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Is fortuity in the eye of the beholder?
Is it a necessary element of loss?

A Critical Examination of the So-called Nonfortuity Defense

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Although of ancient vintage, fortuity theory is experiencing a specious revival of sorts in current insurance discussions. Today, fortuity theory is being asserted by besieged insurers as a definitive defense against coverage under policies of virtually every stripe. However, such a strategy is unsupported by either historical or modern interpretations of fortuity theory.

Two contexts, in particular, have given rise to the use of a purported defense based on the absence of fortuity. Both involve significant risk situations that insurers did not foresee and that pose substantial exposures to the insurance industry.

- The first relates to claims for damages arising from environmental remediation requirements submitted pursuant to historical general liability coverage.

- The second involves claims for so-called "Millennium Bug" or Year 2000 (Y2K) remediation costs tendered pursuant to "sue and labor" provisions in first-party property policies.

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In both cases, insurers are threatened by the exposure and are, therefore, searching for any available coverage defense.

Fortuity theory, as discussed in this article and as asserted by insurers, contemplates a supposed requirement inherent to all insurance that coverage may attach only to losses that are "fortuitous." As considered here, fortuity theory stands alone. Various insurance clauses or state laws that incorporate fortuity-like aspects (expected and intended provisions, known loss doctrine, statutes, and the like) are, for purposes here, separate issues to be considered on their own merits.

Fortuity equals chance, which equals risk, which equals uncertainty, which equals fortuity.

This article will examine the history and functions of fortuity theory, with particular focus on recent efforts to craft new ways to deny coverage on this basis.

- The first section provides a general overview of fortuity theory — first examining its fundamental premises, then considering the role it plays within the insurance industry where it originated. Next, five scenarios are described, illustrating different factual applications that highlight the practical problems affecting applications of fortuity theory. Finally, there is an overview of fortuity theory as applied by the courts.

- The second section traces the historical limitations of fortuity theory in greater detail. It then considers modern treatments that have restricted its scope and applications.

- The third section explores outstanding ambiguities and limitations in fortuity theory.

- The article ends with the conclusion that fortuity theory does not support significant defenses against insurance coverage and that any new nonfortuity defenses are unlikely to prevail.

Legal Doctrine or Underwriting Guideline?

The historical origins of fortuity theory are hidden in the proverbial mists of time. Some say it accompanied the development of both the specified-peril and "all-risk" lines of insurance in 17th century England.[1] Others say it originated in maritime law, where all-risk coverage first emerged.[2] However, the concept underlying fortuity theory was undoubtedly discussed historically within the insurance industry in the context of underwriting principles as distinct from a rule of law. Therefore, in all probability, fortuity theory first emerged as an underwriting guideline, not as a legal precept.

Defining Insurable Risk

At root, fortuity theory reflects the basic notion that insurance is a risk-spreading instrument. Insurance is generally intended to protect against risk, not to provide a financing mechanism for certain and anticipated losses. In this context, the use of the word "fortuity" has been applied in an attempt to demark the types of insured situations that might be faced by a given policymaker.[3] Invoking this fundamental but overly simple principle, courts have from time to time recited a notion that fortuity is a basic requirement of an insurable risk.[4]

To a considerable degree, such a notion simply turns around a circular definition without gaining any meaning in the process. One dictionary defines "fortuitous" as "occurring by chance."[5] In turn, "chance" is defined as "something that happens unpredictably."[6] Similarly, "risk" can be defined as "the chance of loss or perils to the subject matter of an insurance contract."[7] Thus, fortuity equals chance, which equals risk, which equals uncertainty, which equals fortuity. Fortuity theory follows as an axiomatic but not particularly meaningful expression of the principle that an element of chance or uncertainty must be present to define insurable risk.

As always, the devil is in the details, and attempts to simplify and broaden that expression give rise to great potential for abuse. One area of potential abuse concerns the unfairness of implying an extracontractual requirement after the fact. The ability to undertake a search for an element of chance in a given insured situation, especially when undertaken retrospectively (or more to the point, after the premium has been collected), would, of necessity, give rise to the risk that insurers will attempt to escape coverage which might otherwise be appropriate.

The Role of Fortuity Theory

The essential nature of the fortuity doctrine can, in the first and best instance, be considered from the point of view of the insurance industry itself. It appears likely that the very notion of fortuity was crafted in the beginning not by courts, but by underwriters who discussed the concept in the context of selecting risks for coverage. When insurers assert, today, that fortuity is an inherent requirement of all insurance, it is instructive to measure that assertion against historical industry writings that described the doctrine.

Three general insurance textbooks are considered here, although many others could be cited. All three texts were written in the mid-1970s, at a time when the industry had not yet experienced the explosion of environmental claims that later ensued — and before industry representatives could understand the motivations that would evolve for expanding the fortuity doctrine to create a defense against coverage. All three texts were also found by the authors in the Insurance Library at the Lloyd's Building in London.

Textbook Definitions: One

The sixth edition of *Principles of Insurance* describes the concept of fortuity in the context of a discussion of criteria for insurability.[8] The treatise begins by describing seven criteria for insurability:

> The sad fact is that in order to operate a successful insurance plan, several broad criteria need examination: (1) a large group of homogeneous exposure units must be involved, (2) the loss produced by the peril must be definite, (3) *the occurrence of the loss in the individual cases must be accidental or fortuitous*, (4) the potential loss must be large enough to cause hardship, (5) the cost of the insurance must be economically feasible, (6) the chance of loss must be calculable, and (7) the peril must be unlikely to produce loss to a great many insured units at one time.[9] [Emphasis added.]

After setting forth the seven criteria (including, as the third item, the notion of accidental or fortuitous occurrence), the criteria are divided into those without which insurance is *impossible* and those without which insurance is *possible*:

> Among these criteria, a few are essential whereas most are only requisite. ... If a criterion of insurability is deemed essential insurance is impossible without it. ... If a criterion of insurability is considered a requisite, insurance is possible without it by substituting some other characteristic. ... Essential criteria in the aforementioned list are (1) and (7). The others may be considered requisite.[10]

Industry writing is not consistent with the present assertion that fortuity is inherently required.

Criterion number 3, the specification that an occurrence be accidental or fortuitous, is not deemed to be essential, but rather is identified as a criterion without which insurance is *not impossible*. The notion of accidental loss is, then, singled out specifically:

> The foregoing criteria of insurability *are not rigidly followed*. Cases are on record in which coverage is written in violation of one or more of them. *Insurers ... write coverage where the loss is not accidental*. ... These criteria must be viewed as the *optimum to achieve rather than characteristics to be met in every instance*.[11] [Emphasis added.]

The discussion of fortuity set forth in this 1976 textbook is, thus, not consistent with an assertion that fortuity is an inherent requirement of all coverage.

Textbook Definitions: Two

The textbook *Insurance Principles and Practices* discusses the concept of fortuity, but it does not ever identify fortuity or accidental nature as a specific requirement.[12] This text first notes that certain conditions are important: "In order that an insurance contract may operate equitably, produce the desired benefits, and be practical from a business point of view, certain conditions are *desirable*."[13] [Emphasis added.] The text lists six requirements, then sets forth the notion of fortuity without using the term directly. The notion is described in terms of preference, not requirement:

> It is *preferable* that the risk be such that the insured cannot himself produce the event insured against or increase the probability of its happening. At least he should have no incentive for so doing, for otherwise, moral hazard is involved in the contract. If this condition, however, were strictly adhered to, many forms of insurance would be prevented from adequately exercising their legitimate functions.[14]

The question of "elements of chance" is complex.

Finally, an acknowledgment that the "requirements" are not absolute is set forth: "For various reason, insurers often write risks that do not satisfy these six requirements."[15]

Textbook Definitions: Three

General Insurance, 9th Edition, describes five requirements for an insurable risk, but recognizes from the outset that the "requirements" are not strict:[16]

> In order to be considered insurable, a risk must substantially meet the requirements outlined below. Sometimes an insured risk *does not meet each of the requirements perfectly*, but when considered as a whole, the risk may meet the requisites adequately[:] (1) Importance, ... (2) Calculability, ... (3) Definiteness of Loss, ... (4) No Excessive Catastrophic Loss, ... *(5) Accidental Nature*.[17] [Emphasis added.]

The concept of "accidental nature," which might be viewed as a fortuity requirement, is described more specifically as a normative measure rather than as a strict requirement:

> *Accidental Nature*. Insurable risks must also *normally* be accidental in nature. Insurance is intended to cover fortuitous or unexpected losses. Intentional losses caused by the insured are *usually* uninsurable because they cannot reasonably be predicted, and payment for them would be against public policy for encouraging such actions as fraud or arson. Other losses are so common as to be expected rather than unexpected. Wear and tear and depreciation are examples.[18] [Emphasis added.]

The text then sets forth the fundamental truth that the "requirements," including accidental nature, are not absolute:

> The student should note that these requirements for an insurable risk *are not absolute*. Insurability is best described as a relative matter in which the insurable quality of the risk is determined by appraisal of all the requirements together. ... Many common kinds of insurance *do not perfectly meet each of the requirements*. ... Careful analysis in applying each of the requirements for an insurable risk to a particular peril shows that few, if any, are "perfect" insurable risks. Most are only relatively good ones, and some are fine examples of bad ones.[19] [Emphasis added.]

Again, industry writing is not consistent with the present assertion that fortuity is inherently required and that coverage must be denied, absent fortuity.

Desirable, Not Essential

More examples could be cited to illustrate that the insurance industry perceives fortuity as a desirable, but not necessarily essential, underwriting element. These selections illustrate an awareness of pragmatic concerns from the industry that spawned fortuity theory at the outset. In the final analysis, the insurance industry does not view fortuity as an essential underwriting element of insurance.

