The jury verdicts contained all of the legal findings for the insurers to be liable—the fires causing the damage were not "directly or indirectly" caused by the quake. After deeming the special verdicts to be part of the record, Justice Frederick W. Henshaw for the supreme court saw no issue of law remaining in the judgment. All Van Ness and Wise could do was complain about Pillsbury's conduct at trial, particularly Alfred Sutro's remarks in front of the jury.

Immediately before his closing argument, Sutro infuriated the defendants by telling the jurors that the insurance company had not deposited its half of the juror pay. Wise objected vociferously, noting that the share was established retroactively and that the defendant was not in default, and moved then and there for a mistrial. A presumably weary Judge Murasky, three months into the case, instructed the jurors to ignore the discussion altogether.⁷⁷

Sutro had reminded a witness of his prior testimony ("Did I ask you if you saw anything there?" "Did you tell me what you saw?"), something not usually done unless the witness first denies or contradicts his or her earlier statement. The trial judge overruled objections to these reminders because "the witness is a man who does not comprehend readily," and the supreme court saw no abuse of the judge's discretion. "Undoubtedly the questions were leading," Justice Henshaw said, "but they were in their nature harmless."

More entertainingly, Sutro crossed a rhetorical line in the midst of a factual question. The trial transcript on this point

⁷⁶159 Cal. at 52–54. It is unclear why the *California Wine Association* appeal went directly from superior court to the supreme court, now that there was an intermediate appellate court. *Pacific Heating*, at about the same time, progressed to the court of appeal before being heard by the supreme court. The larger amount in controversy in the *California Wine Association* cases may have been the reason.

⁷⁷CWA trial transcript, vol. 5, 3078 (April 13, 1908). Wise also objected to Sutro's comments to a reporter that appeared in the *San Francisco Examiner* of April 13, 1908, but no juror admitted to reading the story. This does not speak well for the *Examiner's* circulation.

has not been found but, with some literary license, might have read along the following lines:

Mr. Sutro. "When [did] the subject of the welching insurance companies that refused to pay the California Wine Association first [come] up?"

Mr. Van Ness. Objection as prejudicial and inflammatory, as mere conjecture and as opinion.

Mr. Sutro. Very well, I will withdraw the adjective "welching."

The supreme court held that the question was inappropriate, but that "the use of this epithet" did not call for reversal.

Tantalizingly, Justice Henshaw turned, at the end of the opinion, to the underlying question. Was the jury verdict—that the loss in question was insured—supported by evidence as required by law? "The more interesting consideration, to which no small part of the briefs of both parties is directed—namely, what in law constitutes a fire directly or indirectly caused by an earthquake—is, for the reasons already given, eliminated from this case. Whatever might be said about it would be purely dicta [language in an opinion not necessary for the holding], and the question may well be left for future consideration."⁷⁸

The insurer's strongest legal argument had apparently been subsumed in the special verdicts, leaving it without recourse on appeal. Had Sutro outfoxed his opponents by securing the special verdicts without objection? The last word in California on the critical issue in the 1906 policyholder cases was thus uttered by a jury, not a judge.

In any event, the last known reported California decision on a policyholder coverage claim based on the great earthquake and fire was entered on December 28, 1910. Soon the California Wine Association had its recovery, without compromise—in Percy Morgan's words, "all, with interest" (minus Pillsbury's fees, of course).⁷⁹

⁷⁸159 Cal. at 54, 55, 57.

⁷⁹Contribution and reinsurance disputes between insurers continued to wend their way through the courts. The decision in *Royal Ins. Co. v. Caledonian Ins. Co.*, 182 Cal. 219, 187 Pac. 748 (1920), for example, was issued fourteen years after the quake and fire. In another category altogether is *American Can Co. v. Agricultural Ins. Co. of Watertown, N.Y.*, 27 Cal. App. 647, 150 Pac. 996 (1915), where a policy expired on April 18, 1906—the very date of the earthquake and the fire in question—and the issue was whether the failure to pay the premium then due invalidated the coverage.