Hypothetical Illustrations

To shed light on problems with application of fortuity theory, it is meaningful to consider several hypothetical situations. Each will illustrate one or more aspects of the problems that arise when fortuity is considered. Five hypothetical contexts are set forth. In each, the concept of "an element of chance" is examined. The five examples will be discussed further in the course of this article.

Scenario One: The Impoundment

Assume that during the time period from 1950 to 1960, an industrial complex impounded process wastewater in an unlined pond. The process water contains heavy metals, including soluble forms of arsenic and zinc. The pond leaks, and process water bearing arsenic and zinc are lost to the ground. Operation of the pond is consistent with state-of-the-art industry practices and is wholly legal at the time.

In the late 1980s, governmental authorities study the site and find arsenic and zinc in groundwater, soil, and surface waters fed by artesian flow from groundwater. Fish populations are diminished in the water sources. Nearby residences draw water from wells. Cleanup is very expensive.

The question of "elements of chance" is complex. While the decision to store process wastewater in an unlined impoundment was certainly known and intended and the loss of water to the ground may well have been known, many elements of chance are, nonetheless, apparent. The mobility of each contaminating element may have been uncertain. The distance the elements would travel and the extent of damage done may have been dependent on unknown geological and hydrological conditions. Concentrations resulting in groundwater may have been uncertain. Persistence may also be uncertain. Whether the elements will still be present in toxic concentrations 10 ... or 20 ... or 30 ... or 40 years later may be utterly uncertain.

Issues relating to resultant liability are also uncertain. At the time of the operation of the impoundment, there was no certainty that any liability would ever result from the then-legal operation. Laws requiring cleanup did not exist, and there was no certainty at the time that cleanup would ever be required. If one assumed that governmental authorities would eventually require remediation of the operation (an uncertain assumption), there would still be great uncertainty as to when such a requirement might be imposed. Moreover, the cost associated with such a requirement would be a matter of utter uncertainty.

Scenario Two: The Taxi Fleet

Assume that a fleet of taxicabs operates in a large metropolitan area with crowded streets and poorly regulated traffic. The owners of the taxicab fleet note that each day, three or four cabs are involved in accidents in varying degrees of severity. They then seek automobile coverage, both for first-party collision and for third-party liability. A policy is issued, although relatively high deductibles are applied to both coverages.

Across the fleet of taxicabs, there is virtual certainty, evidenced by experience, that there will be some incidents every day. When an accident happens, can it be said that the accident was known and, therefore, not fortuitous? As to any individual vehicle, there is no certainty. On an actuarial basis, some loss quantum is known and certain. On a case-by-case basis, there is an element of chance. And as to any event, there is uncertainty about the extent of the loss.

The underwriter, applying notions of fortuity on an actuarial basis, applies a large deductible to exclude the many smaller losses, as they are statistically probable. As for the larger, more "chancy" losses, coverage attaches.

Even when an event is certain, it may be insurable where the timing is uncertain.

Scenario Three: The Life Insurance Policy

Assume that a 55-year-old man undertakes estate planning and elects to purchase a $500,000 life insurance policy. The insurer requires a physical examination. The medical report determines that the man has hypertension, controlled by medication. The insurer quotes a premium, and the life insurance policy is issued.

The insurance issued pays in the event of the man's death. There is one clear and unequivocal certainty at play: The man will eventually die. At first blush, the insurance is being issued with regard to an event certain to happen. Does this violate a fortuity requirement? The question becomes more complex when one considers statistics that demonstrate the increased mortality associated with high blood pressure. If there is such a fortuity requirement, it is not inconsistent with the entire notion of life insurance. What is uncertain is the timing of the event. Insurers know the man will die, but don't know when. Hypertension does not change that uncertainty. The insurers collect the premium and earn money on that premium so long as the man is alive.

There is an element of chance with regard to the timing of the payout, and it is that risk which underpins the coverage. The risk relates to the time value of the premium money. Even when an event is certain, it may be insurable where the timing of the liability is uncertain.

Fortuity is a term that, by its very nature, defies meaningful definition.

Scenario Four: The Hotel Fire

Assume that a fire occurs at a large hotel in a destination resort city. Nearly 100 people are killed, and over 700 more are injured. Lawsuits are filed within the week against the owners of the hotel, and potential liabilities loom large.

The owners of the hotel approach several large, sophisticated insurers and seek insurance coverage for the lawsuits that will follow. Insurers set very large deductibles, but issue a policy covering any liabilities that may result from the fire.

One of two truths must follow: Either there is no fortuity doctrine, or fortuity theory is consistent with the issuance of coverage after the fire has already occurred and the lawsuits have started. Are there elements of chance that are inherent in the situation after the fire? First, although lawsuits have been filed, there are still defenses, and it is not certain that the defenses will not prevail. The fire is certain, but the fact of liability is not certain. Second, the amount of the liability is not certain. There is still an element of chance that attaches to the amount of the liability, if any. Thus, if there is a fortuity requirement, it is still possible to identify elements of chance after the fire has happened. Where an event is known and certain, there may still be uncertainty and an element of chance with regard to whether liability will follow and the extent of any liability.

Scenario Five: The Software Damage

Assume that a large, multinational bank institutes a computerized system of account management beginning in 1960. State-of-the-art computer software is purchased at that time, but because of the state of the computer industry, software must be custom-written. A coding convention is used, designed to conserve scarce processing resources in the computer operation. The convention involves abbreviation of the date function using a two-year date reference (only the last two numerals of the annum referent rather than all four).

Over the years, as computer technology advances, the system is updated, and additions are installed. As the end of the century approaches, it becomes clear that the two-digit year abbreviation will cause confusion within the processor when the year 2000 arrives. While nobody is sure what result will follow when the processor encounters this ambiguity, it is deemed prudent to correct the problem in advance. The cost of remediation is steep.

Identification of the various aspects of certainty and uncertainty — what is known and what is not known — is particularly confusing and confounding in this context. There may be no doubt that the decision to employ a two-digit year abbreviation was intentional and known. This may be true both at the point of initiation of the software and at various points of software development and evolution thereafter. Beyond that, little can be said to be clear. It is possible (although not certain) that any software engineer, at the outset or during the intervening years, thought about what would happen in the year 2000. In a fast-moving industry, where each year has seen significant development of both software and hardware, there cannot be any certainty that a software decision would survive to the end of the millennium.

Hardware and software developments, when viewed prospectively, are a matter of the flow of science and the chance of discovery. If any problem has resulted from the two-digit year abbreviation surviving to the year 2000, the cost of solving the problem could not have been foreseeable or known. Notwithstanding the clarity of the decision to abbreviate the year entry, the situation commencing when the software was put in place and evolving through the intervening years displays ongoing elements of chance.

Five Scenarios, One Theme

The above five scenarios illustrate various aspects of the fortuity issue. As they indicate, the notion of fortuity is difficult to apply conclusively in factual settings. The scenarios and their implications will be explored more fully in the following discussion.

Fortuity as a Legal Doctrine

Difficulties with treating fortuity as a legal element ultimately stem from the elusive nature of fortuity itself. In fact, fortuity is a term that, by its very nature, defies meaningful definition. Inherent difficulties with the elusive concept of fortuity are underscored by certain shortcomings that can be identified at the outset in the concept of fortuity as applied by courts in the legal setting.

Three Basic Difficulties

First, the legal determination of fortuity involves complex questions of mixed fact and law. This can be illustrated, for example, by Judge Hand's rather obfuscatory attempt to clarify the issue:

> [T]he characterization of a loss as "fortuitous" is a legal conclusion to be distinguished from the facts upon which it is based.[20]

Judge Hand's attempted clarification merely underscores the difficulty of treating fortuity as a legal element since the analysis involves intertwined components of fact and law.

Second, courts frequently invoke the word "fortuity" in phrases such as "mere fortuity" involving chance happenings under unpredictable circumstances.[21] In such cases, the phrase "mere fortuity" is used as a basis for avoiding otherwise applicable law. Judicial invocations of fortuity under these situations suggest the difficulty with using fortuity as grounds for legal doctrine. In fact, fortuity in general is treated as a rogue element, disabling potential legal operations on most occasions where it appears in case law. Because of its random, unpredictable nature, fortuity is not generally viewed as a firm foundation upon which to base legal consequences.

Third and last, on a conceptually related front, fortuity is often used as a key element defining illegal games of chance or lotteries. Fortuity is also an essential characteristic of fraudulent insurance schemes, prohibited under law.[22] It is precisely the random and unpredictable fortuity of these schemes, untied to any system of justifiable recompense, that renders them abhorrent to public policy and, hence, illegal. The element of fortuity is a key factor defining such illegal operations.

An Elusive Concept

Difficulties of this sort deepen when the fortuity concept itself is promoted as the subject of legal arguments used by insurers to deny coverage. The imprecision and unpredictability of fortuity make it a particularly elusive standard by which to attempt to measure the legal sufficiency of a contractual claim.[23] As a result of its imprecision, the concept of fortuity has been improperly interpolated into a variety of similar, but distinctly different, insurance contexts, including discussions of accidents and occurrences; expected and intended exclusions; and the known loss, known risk, and loss-in-progress doctrines. However, the most virulent attempted iteration of fortuity is its appearance as an implied exclusion in insurance contracts.[24]

Fortuity analysis is properly incorporated into an insurance contract at the underwriting stage.

Lacking a firm substantive basis in fact or in law, fortuity discussions necessarily lack a strong analytical framework.[25] Later jurists, in analyzing and applying fortuity theory, have found little firm precedent upon which to stand. As a result, modifications and variants in judicial interpretation of fortuity theory have further weakened its residual value as legal precedent.

In an effort to render the elusive fortuity concept more uniform and manageable, some modern courts have applied the *Restatement of Contracts* definition of general contractual fortuity. The *Restatement* definition states:

> A fortuitous event … is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, such as the loss of

a vessel, provided that the fact is unknown to the parties.[26]

In the first instance, the *Restatement* did not purport to create a rule of insurance; the *Restatement* addresses only a general contractual context. Ultimately, this effort at standardization has invoked an additional range of complicating factors in fortuity analysis that have undermined any continuing viability of the nonfortuity defense to coverage.[27]

Fortuity theory lacks historical foundations in state law that otherwise generally governs insurance disputes.

Probability, Not Doctrine

Defining fortuity for insurance purposes is more properly handled as a matter of statistical probability than legal doctrine.[28] At root, fortuity stands for the notion that an event is unpredictable, with a possibility of its occurring in a certain period lying in the range somewhere between 0 percent and 100 percent. In actuarial terms, fortuity analysis is properly incorporated into an insurance contract at the underwriting stage. When issuing policies, insurance underwriters direct their best efforts at "reducing risk by combining a sufficient number of exposure units to make their individual losses collectively predictable."[29] In this context, the determination of an insurable risk involves an underwriting decision based on the statistical evaluation of categories of risk. Thus, fortuity analysis is properly incorporated into the underwriting process before a fortuitous loss has become a reality.[30]

In summary, although fortuity is often cited as a fundamental underpinning of insurance law, it is more properly treated as a matter of underwriting preference. In the legal or theoretical setting, the notion of fortuity itself is problematic, embodying, as it does, reference to chaotic and unpredictable elements of chance ill-suited to play a substantive role in legal theory. The attempt to convert what ought to be one of many considerations evaluated at the point of the underwriting decision into a retrospective measure of coverage does not work. Developments of fortuity theory in case law bear this out. Determining an acceptable level of fortuity as a factual matter is more appropriately handled using the sophisticated tools of statistical probability prior to contracting than as *de facto* legal reasoning about fortuity theory. As a result of these limitations, although fortuity will undoubtedly continue to play a role in defining insurable risk from an actuarial standpoint, it does not offer a viable and significant basis to defend against insurance coverage.

Historical Developments

Certain parameters and limitations of fortuity theory can be traced to the infancy of the European insurance industry and subsequent developments on the North American continent. Other limitations have arisen under modern interpretations of fortuity theory. This section briefly traces historical applications of fortuity theory and subsequent devolvement of fortuity theory under modern legal analysis.

Historical Parameters

At the time when fortuity theory first emerged in legal analysis, insurance policy provisions were written on an *ad hoc* basis, standard contracts had not yet been developed, and regulation of the insurance industry was nonexistent.[31] In this undeveloped and uncontrolled insurance market, fortuity represented the basic principle that insurance is designed to indemnify the insured against risks, not certainties. In embodying the "risk" requirement, the doctrine protected the public, on one hand, against policies issued in an "outbreak of gambling" without offering any meaningful protection for the insured.[32] On the other hand, it guarded against recovery on policies subject to fraudulent misrepresentations or deliberate concealment by the insured, or for losses intentionally caused by the policyholder.[33]

"All-Risk" Context

Although the historical development of fortuity theory is a matter of some debate, it apparently emerged in the context of "all-risk" types of first-party coverage.[34] The "all-risk" type of policy evolved in the marine context because of difficulty enumerating the "perils of the sea" that might damage cargo during shipping.[35] "All-risk" coverage expanded with the development of so-called "inland marine" property policies to cover the shipment of goods further inland by rail.[36] In contrast, the primary risk to property on land in the early days of insurance was fire. To meet the need to insure this type of policy, specific-perils property insurance developed as a counterpart to "all-risks" marine policies, apparently also in 17th century England.[37]

"All-risk" policies are first-party contracts, designed to protect specific property under the ownership or control of the policyholder. In this context, fortuity theory endorsed the basic concept that an insured party cannot intentionally cause a loss or fraudulently conceal a known or inevitable loss in order to collect insurance proceeds.[38] This concept is appropriate in the context of first-party coverage where insured property is under the control of the insured, which creates the risk of intentional manipulation by the insured. However, it is not clear that this concept is meaningful in any but the first-party context. It is also not clear that the concept adds value where there is no possibility of intentional manipulation based on the prospect of fraudulent or contrived action intended to beget coverage.

Federal Context

Marine policies, under which historical fortuity case law developed, are governed by admiralty and maritime law.[39] Although the U.S. Supreme Court has ultimate jurisdiction in this area, it has largely deferred to the federal courts to which Congress has accorded admiralty and maritime jurisdiction.[40] Unlike other areas of admiralty law, Congress has not enacted legislation to govern marine insurance law. "As a result of this lacuna [gap], marine insurance policies are governed by state insurance regulations, unless federal courts have fashioned an admiralty law on point, or unless a need for such a rule exists."[41]

Consequently, federal courts have exercised primary jurisdiction in cases invoking the fortuity theory under marine policies over the past century.[42] Indeed, the historical roots of the fortuity theory in the context of marine "all-risk" policies is so strong that many authorities consider the fortuity theory to be purely a "creature of federal law."[43] To the extent that this is so, fortuity theory lacks historical foundations in state law that otherwise generally governs insurance disputes.

As legal precedent, the historical decisions invoking fortuity theory are extremely limited in actual scope and prospective application. Perhaps the earliest U.S. Supreme Court precedent for fortuity theory is the 1887 admiralty decision, titled *Orient Mutual Insurance Co. v. Adams*.[44] In *Orient*, because the steamer captain did not follow the "custom of the river," his vessel was carried over a waterfall and crashed on a pier. When the captain sought coverage for the damages, the insurer argued that losses caused by the captain's "misconduct" were outside the realm of fortuity. The court stated, "the misconduct of the master, unless affected by fraud or design, would not defeat a recovery on the policy."[45] The court continued, "[T]he insured, so long as he acts with fidelity, is answerable neither for his servants nor himself."[46] The primary concern inherent to this view is one of fraud. Again, the first-party context, where there is potential for abuse, supports the need for such a notion where other contexts do not.

Orient is rarely cited as authority for fortuity theory, the courts having found the decision problematic. In *Youell v. Exxon Corp.*, the court stated that "*Orient* is equivocal as to ... whether a marine insurer is liable under a policy for losses caused by an insured's recklessness."[47] On the one hand, "*Orient* affirmed ... that the insurer is not liable for damages that occur because the master acted 'designedly or recklessly.'"[48] On the other hand, "*Orient* also stated the insurer is liable for all losses except those caused by the master's 'fraud or design.'"[49] In light of these conflicting considerations, the *Youell* court concluded, "We cannot reconcile these two statements, for, at least in modern legal parlance, 'recklessness' is different from both fraud and design."[50] This ambiguity suggests why the case is rarely cited as legal precedent for fortuity theory.

The British Influence

A British House of Lords decision is more frequently cited by U.S. courts as the "leading case on the subject."[51] In *British and Foreign Marine Ins. Co., Ltd. v. Gaunt*, policyholders sought coverage under their "all-risk" marine policies for a damaged cargo shipment.[52] The court ruled, "In order to recover under an 'all risks' policy the assured must prove affirmatively some casualty or fortuitous occurrence."[53] Although the court allowed the insured to recover, the recorded opinions of Lords Birkenhead, Finley, and Summer "provide the first comprehensive statement of the fortuity theory and its connection with the basis of all-risk coverage."[54] Concerning the fundamental requirement of fortuity in a first-party context, Lord Birkenhead observed:

> In construing these policies it is important to bear in mind that they cover "all risk." These words cannot, of course, be held to cover all damage however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies. There is little authority on this point, but the decision … in *Schloss Brothers v. Stevens* … states the law accurately enough. … [T]he words "all risks by land and water" as used in the policy then in question "were intended to cover all losses by any accidental cause of any kind occurring during the transit. … There must be a casualty." Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty.[55]

This 1921 pronouncement by the British court on the principle of first-party fortuity, though sometimes cited by U.S. courts, cannot be considered binding authority or persuasive precedent. Its elucidation of fortuity theory is of discretionary value at best. The fact that it is cited as a landmark first-party fortuity decision rather indicates the dearth of fortuity case law in the United States.

Few cases today actually find an absence of fortuity so as to deny coverage on that basis.

As precedent, the *Gaunt* decision must be recognized as having very limited reach. The distinction between a loss (or damage) and ordinary depreciation may be well-taken. It must not, however, be unduly extended. The exclusion of wear and tear is a discrete concept, properly limited to a situation where the loss is economic and not in any sense episodic or active. Taken to an extreme, the concept of exclusion of wear and tear would preclude coverage under life insurance policies, where one experiences the ultimate in "depreciation." Moreover, wear and tear, or depreciation, may also not constitute a loss or damage. Policy terms defining the trigger of coverage as an "accident" or an "occurrence" would be expected to define away any coverage for depreciation without reference to a concept of fortuity.

Latent Defect, Not Fortuity

A U.S. case sometimes cited as authority on fortuity theory is *Mellon v. Federal Insurance Co.*[56] That case involved damage to two boilers on a steamship. At issue was a marine policy insuring against "the perils … of the seas, … and all other perils, losses and misfortunes which have or shall come to the hurt, damage or detriment of the said ship."[57] Judge Hand interpreted the perils clause as an "all-risk" clause and found that "the libelant has discharged his burden when he has proved that the loss was due to a casualty and was caused by some event … covered by the general expressions of the policy [citing *Gaunt*]."[58]

Judge Hand allowed coverage only for the boiler that had exploded, finding the damages sustained by the leaking boiler might have resulted from latent defects in the boiler, instead of being purely fortuitous.[59] *Mellon* thus invoked an aspect of fortuity theory holding that latent defects in insured chattel do not give rise to an insurable risk. As with the exemption for ordinary wear and tear, latent defect is a discrete concept of limited application.