THE SIGNIFICANCE

Jack Sutro's explanation of the importance of his father's work for the California Wine Association has been passed down in the lore of their law firm to the present day: "That decision of the California Supreme Court enabled literally hundreds and even, perhaps, thousands of San Francisco property owners whose property was destroyed on that fateful day of 1906 to recover. Which I think is a pretty important case."⁸⁰ An earlier interview with Sutro refers in similar terms to the federal court *California Wine Association* case. He may have had the April 1908 state trial victory, the June 1910 federal trial victory, and the December 1910 state supreme court affirmance all in mind when he made these statements. Throughout this time period, the *California Wine Association* rulings are likely to have induced stubborn insurers to concede or settle with large numbers of remaining policyholders.⁸¹

Some \$235 million was eventually paid to San Franciscans by the insurers. "The property insurers saved San Francisco by covering more than 90 percent of the damage as fire damage at a time when earthquake damage was not insured."⁸² Since their investors were chiefly from the East Coast and Europe, a form of geographic wealth transfer contributed to the renaissance of the city.

Unfortunately, San Francisco missed a chance to rebuild along the natural contours of its hills using the grand designs long proposed by architect Daniel Burnham; the reconstruction took place using the checkerboard layout of streets heedless of topography. The state failed to upgrade its building code for many years. The city's coming-out party was the 1915 Panama

⁸⁰Sutro, "A Life in the Law," 35.

⁸¹The federal trial transcript (*CWA* trial transcript, vol. 6) refers to some seven other cases pending in the Northern District as of May 1910, which appear to have been disposed of immediately after the *California Wine Association* victory. They may have included *Whittier-Coburn Co. v. Alliance Co. Ltd. of London* (N.D. Cal. 1908), case 14193, a pending case evidenced by testimony in the National Archives and excerpted at <http://www.archives.gov/exhibits/sf-earthquake-and-fire/earthquake-fire.html>. The San Francisco Historical Society website features a photograph of a section of Clay Street still in ruins some time after the quake and fire. An online caption notes that the owners were waiting for insurance adjustments before rebuilding (<http://www.sfmuseum.org/eqphotos/sfweb/big/19060318.jpg>).

⁸²Harrington, "Lessons of the 1906 San Francisco Earthquake," 28. The 90-percent figure must refer to the total fire insurance policy face value, not the estimated \$500 million of total property damage.

Pacific International Exposition, subdued by the outbreak of World War I.

San Francisco continued to lose ground to Los Angeles for West Coast leadership, despite the reconstruction. As Simon Winchester notes, the city was rebuilt, but no one ever forgot that San Francisco had been leveled, while Los Angeles had not.⁸³ One wonders if New Orleans will reclaim its commercial prominence on the Gulf of Mexico after Hurricane Katrina or if, like Venice, a once-great mercantile city, it will hereafter focus on hospitality and tourism. Ensuing loss emerged as a major issue after Hurricane Katrina in 2005 and Hurricane Sandy in 2012, as insurers and insured disputed whether the flood exclusions in policies applied to the windstorm, water intrusion, mold, and other damage suffered.⁸⁴

The California Wine Association and Percy Morgan met sad but separate endings. The temperance movement and Prohibition spelled the demise of a centralized organization for large-scale commercial distribution of alcoholic beverages. The association was wound up, and the wineries regained their independent means of distributing grapes and wine for medicinal and sacramental purposes.⁸⁵

When Morgan retired in 1911, a grateful association board presented him with a "finely crafted double-barreled shotgun." A member of the "handsome brigade" of millionaires from each state participating in President Taft's 1909 inauguration, husband of a beautiful society debutante, father of two Princeton students, and owner of a grand Elizabethan Tudor mansion in Los Altos Hills, he was a man who seemingly had everything for which someone in his station could wish. But like Richard Cory, one night in 1920 Percy Morgan went home and "took his cherished shotgun and ended his life."⁸⁶

⁸³Winchester, *A Crack in the Edge*, 332–33.

⁸⁴Peter M. Gillon, "Concurrent Causation and Other Key Issues in Today's Disaster Coverage Cases," in *Recent Developments in Disaster Coverage Litigation: Leading Lawyers on Analyzing Disputes, Evaluating Insurance Policies, and Understanding Recent Litigation Trends* (Boston, 2011); "State Insurance Regulators Move to Protect Consumers After Sandy," *Claims Journal* (Nov. 7, 2013), <http://www.claimsjournal.com/news/national/2012/11/07/217027.htm>; Risk Management Solutions, *Hurricane Katrina: Profile of a Super Cat* (Newark, CA, 2005). One commentator even invoked Cuthbert Heath's waiver of defenses in 1906 (Insurance Scrawl blog, http://www.insurancescrawl.com/archives/katrinarita_related/index.htm).

⁸⁵Peninou and Unzelman, *CWA & Member Wineries*, 116–22.