Inherent Vice, Not Fortuity

Other historical cases frequently cited as precedent for the fortuity theory are similarly limited in factual scope and application. One such case is *Chute v. North River Insurance Co.*[60] *Chute* involves the related "inherent vice" doctrine.[61] At issue was a $2,000 loss from the cracking of a precious opal. The policy covered "jewelry … against all risks of loss or damage during transportation (including all risks of loss or damage caused by breakage, fire and theft) or otherwise."[62] The policyholder admitted that the crack was due to an intrinsic defect in the jewel, and the court found that the insurer was not liable for the loss, stating:

> Plaintiff purchased and defendant furnished indemnity against loss or damage from fortu-

> itous and extraneous circumstances rather than warranty of the quality and durability of chattels. … Because the policy must be considered as one against damage from fortuitous and extraneous risks, it is not permissible to resort to an ultraliteral interpretation which will convert it into a contract of warranty against loss resulting wholly from inherent susceptibility to dissolution.[63]

Although "inherent vice" was historically a fairly important aspect of first-party fortuity theory, this aspect of the theory has deteriorated under modern analysis. In large part, this deterioration has followed the adoption of the definition of fortuity from the *Restatement of Contracts*.[64] The following section discusses developments under modern interpretations of fortuity theory in greater detail.

Subsequent Legal Devolvement

Under modern jurisprudence, "the burden of demonstrating fortuity is not a particularly onerous one."[65] Since *Gaunt* and *Mellon*, "courts have consistently paid lip service to the concept [of fortuity], while finding a variety of reasons to rule in favor of the insured."[66] Few cases today actually find an absence of fortuity so as to deny coverage on that basis. Furthermore, those cases that can be "cited in support of any defense bottomed on the doctrine are often less than models of legal reasoning."[67] As the following section discusses, any nonfortuity defense today is largely a specious argument that cannot be sustained under modern legal analysis. This section generally examines developments in fortuity theory that have limited applications of a possible nonfortuity defense to insurance coverage. The two key developments discussed involve application of a subjective standard and the concurrent cause doctrine in the context of fortuity theory.

Subjective vs. Objective Standard

Traditionally, an objective standard was applied to determine whether or not a loss was fortuitous. However, modern courts have increasingly applied a subjective approach. Courts' use of a subjective approach results in a *de facto* deferral to the policyholder's point of view. As this section explores, the change from the historical objective approach to the modern subjective approach has essentially overcome any viable nonfortuity defense to insurance coverage.

The historical approach to determining the fortuitousness of loss focused on whether the loss resulted from an objective characteristic of the insured property that, therefore, took the loss out of the insured "all-risks" category. Thus, for example, in *Gulf Transportation Co. v. Fireman's Fund Ins. Co.*, the court stated:

> Whether the assured were ignorant of the unseaworthiness of the ship or not … makes no difference; if the ship was not, in fact, seaworthy at the outset of the adventure, … that state of things never existed which was the foundation for the underwriter's promise, and he subsequently can never be bound thereby.[68]

The parties' subjective knowledge of any defective condition at the time of contracting was irrelevant to the objective determination of whether an inherent defect existed in the insured property.

Courts' increasing use of a subjective standard introduces a state-of-mind requirement into fortuity analysis.

Increasingly, however, the traditional objective rule is giving way to a subjective standard examining the policyholder's state of mind to determine whether or not a loss is fortuitous. Under this approach, "[I]t matters not whether loss was a physical certainty, but only *whether the insured was aware that the loss would occur*."[69] Primarily, the subjective approach derives from the fortuity definition supplied by the *Restatement of Contracts*, which states: "A fortuitous event … is an event which, so far as the parties to the contract are aware, is dependent on chance."[70]

Courts are also basing their use of a subjective standard on other legal reasoning. One rationale involves coverage for negligent acts, generally considered fortuitous, whereas willful acts are not.[71] For example, an admiralty law treatise on marine policies states, "What is covered is not any loss that may happen on the sea, but fortuitous losses occurring through extraordinary action of the elements at sea, or any *accident* or *mishap* in navigation."[72] [Emphasis added.] Some courts reason that applying an objective standard would result in noncoverage for the policyholder's negligence, "the very protection the policyholder attempts to acquire through purchase of an insurance policy."[73]

Other courts are basing their use of a subjective standard on express policy language that "speaks of the expectations of the insured, not those of a reasonable person."[74] However, this reasoning is based on an express policy exclusion for losses expected or intended by the insured, rather than on any "implied" fortuity theory. Thus, it cannot be said to pertain to "pure" fortuity theory, *per se*, although it clearly reinforces the consistent trend toward a subjective standard in fortuity analysis. In its place, it establishes a *de facto* test that looks at whether the policyholder was subjectively aware that the loss was certain to occur during the policy period.

Regardless of the reasoning used, courts' increasing use of a subjective standard introduces a state-of-mind requirement into fortuity analysis. Since insurers presumably would not insure an inevitable loss, the focus under this approach necessarily shifts to whether the policyholder was aware of an inevitable loss at the time the insurance contract was formed.[75] Thus, the modern approach eliminates the fictional "reasonable person" standard employed under traditional fortuity analysis.

Like the fortuity theory itself, the subjective standard has been employed primarily in the first-party policy context in which it developed. For example, in *Employers Casualty Co. v. Holm*, the Texas Court of Appeals considered whether an inherent defect in the insured property, discovered after the damage occurred, meant the loss was not fortuitous. Reciting the *Restatement of Contracts* definition, the court found the damage at issue was fortuitous, stating, "So far as the parties were aware at the time the policy was issued, any loss such as that sued for herein, would be dependent upon chance."[76]

Federal Application

In an instructive set of cases, the Third Circuit reversed a federal district court's application of the traditional objective rule in favor of the subjective *Restatement* approach. The cases concerned business interruption losses arising from certain casualties at the company's bauxite mining and processing facility. The lower court found that a loss was nonfortuitous due to the fact that the machinery became damaged because it was incorrectly designed for its intended use. The district court applied the traditional objective approach, found that design defects made the equipment failure inevitable, and denied coverage. In the words of the district court:

> A non-fortuitous loss due to an inherent vice, defect or infirmity, is not covered by a contract of insurance. … Public policy requires that this be so, for insurance policies are designed to cover risks, and implicit in the concept of risk is chance and uncertainty. If it is inevitable that there will be loss, whether by the insured's own misconduct or by the inherent nature and qualities of the object of the insurance, it is against public policy to insure against the inevitable loss.[77]

On appeal, however, the Third Circuit Court reversed. In attempting to predict Pennsylvania law on this point, the court noted that the *Restatement* definition is consistent with Pennsylvania's definition of an accident, stressing its unplanned and unintentional nature. The court found it would be inappropriate to cause the insured to suffer a forfeiture on the basis of hindsight when the insured thought, and the parties agreed at the time of contracting, that only a risk of loss was involved.[78]

Limited Viability

The only viable defense that can be raised under the subjective standard relates directly to the notion that, "[u]nder the fortuity requirement, there can be no liability insurance coverage for property damage that the insured *knows about* when the policy is issued."[79] [Emphasis in original.] The usual remedy in such cases is "rescinding the entire policy on grounds of fraud or misrepresentation."[80] The limited aspect of fortuity theory premised on evidence of fraud or misrepresentation continues to offer a viable defense today against coverage when preexisting, known losses were concealed or undisclosed.[81]

In summary, the subjective standard has undermined the viability of any continuing fortuity defense in the context of insurance law. The subjective approach focuses on whether the policyholder was aware of the certainty of loss. Such a standard is easily met by policyholders; in fact, "virtually any loss can be held to be fortuitous under the modern rule."[82] Under the subjective standard, absent evidence of fraud or misrepresentation, it is virtually impossible to prove a loss was nonfortuitous. It is scarcely surprising, therefore, that the modern subjective standard has been characterized as "digging the grave of the fortuity doctrine."[83]

Concurrent Causation

Yet another development is concurrent causation:

> If cases espousing the modern rule can be characterized as digging the grave of the fortuity theory, then a collateral development may in fact bury it. Even if a particular loss could be shown to be nonfortuitous, the insurer would still face an uphill battle. The reason lies in a second development of even more devastating significance for the insurance industry as a whole: … the concurrent cause doctrine."[8]

This final development in fortuity theory has further limited the continued viability of any nonfortuity defense under modern case law. The concurrent cause doctrine has been described as follows:

> This theory, with its genesis in third-party liability principles, is that all potential concurrent proximate causes of a loss must be identified; if any of these causes is not specifically excluded, coverage is available. Under this theory, an insured may recover on an all-risk homeowners policy even when the cause of loss is specifically excluded, so long as there is present some other contributing cause which is not specifically excluded.[85]

In determining whether a policy covers a given loss, the majority of courts will look to the proximate cause of loss to determine whether coverage is available. When two or more causes combine to cause the loss, some of which are insured and some of which are not, the loss is not insured unless the covered cause is the predominant efficient cause of the loss.[86]

Under the modern subjective standard of fortuity theory, the concurrent cause doctrine has had relatively little impact to date because application of the subjective standard alone is "generally sufficient in and of itself to establish that any particular loss is legally 'fortuitous.'"[87] However, at least one fairly recent decision has held that a loss was fortuitous purely because of the concurrent cause doctrine itself. In *Mattis v. State Farm Fire & Casualty Co.*, damage to a home was caused by a combination of factors, including earth movement and human negligence.[88] The court found that this very combination of causes made the loss uncertain and, hence, fortuitous. The court's opinion stated, in part:

> The cause of loss was a combination of natural and human failure. … [I]t is not possible to conclude that absent one cause the other cause would have by itself brought about the loss. It is this that makes the loss fortuitous and, therefore, an insurance risk.[89]

Thus, under this interpretation of the concurrent cause doctrine, whenever any combination of causes contributes to loss, that unpredictable combination of causes in itself makes the loss unforeseeable and, hence, fortuitous. This very broad interpretation may well spell the ultimate demise of the fortuity theory in cases involving multiple causation factors — in other words, a majority of cases.

Outstanding Ambiguities

The fortuity theory is limited in significant ways because of key uncertainties pertaining to its potential application. To some extent, at least, the limited fortuity theory applied by the insurance industry itself and by the courts is a surrogate for these underlying perplexities. This section explores several key ambiguities in fortuity theory (suggested in the scenarios outlined above) in greater detail, together with theory implicating these concerns.

Exploring the Meaning of Fortuity *Per Se*

The first set of ambiquities arises from the both the timing and the amount of a given loss.

Timing of Loss: When Is Loss Fortuitous?

A key problem area in fortuity analysis involves what might be called the timing of a loss. This issue is illustrated by the life insurance scenario described above: Although everyone will certainly die, the exact timing of a person's natural death is unknown in advance. From an actuarial standpoint, however, the probability of death can be predicted for a given category of policyholders, and life insurance policies are issued with premiums based on the statistical probability of death for that group of policyholders.[90] Although a given policyholder's death is inevitable eventually, it is deemed fortuitous unless it was caused deliberately by the policyholder.[91]

A preexisting loss unknown to the parties can also be deemed fortuitous, particularly under the modern subjective approach.

The problematic issue of the timing of loss is also illustrated by the hotel-fire scenario described above. Even after a fire has occurred, the potential liability and the scope of that liability remain unknown. A noteworthy example of this type of event involved the 1980 fire at the MGM Grand Hotel in Las Vegas, NV, in which 85 people were killed and over 700 were injured.[92] The unfortunate incident exposed the hotel to significant liabilities of an initially indeterminate scope and degree. After the fire, the hotel purchased insurance "to cover retroactively its exposure from the incident."[93] The insurers evidently found adequate fortuity present to justify underwriting the risks involved — even though the loss had already occurred.

In case law, the timing of loss issue is illustrated, for example, by *Insurance Company of North America v. U.S. Gypsum Company*.[94] Prior to obtaining insurance, the policyholder in that case had experienced subsidence at several sites, due to its mining activities. The insurer attempted to argue that a massive subsidence event was not covered by insurance because the policyholder had known about the subsidence problem associated with its business activities for decades. However, the Fourth Circuit, applying the modern subjective standard, held that the subsidence event was fortuitous since the parties did not know for a certainty that the specific loss would occur during the policy period.

Amount of Loss: How Much Is Fortuitous?

Another problematic aspect of fortuity analysis revolves around the question of how much of a given loss is deemed fortuitous. This situation is addressed by the impoundment and the software-damage scenarios, both described above. In general terms, these scenarios illustrate the wide range of linked consequences that may or may not be deemed fortuitous. Given a certain causal chain that results in loss, how many of the linked events can be deemed fortuitous?

Causation "in the digital domain" is an especially elusive concept.[95] As both the software-damage and the impoundment scenarios describe, an extensive chain of events can often combine, resulting in loss or damage. In the digital realm, causation chains are even more tenuous. Whereas, under traditional tort analysis, legal responsibility follows the chain of causation and foreseeability of result, fortuity theory is premised on the unforeseeability of loss. At what point does the loss, emanating from certain causes, become fortuitous? At what point does an existing fortuitous loss become known? Fortuity theory presumes a point certain on which foreseeability descends and the chain of fortuity is severed. However, reality seldom holds such clear demarcations.

What Distinguishes an Event From Its Class

This brings the discussion to a final, fundamental conundrum in fortuity theory. What is it that renders a given event fortuitous as compared to its statistically nonfortuitous class? This issue is illustrated by both the life insurance and taxi-fleet scenarios. In a general sense, both of these scenarios are premised upon the underwriters' statistical analysis of a class of policyholders. With respect to the category, an insured event is certain to occur an average number of times. Only the identity of the precise policyholder or insured unit that will experience a given loss is unknown. Thus, in terms of fortuity theory, the loss is uncertain only as to the specific individual policyholder, whereas a number of occurrences is predictable for the insured class as a whole. This random aspect is a fragile base from which to launch a defense against insurance recovery.

Implications in Legal Analysis

To a certain extent, timing and causation issues overlap under courts' analysis of the "known loss" and "loss-in-progress" rules. That is, a preexisting loss unknown to the parties can also be deemed fortuitous, particularly under the modern subjective approach of fortuity theory. As the *Restatement of Contracts* definition of fortuity provides, a preexisting loss can be deemed fortuitous if the parties were unaware of it at the time of contracting:

> A fortuitous event … is an event which, so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, such as the loss of a vessel, provided that the fact is unknown to the parties.[96]

The increasing use of this definition of fortuity by the courts has, thus, broadened the scope of fortuitous risk to include preexisting losses, eroding fortuity-like defenses under the known loss and loss-in-progress doctrines.

Known Loss

The issue of known loss is treated authoritatively in *Montrose Chemical Corp. v. Admiral Insurance Co.*[97] In that case, the court construed California insurance code provisions imposing a fortuity-like requirement on insurance contracts.[98] The court first carefully distinguished first-party property insurance from third-party liability insurance, observing, "Unfortunately, some courts have failed to draw these critical distinctions when discussing coverage under first and third party insurance policies."[99] The court noted that, although the statute does not differentiate between first- and third-party policies, "the distinctions inherent in the two types of coverage necessarily result in a different analysis."[100] In this connection, the court observed that first-party property coverage cannot be obtained for damage that has already occurred to the insured's own property. In the third-party liability context, however, the court clarified that insurance cannot be obtained for a "known liability."[101]

The coverage at issue in *Montrose* was third-party liability coverage issued two months after the policyholder had received notice from the Environmental Protection Agency that it was a "potentially responsible party" for cleanup at a toxic waste disposal site. The insurer attempted to argue that this notification made the losses nonfortuitous, asserting that Montrose could not be insured against liability for a pollution event that had already happened and of which it already had knowledge. However, the court was not persuaded.

The *Montrose* court found that although the escape of toxic waste from the disposal site was a known event, there was no known loss at the time of the policy's inception. In fact, the court found there was no certainty that Montrose would be held liable for costs associated with that known event at the time the policy was issued. In the court's opinion:

> While it may be true that an action to recover cleanup costs was inevitable as of that date, Montrose's liability in that action was not a certainty. There was still a contingency, and the fact that Montrose knew it was more probable than not that it would be sued (successfully or otherwise) is not enough to defeat the potential of coverage (and consequently, the duty to defend).[102]

The court concluded, "[A]s long as there remains uncertainty about damage or injury that may occur during the policy period and the imposition of *liability* upon the insured, … there is a potentially insurable risk within the meaning of sections 22 and 250 for which coverage may be sought."[103] [Emphasis in original.] Thus, *Montrose* recognized that fortuity theory did not offer a defense against insurance coverage in the third-party context, even given the fortuity-like requirements imposed by the California Code, since the policyholder's ultimate liability was unknown at the time the insurance contract was entered.

Loss in Progress

Similar considerations apply under the loss-in-progress rule. Concerning this rule, one authority states, "The loss in progress rule precludes coverage of losses that begin prior to policy issuance but that continue into the policy period."[104] Like fortuity theory in general, the loss-in-progress rule developed in the context of first-party insurance policies.[105] The loss-in-progress doctrine is designed to deal with situations "where, for example, a homeowner attempts to purchase property insurance with knowledge that flood waters are already lapping at his living room door."[106] In such a case, the rule prohibits coverage for incipient damage that continues into the policy period. As with fortuity theory in general, the loss-in-progress rule clearly "has its roots in the prevention of fraud."[107]

Under the archaic objective approach, a loss was deemed nonfortuitous if the loss began before the policy's inception and continued into the policy period. However, the modern subjective approach emphasizes whether the progressive loss was known to the policyholder at the time of obtaining insurance. By definition, if subjective knowledge of a loss in progress can be proved as existing at the time the insurance contract was issued, the loss is deemed nonfortuitous. Thus, the subjective approach has eroded defenses under the loss-in-progress doctrine in the first-party context.

Fortuity-like defenses are rarely effective under modern jurisprudence.

As with the known loss doctrine discussed above, the loss-in-progress doctrine is of limited application to third-party liability policies. In the third-party context, the application of this doctrine takes the form of an inquiry into "whether the insured was aware of its legal liability at the inception of its policies."[108] A "loss in progress," in a legal sense, is rarely known at the time an insurance contract is entered. Furthermore, under the modern subjective standard, a viable defense based on this doctrine is acutely rare in third-party liability insurance cases.

Known Risk

Finally, in keeping with their limited application of fortuity theory in general, courts have universally rejected any attempts to assert a novel fortuity-related defense under the "known risk" moniker.[109] One notable case treating the "known risk" argument is *City of Johnstown, N.Y. v. Bankers Standard Insurance Co.*[110] In that case, the insurers argued that the city knew about its contaminated landfill before obtaining liability insurance coverage, noting that the city had operated the landfill for decades and related groundwater contamination had been evident for 15 years. On that basis, the insurers argued that the resulting loss constituted a "known risk" for the city and was, therefore, nonfortuitous.