⁸⁶*Ibid.*, 110–14; Carlsmith, "Percy Tredegar Morgan"; Edwin Arlington Robinson, *Richard Cory* (1897). Morgan left no suicide note, and his act might have been the result of the demise of his cherished California Wine Association, or a debilitating leg injury, or some other cause.

What of the insurers? At least twelve companies went bankrupt following the calamity.⁸⁷ The payouts on San Francisco 1906 policies wiped out the underwriting profits from American casualty line premiums collected over the preceding forty-seven years.⁸⁸ The insurers had to sell off their shares of companies to raise cash, which depressed stock prices beyond the initial reverse that the market suffered immediately after the quake. The large outflows of gold from London to California led the Bank of England to increase interest rates to induce the return of bullion to Britain, contributing to the Panic of 1907.⁸⁹

Reinsurers pressed for a clear omnibus exclusion of coverage for fires associated with earthquakes. European countries, the least in need of such a clause, complied. Americans and others on the Pacific Ocean's Rim of Fire objected.⁹⁰ Today's most used policy form nationwide provides coverage for what has come to be known as "ensuing loss": "We will not pay for loss or damage caused by or resulting from any of the following [excluded causes of loss—earthquake, flood, etc.]. But if an excluded cause of loss listed [above] results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss."⁹¹

⁸⁷Bronson, *The Earth Shook*, 115. Some of these companies were woefully undercapitalized. The Trader's Insurance Company held \$1.8 million in capital and surplus but had issued \$160 million in insurance, some \$4.6 million of it in San Francisco alone, and was immediately insolvent in 1906. Kennedy, *The Great Earthquake*, 249. *Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co.*, 166 Fed. 548 (N.D. Ga. 1909), a reinsurance case, stated that the defendant paid only 30 percent to its San Francisco claimants and was promptly deemed insolvent. Sullivan & Cromwell brought a case on behalf of M.J. Bradenstein & Co. (maker of MJB coffee) directly against reinsurers of its primary insurer, which had withdrawn from the American market and left no assets behind. *New York Times*, July 26, 1907.

In 1906, there was very little reinsurance, and what there was often was placed with other companies with San Francisco exposures. There was little regulatory oversight over reserve levels and underwriting practices, and no system of industry assessments to cope with insurer insolvencies.

⁸⁸Swiss Re, *A Shake in Insurance History*, 12; Kennedy, *The Great Earthquake*, 250.

⁸⁹Odell and Weidenmier, "Real Shock, Monetary Aftershock." In response, the United States permitted banks to issue currency backed by commercial paper rather than gold (*Aldrich-Vreeland Act*, c. 229, 35 Stat. 546 [1908]), paving the way for the *Federal Reserve Act* (P.L. 63-43 [1913]).

⁹⁰Tillmann J. Röder, *From Industrial to Legal Standardization, 1871–1914: Transnational Insurance Law and the Great San Francisco Earthquake* (Leiden, Netherlands, 2012).

⁹¹Harrington, "Lessons of the San Francisco Earthquake," 29 (referencing Insurance Services Office [ISO] form CP 1030 0402 [2001]).



Percy T. Morgan was the president of the California Wine Association and a steadfast litigant against the "six-bit" insurance companies that offered compromises or denied liability. (Courtesy of Gail Unzelman)

This language is quite helpful for insureds. Endorsements can limit the effect of the standard clause, however, and can raise questions as to the scope of the ensuing loss coverage.

In 1909, the California State Legislature enacted a standard fire policy that did not exclude earthquake damage. Today, the *California Insurance Code* prohibits exclusion of insurance risks from residential policies unless the policyholder is offered the opportunity to purchase coverage on standard terms. In order to encourage purchase of such catastrophic policies, the code excludes coverage of many earthquake losses from the base policy. But that rule does not "exempt[] an insurer from its obligation under a fire insurance policy to cover the losses of a fire which is caused by or follows an earthquake." No matter how much doctrinal confusion it has sown, the latter statute appears to follow directly from the principal rulings in the 1906 policyholder cases.⁹²

It suffices to say that disputes will likely arise any time that an excluded peril, such as an earthquake or flood, is followed closely in time by a covered peril. Risk managers and insurance professionals focus on risk prevention, design of policy language, procurement of layers of insurance and reinsurance, and other prospective techniques. But after some future act of God, Sutro's and Van Ness's successors, the insurance litigators, will be in court advocating their views of the meaning of policies and statutes drafted much like the clauses of a century ago. On that somber day, a judge will need to undertake the "future consideration" that was predicted by Justice Henshaw in his 1910 supreme court opinion.⁹³

CONCLUSION

The insurance coverage decisions arising from the 1906 San Francisco earthquake and fire were not one-sided affairs by which legal and public opinion uniformly disgorged insurance company assets to rebuild the city. Companies won some cases, even before presumably hostile San Francisco juries. With care if not consistency, the judges scrutinized the language and

⁹²*California Insurance Code* §10088.5. For an overview of the complex California insurance law on concurrent causation and "anti-concurrent causation," see Scott Johnson, "The Efficient Proximate Cause Doctrine in California: Ten Years after Garvey," *Journal of Insurance Coverage* 2 (Autumn 1999): 1.