The court found no prior discussion of the purported doctrine under the case law cited by the insurer and declined the opportunity "to announce a novel 'known risk' doctrine in New York insurance law."[111] In its rationale, the court stated that to "embrace the 'known risk' theory … might well swallow up the more narrow doctrines regarding (1) concealment and misrepresentation, and (2) damages that are 'expected' or 'intended' by the insured."[112] Thus, the court refused to expand the limited range of fortuity theory to accommodate new defenses against insurance coverage.

Similarly, in another case, the Delaware Superior Court considered the insurer defendants' argument that the "known risk doctrine thrives in Missouri today."[113] However, the court found that the cases cited as authority concerned absence of fortuity or known loss doctrines rather than the known risk doctrine."[114] In summarizing its findings, the court stated:

> As these cases indicate, the "known risk" doctrine actually stands for the proposition that when a risk of loss reaches a certain level of probability, it then becomes possible to infer the insured's expectation of harm from the facts presented. Therefore, what appears to be a refusal to extend coverage because of a "known risk" is really the refusal to cover a loss which was "reasonably expected from the standpoint of the insured." Because of this, what has been commonly described as the "known risk" defense is really nothing more than the absence of fortuity defense under a different cover.[115]

The court noted that, due to its "deceptiveness," the "known risk" theory has "developed in a few courts as a misapplication of the known loss theory in the third-party liability setting."[116] However, the court refused to entertain any such expansions of fortuity-like defenses. The court noted that the "known risk" theory was inconsistent with both the purpose of insurance itself, which seeks to insure against known risks as a matter of course, and with Missouri law:

> (1) The notion of a risk being uninsurable simply because it is known in advance of coverage is counterintuitive and inconsistent with the basic purpose of insurance — to insure one's self against a known risk of harm, and (2) the known risk doctrine, as described and adopted in the leading cases, is actually the absence of fortuity defense with an objective standard for "expectation" being imposed upon the insured, which is at odds with Missouri's subjective standard for that very defense.[117]

The court concluded, "To presuppose that the knowledge of a risk precludes the ability to obtain insurance for that risk is counterintuitive; if the premise is carried to its logical conclusion, it would do away with the very industry that has conjured up this novel defense."[118]

Fortuity-Like Defenses Rarely Effective

In summary, fortuity-like defenses are rarely effective under modern jurisprudence. Inevitable risks are often insured, provided that the timing of the loss is uncertain at the time the contract is entered. Existing risks of loss that are known, yet unquantified, at the time of contracting are sometimes insurable. Risks that may follow from preexisting conditions can also be insured in some circumstances. The uncertainty of the timing of a loss can render fortuitous an otherwise certain event. These realities suggest why courts have consistently found fortuity an uncertain standard by which to measure insurance contract obligations.

Summary and Conclusion

Fortuity theory is a creation of the insurance industry; it basically stands for the proposition that what is insured is loss resulting from "risk" involving a component of chance, not certain loss. However, insurers do not universally require fortuity as a basis for underwriting a given risk. Instead, it is viewed as a preferred but nonessential element of insured risk.

In the legal context, fortuity theory originated as a first-party coverage concept designed to prevent fraud. It has been invoked in its pure form, but rarely. The historical precedent for fortuity theory arose primarily under admiralty law. Persuasive historical precedent for the doctrine is sparse. The cases cited as historical precedent are most often old British or federal admiralty decisions that support only a very limited version of the doctrine. As such, the notion of fortuity lacks a strong foundation in the body of general insurance law governing insurance disputes.

Under archaic interpretations, fortuity analysis focused on an objective standard. Under this antiquated approach, a loss was deemed nonfortuitous, hence not covered, if the loss was objectively inevitable. If insured property had a preexisting defect, the loss would be deemed nonfortuitous — even if the defect was not known or recognized at the time of contracting. Such an approach led to inappropriate results and was inherently flawed.

Today, the old approach has properly given way to a modern approach that largely does not justify a nonfortuity defense, unless fraud or misrepresentation is involved. This approach examines not whether the loss was actually inevitable, but whether either of the parties was aware that the loss was inevitable at the time of contracting. The courts' use of the subjective approach has also resulted in a significant erosion into the fortuity-like doctrines involving known losses and losses in progress. A related development involves the concurrent cause doctrine. Where multiple causes have combined to effect a loss, certain courts have found that this factual setting alone establishes fortuity. In view of these developments, as one analyst stated, "recent decisions have effectively emasculated any assertion that a particular loss is nonfortuitous."[119]

Importantly, even if fortuity theory is acknowledged to be sound in principle, it leaves a number of key questions unanswered, such as when to deem a loss fortuitous, how much of a loss can be deemed fortuitous, and the standard by which a loss is deemed fortuitous. Timing and causation issues are always difficult to predict and analyze. It is not hard to see that imposing a legal requirement of uncertainty as a condition affecting contractual liability is even more problematic. Indeed, the history of fortuity theory is not supportive of a broad doctrine, either in the writings of the insurance industry itself or of courts interpreting insurance contracts.

Theoretical determinations of fortuity more properly belong to the actuarial realms of statistical probability than to courts of law. The modern legal approach toward fortuity theory limits its role to areas primarily affected by fraud and misrepresentation.

Nonfortuity defenses are rarely upheld by the courts, and fortuity doctrine is unlikely to yield any new insurance coverage defenses.

Endnotes

1 Gorman, John P. , "All Risks of Loss v. All Loss: An Examination of Broad Form Insurance Coverages," *Notre Dame Lawyer* 34 (University of Notre Dame, Notre Dame, IN, 1959): 348.

2 Cozen, Stephen A., and Richard Bennett, "Fortuity: The Unnamed Exclusion," *The Forum* 20 (Winter 1985): 228.

3 *See, e.g.*, Stempel, Jeffrey W., *Law of Insurance Contract Disputes* 2nd ed. § 1.05 (Aspen Publishers, Inc., New York, 1999) ("Insurance exists to provide indemnity for fortuitous losses only.").

4 *See, e.g.*, *University of Cincinatti v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1280 (6th Cir. 1995) ("[A]n all-risk policy, like any other insurance policy, insures only against fortuitous losses"); *Altena v. United Fire & Cas. Co.*, 422 N.W.2d 485, 487 (Iowa 1988) ("[I]nsurance concerns fortuitous losses only"); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 299 (Minn. Ct. App. 1997) ("[R]ecovery under an 'all risk' policy will, as a rule, be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage.") *See generally* Russ, Lee R., and Thomas F. Sagalla, *Couch on Insurance*, rev. ed., 3d § 148:58 (West Publishing Co., New York, 1998) ("Even under an all-risk policy, losses not excluded are within policy coverage only upon meeting the causation requirement that they be fortuitous."). *See also* Kalis, Peter J., Thomas M. Reiter, and James R. Segendahl, *Policyholder's Guide to the Law of Insurance Coverage* § 13.06 (Aspen Publishers, Inc., New York, 1997); Ostrager, Barry R., and Thomas R. Newman, *Handbook on Insurance Coverage Disputes*, 9th ed., § 8.02 (Aspen Publishers, Inc., New York, 1997); Keeton, Robert E., and Alan I. Widiss, *Insurance Law: a Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* § 5.3(a) (West Publishing Co., St. Paul, MN, 1988).

5 *Webster's New Collegiate Dictionary* (G&C Merriam Co, Springfield, MA, 1981).

6 Ibid.

7 Ibid.

8 Mehr, Robert I., and Emerson Cammack, *Principles of Insurance*, 6th ed. (R.D. Irwin, Inc., Homewood, IL, 1976).

9 Ibid., 34.

10 Ibid.

11 Ibid., 36-37.

12 Riegel, Robert, Jerome S. Miller, and C. Arthur Williams, Jr., *Insurance Principles and Practices: Property and Liability*, 6th ed. (Prentice-Hall, Inc., Englewood Cliffs, NJ, 1976).

13 Ibid., 16.

14 Ibid.

15 Ibid., 17.

16 Bickelhaupt, David L., *General Insurance*, 9th ed. (R.D. Irwin, Inc., Homewood, IL, 1974).

17 Ibid., 11-12.

18 Ibid., 13.

19 Ibid.

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

21 *See, e.g.*, *Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21 (1st Cir. 1997); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551 (9th Cir. 1991); *Drake v. Gordon*, 848 F.2d 701 (6th Cir. 1988); *Maryland Cas. Co. v. ARMCO Inc.*, 822 F.2d 1348 (4th Cir. 1987); *Polius v. Clark Equipment Co.*, 802 F.2d 75 (3d Cir. 1986); *Darien Bank v. Travelers Indem. Co.*, 654 F.2d 1015 (5th Cir. 1981); *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973); *In re Petitions of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964); *Metropolitan Life Ins. Co. v. Banion*, 86 F.2d 886 (10th Cir. 1936); *Foster-Gardner Inc. v. Nat'l Union Fire Ins. Co.*, 959 P.2d 265 (Cal. 1998); *Utica Mut. Ins. Co. v. Bausch & Lomb Inc.*, 603 A.2d 1241 (Md. Sp. App. 1992); *General Accident Ins. Co. v. State*, 672 A.2d 1154 (N.J. 1996); *Reed v. Church*, 8 S.E.2d 285 (Va. 1940); *Beal v. City of Seattle*, 954 P.2d 237 (Wash. Ct. App. 1998).

22 Two seminal U.S. Supreme Court cases on this topic are *Public Clearing House v. Coyne*, 194 U.S. 497, 48 L. Ed. 1092, 24 S. Ct. 789 (1904) and *Lottery Case*, 188 U.S. 321, 47 L. Ed. 492, 22 S. Ct. 321 (1903). In the latter case, the Supreme Court noted: "A lottery ticket, in all its aspects, is of the same nature as an insurance policy, which represents an analogous form of wagering contract. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature." 188 U.S. at 327.

23 Some problems with foreseeability in the general legal context have been discussed by Banks McDowell in "Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness," *Defense Law Journal* 36 (1987): 65.

24 As this article discusses, although the courts will frequently recite that fortuity is an implied element of insurance contracts, this rarely results in substantive rulings. However, commentators have identified certain circumstances when courts will read a "principle of fortuity" into insurance policies on public interest grounds, as follows: "1) avoiding profit

from wrongdoing, (2) deterring crime, (3) avoiding fraud against insurers, and (4) maintaining coverage of a scope consistent with the reasonable expectations of the contracting parties on matters as to which no intention or expectation was expressed," Keeton, Robert E., and Alan A. Widiss, *Insurance law: a guide to fundamental principles, legal doctrines, and commercial practices* § 5.3a (West Publishing Co., St. Paul, MN, 1971): 279. In such cases, fortuity is invoked as a surrogate for public policy considerations.

25 See below, section on historical development.

26 *Restatement of the Law of Contracts* § 291 comment a (American Law Institute, St. Paul, MN, 1932). *See, e.g., Compagnie des Bauxites de Guinee v. Ins. Co. of N. Am.*, 724 F.2d 369 (3d Cir. 1983); *Morrison Grain Co. v. Utica Mutual Ins. Co.*, 632 F.2d 424 (5th Cir. 1980); *Essex House v. St. Paul Fire & Marine Ins. Co.*, 404 F. Supp. 978 (S.D. Ohio 1975); *Mattis v. State Farm Fire & Cas. Co.*, 118 Ill. App. 3d 612 (1983); *Employers Cas. Co. v. Holm*, 393 S.W.2d 363 (Tex. Civ. App. Houston 1965, no writ) (applying the *Restatement* definition of fortuity).

27 See below, section on subsequent legal devolvement.

28 *Holme's Appleman on Insurance*, 2nd ed., revised by Eric M. Holmes (West Publishing Co., St. Paul, MN, 1996): 1.3 ("[I]nsurance is a highly scientific form of risk management with a basis rooted in statistical probabilities.")

29 Mehr, Robert I., Emerson Cammack, and Terry Rose, *Principles of Insurance* (R.D. Irwin, Inc., Homewood, IL 1985): 32.

30 Even this statement may oversimplify the matter. Some insurance theorists demur at the definition of risk as the "chance of loss," arguing that when reduced to the realm of statistical probability, the essential "chance" element of uncertainty and, thereby, the risk, is eliminated. See generally, Vaughan, Emmett J., *Fundamentals of Risk and Insurance* (Wiley, New York, 1986): 13-14.

31 *See generally* Bennett, Howard N., "Marine Insurance & War Risks" (paper delivered to the Nottingham University Centre for International Defence [sic] Law Studies, May 26, 1993), http://www.nott.ac.uk/~llzweb/rps/bennett.txt (briefly tracing the early history of Lloyd's and the London Market).

32 Ibid.

33 This aspect remains one branch of fortuity analysis in current case law.

34 See notes 1 and 2 above and accompanying text.

35 Marine insurance, the oldest form of insurance, has been dated back to ancient Rome. Admiralty or maritime law, itself, derives from the commerce and customs of early seafaring nations, including the Egyptians, Phoenicians, and Greeks, who conducted commerce in the Mediterranean Sea. The island of Rhodes is credited with the earliest maritime code, which ultimately influenced Roman law. These brief recitations aside, the history of maritime law and the insurance industry is beyond the scope of this article. *See generally* references cited in Nelli, Humbert O., *A Bibliography of Insurance History* (Georgia State University Business Press, Atlanta, 1976).

36 Gorman, John P. , "All Risks of Loss v. All Loss: An Examination of Broad Form Insurance Coverages," *Notre Dame Lawyer* 34 (1959): 349.

37 Ibid., 348.

38 *See, e.g.*, Stempel, Jeffrey W., *Law of Insurance Coverage Disputes* 2nd ed. § 1.05(a)[1] (Aspen Publishers, Inc., New York, 1999) ("It would defeat the purpose of insurance and encourage 'moral hazard' if policyholders could be compensated for losses they intentionally bring about by their own acts.").

39 The distinction between admiralty law and maritime law has become blurred under modern scholarship; however, historically, a distinction was made. Although an exposition on admiralty and maritime law is beyond the scope of this article, a few points bear mentioning in this context. U.S. admiralty law is derived from the British admiralty courts present in most early American colonies. Joseph Story, in his [1833] monumental work *A Familiar Exposition of the Constitution of the United States* (Reprint with a foreword by Edwin Meese III, Regnery Gateway, Lake Bluff, IL, 1986), draws distinctions between the words "admiralty" and "maritime," declaring that the purpose of maritime law is "to free the jurisdiction of the Admiralty Court from the shackles forged by centuries of writs of prohibition issuing from the courts of common law," to "enable the fullest development of sea-borne foreign commerce in accordance with principles of maritime international law," and "to enable the Admiralty Court to exercise its jurisdiction *in rem* beyond those causes which are founded upon maritime liens, notably in cases which 'affect the commerce and navigation of foreign nations.'" Wiswall, Frank L., Proctor and Advocate in Admiralty, "The Jurisdiction and Practice of the Admiralty Court Revisited" (1994 Ebsworth & Ebsworth Maritime Law Lecture, available at www.anu.edu.au/law/pub/icl/lectures/The1994EbsworthEbsworthMar.html). *See also* Legal Information Institute, Admiralty, www.law.cornell.edu/topics/admiralty.html.

40 Although the federal Constitution confers primary jurisdiction over admiralty and maritime cases to the U.S. Supreme Court, the court has repeatedly held that Congress

has power to extend admiralty and maritime jurisdiction by statute. Supreme Court jurisdiction over admiralty and maritime cases derives from Article III, § 2 of the U.S. Constitution. The Judiciary Act of 1789 conferred admiralty jurisdiction on the federal courts, Judiciary Act of 1789, ch. 20 § 11, 1 Stat. 73 (1845). Although states may not infringe on admiralty jurisdiction either by legislation or case law, state courts may exercise concurrent jurisdiction over admiralty claims so that nonadmiralty remedies will not be foreclosed, pursuant to the "Savings to Suitors Clause," 28 U.S.C. § 1333(1) (1993 & Supp. 1998). The Supreme Court has repeatedly held that there are constitutional limitations on the power of Congress to legislate in the area of admiralty and maritime law. *See, e.g.*, *Panama Railroad v. Johnson*, 264 U.S. 375 (1924) ("[T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in these subjects and cannot be altered by legislation." *Id.* at 386-87.) However, more recently, the court has apparently abdicated its constitutional authority to Congress in this area: "In this era, an admiralty court should look primarily to … legislative enactments for policy …. We … must … keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990). In light of such pronouncements, the Supreme Court's future exercise of its constitutional authority over admiralty and maritime jurisdiction appears extremely unlikely.

41 *Youell v. Exxon Corp.*, 48 F.3d 105 (2d Cir. 1995).

42 "As an initial matter, we agree with plaintiffs that the fortuity rule is indeed a creature of federal law. Federal courts sitting in admiralty have been applying some variation of the fortuity rule in marine insurance cases for over a hundred years. … In so doing, these courts have predominantly looked to federal law as precedent. … And to the extent that admiralty courts have looked to other sources, they have relied on British as much as state case law authority. That admiralty courts do not look exclusively to state law on the issue of fortuity indicates to us that the rule must have an independent existence in federal maritime law." *Youell v. Exxon Corp.*, 48 F.3d 110 (2d Cir. 1995).

43 *Id.*

44 *Orient Mutual Insurance Co. v. Adams*, 123 U.S. 67 (1887).

45 *Id.* at 73.

46 *Id.*

47 *Youell v. Exxon Corp.*, 48 F.3d 105, 111 (2d Cir. 1995).

48 *Id.*

49 *Id.*

50 *Id.*

51 Cozen, Stephen A., and Richard Bennett, "Fortuity: The Unnamed Exclusion," *The Forum* 20 (Winter 1985): 229 (quoting Gorman, John P. , "All Risks of Loss v. All Loss: An Examination of Broad Form Insurance Coverages," *Notre Dame Lawyer* 34 (1959): 353).

52 *British and Foreign Marine Ins. Co., Ltd. v. Gaunt*, 2 A.C. 41 (1921).

53 *Id.* at 43.

54 Cozen, Stephen A., and Richard Bennett, "Fortuity: The Unnamed Exclusion," *The Forum* 20 (Winter 1985): 229.

55 *British and Foreign Marine Ins. Co., Ltd. v. Gaunt*, 2 A.C. at 46-47 (1921).

56 *Mellon v. Federal Ins. Co.*, 14 F.2d 997 (S.D.N.Y. 1926).

57 *Id.* at 1002.

58 *Id.*

59 *Id.*

60 *Chute v. North River Insurance Co.*, 214 N.W. 473 (Minn. 1927).

61 *See, e.g., Mayeri v. Glens Falls Ins. Co.*, 85 N.Y.S.2d 370 (S. Ct. 1948); *Texas & Pac. Ry. v. Prunty*, 233 S.W. 625 (Tex. Civ. App. 1921).

62 *Chute*, 214 N.W. at 473.

63 *Id.* at 474.