⁹³Compare Arthur Allen Leff, "The Leff Dictionary of Law: A Fragment," *Yale Law Journal* 94 (1985): 1855, 1915-16. ("The late J.A. MacLachlan of Harvard used to define ['act of God'], impiously but usefully, as 'that which no reasonable God would do.'")

intent of the policies, the causal path between the earthquake and the damage, and the parties' behavior before, during, and after the casualty loss. General principles, canons of construction, and maxims of jurisprudence appear to have been used more as citation sources than as guides to reasoning. The opinions reflect the full range of topics that must be addressed after a natural calamity and provide helpful citations for insured and insurer alike.

At least three general lessons emerge from this review of the opinions. First, venue matters. Having the cases heard by juries and judges literally in the claimants' "home court" made a large difference.⁹⁴ Judgments in California for insurers, as in *San Francisco Savings* and *German Society*, and the *Borgfeldt* judgment in Germany for an insured, stand as shining counterexamples. The Ninth Circuit's opinion in *Richmond Coal* might be the case where a California jurist stretched to the utmost for the policyholder. One need only consider how the results might have varied had the claims been presented to courts or arbitrators in New York or Europe.

Second, facts matter. It is impossible to say in principle that Cuthbert Heath acted purely out of a spirit of generosity, or that the Hamburg-Bremen company always evaded its legal and moral obligations. Contrary to historians' attention to the words spoken or written, many of the loudest "waivers" had no quake-caused fire exclusions to waive, and even Hamburg-Bremen paid 98 or 100 percent of a number of claims. Any specific fire may or may not have been caused by the quake, so any given loss may or may not have been covered by a given policy. The *California Wine Association* cases most clearly stand for the proposition that the trial court is the arena where most cases were won or lost.

Third, advocacy matters. Although most reported decisions were in the policyholders' favor, the verdicts for insurers indicate that each of the victories—on both sides—was a "close-run thing." Clear-headed evaluation of a claim may help a party decide whether to settle or to litigate a coverage dispute. Attenuated subtleties such as artfully drawn special jury verdicts may secure or preserve a win. In high-stakes cases, clients must be steadfast and tenacious, and their lawyers must be vigilant and creative.

⁹⁴For a polite European insurance company perspective on this point, see Swiss Re, *A Shake in Insurance History*, 12. ("Improper, liberal and conflicting interpretations were thus made by many of those who had an interest in the loss settlement.")

APPENDIX

Known 1906 San Francisco Insurance Decisions

The following decisions involving fire insurance policies affected by the 1906 San Francisco earthquake and fire are published in the federal and state court official reports or described in selected newspaper accounts. Since nearly 100,000 claims were filed after the calamity, and since some of these decisions themselves refer to additional decisions with unnamed parties, the list is far from comprehensive.