64 See the following section, subsequent legal development, and notes 26 and 27 and accompanying text.

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

66 Cozen, Stephen A., and Richard Bennett, "Fortuity: The Unnamed Exclusion," *The Forum* 20 (Winter 1985): 223.

67 Ibid., 234.

68 *Gulf Transp. Co. v. Fireman's Fund Ins. Co.*, 83 So. 730, 733 (1920), quoting Arnould Joseph, *Arnould on the Law of Marine Insurance and Average*, 9th ed. (Stevens and Sons, London, 1914): ¶ 688.

69 Cozen, Stephen A., and Richard Bennett, "Fortuity: The Unnamed Exclusion," *The Forum* 20 (Winter 1985): 234.

70 See note 26 above and accompanying text.

71 "It is well-settled [sic] that negligence on the part of the insured does not negate a finding of fortuity." Kalis, Peter A., Thomas M. Reiter, and James R. Segendahl, *Policyholder's Guide to the Law of Insurance Coverage*, § 13-27 (Aspen Publishers, Inc., New York, 1997).

72 Gilmore, Grant, and Charles L. Black, Jr., *The Law of Admiralty*, 2nd ed., § 2-9, (Law and Business Foundation Press, Mineola, NY, 1975): 72.

73 Stempel, Jeffrey W., *Law of Insurance Coverage Disputes* 2nd

ed. §1.05(a)[1] (Aspen Publishers, Inc., Chicago, 1994): 1-37.

74 Stempel, Jeffrey W., *Law of Insurance Coverage Disputes* 2nd ed. §1.05(a)[1] (Aspen Publishers, Inc., Chicago, 1994): 1-37, citing *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 718 (Cal. Ct. App. 1996). Sample policy language of this sort includes exclusion a. of the 1973 comprehensive general liability coverage form, providing, "This insurance does not apply to: 'bodily injury' or 'property damage' expected or intended from the standpoint of the insured."

75 This rule has its exceptions, such as the fire at the MGM Grand Hotel, which the insurers insured as a preexisting loss. *See, e.g.*, Smith, Michael L., and Robert C. Witt, "An Economic Analysis of Retroactive Liability Insurance," *Journal of Risk and Insurance* (September 1985): 379.

76 *Employers Casualty Co. v. Holm*, 393 S.W.2d 363 (Tex. Civ. App. Houston 1965, no writ).

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

78 *Compagnie des Bauxites de Guinee v. INA*, 724 F.2d 369 (3d Cir. 1983).

79 Ostrager, Barry R., and Thomas R. Newman, *Handbook on Insurance Coverage Disputes*, 9th ed., § 8.02(c) (Aspen Publishers, Inc., New York, 1998): 379.

80 Stempel, Jeffrey W., *Law of Insurance Coverage Disputes* 3rd ed. §1.05(a)[2] (Aspen Publishers, Inc., Chicago, 1994): 1-52.

81 *See, e.g., Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56 (3d Cir. 1982); *Drewett v. Aetna Cas. & Sur. Co.*, 539 F.2d 496 (5th Cir. 1976); *Time Oil Co. v. Cigna Property & Cas. Ins. Co.*, 743 F. Supp. 1400 (W.D. Wash. 1990); *New Castle County v. Hartford Accident & Indem. Co.*, 685 F. Supp. 1321 (D. Del. 1988); *Shelton v. Commercial Union Assur. Co.*, 396 So. 2d 1379 (La. Ct. App. 1981); *Muller Fuel Oil Co. v. Ins. Co. of N. Am.*, 232 A.2d 168 (N.J. Super. Ct. App. Div. 1967); *D'Auria v. Zurich Ins. Co.*, 507 A.2d 857 (Pa. Super. 1986); *Burch v. Commonwealth City Mut. Ins. Co.*, 450 S.W.2d 838 (Tex. 1970).

82 Cozen, Stephen A., and Richard Bennett, "Fortuity: The Unnamed Exclusion," *The Forum* 20 (Winter 1985): 244.

83 Ibid, 245.

84 Ibid.

85 Jordan, Leo J., "Proximate v. Concurrent Cause: The California Syndrome," *Texas Insurance Litigation Reporter* (April 1984): 83.

86 Cozen, Stephen A., and Richard Bennett, "Fortuity: The Unnamed Exclusion," *The Forum* 20 (Winter 1985): 245. *See, e.g., Dickson v. United States Fidelity & Guaranty Co.*, 466 N.W.2d 515 (Wis. 1970) (applying the traditional concurrent cause doctrine to find that an insured cause of damage was the predominant cause of the loss and, hence, that coverage was available for the loss).

87 *Id.* at 248.

88 *Mattis v. State Farm Fire & Casualty Co.*, 454 N.E.2d 1156 (Ill. Ct. App. 1983).

89 *Id.* at 1164.

90 As an insurance textbook acknowledges, "The risk of loss from death is not insurable because everyone is certain to die. Insurance, however, is written against losses arising from untimely death, as the hour of death is uncertain." Mehr, Robert I., and Emerson Cammack, *Principles of Insurance* 6th ed. (R.D. Irwin, Inc., Homewood, IL, 1976): 35.

91 There are exceptions to this rule, such as where policyholders' beneficiaries have successfully argued that a seemingly intentional act was the result of an irresistible impulse or an impaired cognitive process. *See generally* Stempel, Jeffrey W., *Law of Insurance Coverage Disputes* §1.05(a)[1] (Aspen Publishers, Inc., New York, 1998): 1-49.

92 Venezian, Emilio C., and Joseph A. Fields, "Informational Asymmetries in Retroactive Insurance," *Journal of Risk and Insurance* (December 1987): 780.

93 Ibid.

94 *Insurance Company of North America v. U.S. Gypsum Company*, 870 F.2d 148 (4th Cir. 1989).

95 For a discussion of this point, *see generally* Karnow, Curtis E. A., "Liability for Distributed Artificial Intelligences," *Berkeley Technology Law Journal* 11 (Spring 1996) 147.

96 *Restatement of the Law of Contracts* § 291 comment a (American Law Institute, St. Paul, MN, 1932). *See, e.g., Compagnie des Bauxites de Guinee v. Ins. Co. of N. Am.*, 724 F.2d 369 (3d Cir. 1983); *Morrison Grain Co. v. Utica Mutual Ins. Co.*, 632 F.2d 424 (5th Cir. 1980); *Essex House v. St. Paul Fire & Marine Ins. Co.*, 404 F. Supp. 978 (S.D. Ohio 1975); *Mattis v. State Farm Fire & Cas. Co.*, 118 Ill. App. 3d 612 (1983); *Employers Cas. Co. v. Holm*, 393 S.W.2d 363 (Tex. Civ. App. Houston 1965, no writ) (applying the *Restatement* definition of fortuity).

97 *Montrose Chemical Corp. v. Admiral Insurance Co.*, 913 P.2d 878 (Cal. 1995). The court in that case primarily refers to the "known loss" rule as the "loss-in-progress rule."

98 Section 22 of the California Insurance Code defines insurance as "a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a *contingent* or *unknown* event." Cal. Ins. Code, § 22 (1993 & Supp. 1999). [Emphasis added.] It further provides, "[A]ny contingent or unknown event, whether past or future, which

may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this code." Cal. Ins. Code, Chapter 2 § 250 (1993 & Supp. 1999). Finally, section 533 states, "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." New York also has a statute implying a fortuity requirement into insurance contracts. Article 11 of the New York Insurance Code defines an insurance contract as "any agreement or other transaction whereby one party, the 'insurer,' is obligated to confer benefit of pecuniary value upon another party, the 'insured' or 'beneficiary,' dependent upon the happening of a fortuitous event." The New York Insurance Code further expressly defines a fortuitous event as "any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party." N.Y. Ins. Code, Chapter 27 § 1101(a) (1985 & Supp. 1999); *see also David Danzeisen Realty Corp. v. Continental Ins. Co.*, 565 N.Y.S.2d 223, 224 (N.Y. App. Div. 1991).

99 *Montrose Chemical Corp. v. Admiral Insurance Co.*, 913 P.2d at 887.

100 *Id.* at 905.

101 *Id.*

102 *Id.* at 904.

103 *Id.* at 906.

104 Kalis, Peter J., Thomas M. Reiter, and James R. Segendahl, *Policyholder's Guide to the Law of Insurance Coverage* § 6.04 (Aspen Publishers, Inc., New York, 1997): 6-14.

105 Ibid.

106 Ibid.

107 *Inland Waters Pollution Control, Inc. v. National Union Fire Ins. Co.*, 997 F.2d 172, 179 (6th Cir. 1993).

108 *Id.*

109 *See, e.g., Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204 (Ill. 1992) ("This principle has been referred to as 'known risk,' 'loss in progress' and 'known loss.'") *Id.* at 1209.

110 *City of Johnstown, N.Y. v. Bankers Standard Insurance Co.*, 877 F.2d 1146 (2d Cir. 1989).

111 *Id.* at 1153.

112 *Id.*

113 *Monsanto Co. v. Aetna Cas. & Sur. Co.*, No. 88C-JA-118, 1993.DE.1139, http://www.versuslaw.com, at ¶ 150 (Del. Super. Ct. 1993).

114 *Id.* at ¶157.

115 *Id.* at ¶ 159.

116 *Id.* at ¶ 164.

117 *Id.* at ¶ 167.

118 *Id.* at ¶165, quoting David Roberts, "The 'Known Risk' Doctrine: The Emperor's New Clothes," *Environmental Claims Journal* 3 (1991): 511.

119 Cozen, Stephen A., and Richard Bennett, "Fortuity: The Unnamed Exclusion," *The Forum* 20 (Winter 1985): 223.