- Levi Strauss Realty v. Transatlantic Fire Ins. Co. of Hamburg* (N.D. Cal. Sept. 14, 1906), reported in *San Francisco Argonaut* (Sept. 22, 1906) ("first insurance case in court"); *The Standard*, Sept. 22, 1906; *New York Times*, Sept. 15, 1906.
- Newburgh v. Transatlantic Fire Ins. Co. of Hamburg* (S.F. Superior Court Oct. 8, 1906), reported in *New York Times*, Oct. 9, 1906 ("the first decision to be rendered in the Superior Court").
- Bergin v. Commercial Union Assurance Co. of London* (N.D. Cal. Jan. 24, 1907), reported in *New York Times*, Jan. 25, 1907.
- M.J. Brandenstein & Co. v. Rhine & Moselle Fire Ins. Co. of Strasburg* (1906 or 1907), reported as an unsatisfied judgment for the plaintiff in *New York Times*, July 26, 1907, also reporting a new July 1907 filing in *M.J. Brandenstein & Co. v. Helvetia Swiss Fire Ins. Co.* (S.D.N.Y.).
- Baumgarten v. Alliance Assurance Co.*, 153 Fed. 301 (N.D. Cal. 1907).
- Henry Hilp Tailoring Co. v. Williamsburgh City*, 157 Fed. 285 (N.D. Cal. 1907).
- San Francisco Savings Union v. Western Assurance Co. of Toronto*, 157 Fed. 695 (N.D. Cal. 1907).
- Willard v. Williamsburgh City* (N.D. Cal. Nov. 13, 1907), reported in *New York Times*, Nov. 15, 1907.
- Baker & Hamilton v. Williamsburgh City*, 157 Fed. 280 (N.D. Cal. 1908).
- Board of Education of City & County of San Francisco v. Alliance Assurance Co.*, 159 Fed. 994 (N.D. Cal. 1908).
- People v. Di Ryana*, 8 Cal. App. 333, 96 Pac. 919 (1908).
- California Wine Association v. Commercial Union Fire Insurance Co. of N.Y.* (S.F. Superior Court April 16, 1908), reported in *San Francisco Chronicle*, April 18, 1908, aff'd, 159 Cal. 49, 112 Pac. 858 (1910).
- Williamsburgh City v. Willard*, 164 Fed. 404 (9th Cir. 1908), affirming verdict in N.D. Cal. (Nov. 13, 1907).
- Clayburgh v. Agricultural Ins. Co. of Watertown, N.Y.*, 155 Cal. 708, 102 Pac. 812 (1909).

- Richmond Coal Co. v. Commercial Union Assurance Co.*, 159 Fed. 985 (N.D. Cal. 1909), rev'd, 169 Fed. 746 (9th Cir. 1909).
- Pacific Heating & Ventilating Co. v. Williamsburgh City*, (Cal. App. July 26, 1909), reported in *San Francisco Chronicle*, July 27, 1909.
- Commercial Union Assurance Co. v. Pacific Union Club*, 169 Fed. 776 (9th Cir. 1909).
- After the federal *Pacific Union Club* decision was issued, twenty-four additional cases were disposed of in favor of the policyholders in the Northern District by Judge Van Fleet (*San Francisco Chronicle*, May 28, 1909).
- McEvoy v. Security Fire Ins. Co. of Baltimore*, 110 Md. 275, 73 Atl. 157 (1909).
- The *McEvoy* case quotes a decision in *Borgfeldt v. North German Fire Ins. Co.* (General Court of Hamburg, Germany), possibly the same as the case decided in Hamburg for an unnamed plaintiff against the same insurer on January 11, 1907, as reported in *New York Times*, Jan. 22, 1907.
- Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co.*, 166 Fed. 548 (N.D. Ga. 1909).
- Richmond Coal Co. v. Commercial Union Assurance Co.*, 169 Fed. 746 (9th Cir. 1909), rev'g 159 Fed. 985 (N.D. Cal. 1909).
- California Wine Association, M.T. MacDonald, Mt. Shasta Water Co., Baker & Hamilton v. Commercial Union Fire Ins. Co. of N.Y., Palatine Ins. Co., Alliance Assurance Co. et al.* (N.D. Cal. June 12, 1910), verdicts in thirty cases reported in *The Adjuster* 40 (June 1910): 197–98, and *San Francisco Chronicle*, June 13, 1910.
- German Savings & Loan Society v. Commercial Union Assurance Co.*, 187 Fed. 758 (9th Cir. 1910).
- Haas Bros. v. Hamburg-Bremen Fire Ins. Co.*, 181 Fed. 916 (9th Cir. 1910).
- Pacific Heating & Ventilating Co. v. Williamsburgh City*, 158 Cal. 368, 111 Pac. 4 (1910).
- Pacific Union Club v. Commercial Union Assurance Co.*, 12 Cal. App. 503, 107 Pac. 728 (1910).
- Pacific Union Club v. Palatine Ins. Co.*, 12 Cal. App. 515, 107 Pac. 733 (1910).
- California Wine Association v. Commercial Union Fire Ins. Co. of N.Y.*, 159 Cal. 49, 112 Pac. 858 (1910).
- Norwich Union Fire Ins. Soc'y v. Stanton*, 191 Fed. 813 (2d Cir. 1911).
- Borgfeldt v. Curry*, 25 Cal. App. 624, 144 Pac. 976 (1914).
- American Can Co. v. Agricultural Ins. Co. of Watertown, N.Y.*, 27 Cal. App. 647, 150 Pac. 996 (1915).
- Royal Ins. Co. v. Caledonian Ins. Co.*, 182 Cal. 219, 187 Pac. 748 (1920).

