

18 REVLITIG 581
(Cite as: 18 Rev. Litig. 581)

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Review of Litigation
Summer, 1999

Article

*581 FORTUITY, INSURANCE, AND Y2K

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Many people believe that certain software problems, combined with the way some computers have been designed or utilized, will cause substantial losses when 1999 becomes 2000. [FN1] The general purpose of this Article is to consider whether the Principle of Fortuity, a foundational principle in insurance law, impedes coverage *582 for potentially costly Y2K situations. Section I provides examples of situations that might occur. Section II explores the context of the insurance dimensions of the Y2K problem. The Principle of Fortuity and its variants are discussed in Sections III and IV. Section V applies the observations about the Principle of Fortuity contained in this Article to the Y2K problem.

I. Y2K Catastrophes: Some Possibilities

It is possible that a Y2K malfunction will cause elevators to stop, or in the worst case scenario, cause them to drop. [FN2] A good case scenario is that the elevators will stop and lock shut. A better case scenario is that they will go a pace to their home stops and the doors will open. Finally, the best case scenario is that they will stop immediately and the doors will open. In any one of these cases, a passenger might experience acute, even heart-pounding fear, possibly rising to the level of being heart-stopping.

Medical equipment may also be affected. Some say that healthcare delivery systems are in poor shape vis-a-vis Y2K. [FN3] Moreover, individually utilized medical devices such as pacemakers might stop or malfunction. There is concern about drug pumps and the possibility that some important medicines will not be distributed properly. [FN4]

Additionally, many sorts of transportation vehicles may be troubled. [FN5] Airplanes could be particularly susceptible to problems because they not only rely on computers internally, but are also coordinated by computers in air traffic control towers. Many people therefore say they will not fly early in the year 2000 for fear of planes not working properly. There is also substantial concern about trains with computerized scheduling. Automobiles contain many micro-computers, *583 and they may malfunction in various ways. Certainly, if the power windows do not work, it would be a minor irritation; but if the brakes do not work, it would be a catastrophe.

Building security and fire suppression sprinkler systems may malfunction when 2000 comes. [FN6] Security systems might simply stop working or lock automatically, thus keeping people inside, as well as out. Then again, they might unlock, letting in undesirables. We may not know if sprinkler systems malfunction for some time since fire is not an everyday occurrence. Almost certainly, after January 1, 2000, safety inspectors should look for Y2K problems concerning fire suppression systems. Interestingly, none of the agencies that inspect for such problems are insurance companies. One would expect negligent inspection lawsuits to arise in these and similar areas. However, such lawsuits are not usually successful against insurers for a variety of reasons. [FN7]

Further, credit management is widely run by computers. [FN8] If payment is recorded as being 100 years late, rather than merely a month or two, there is a danger that important services will be terminated, goods will eventually be repossessed, and defamatory credit reports will be issued.

Of course, software might become unusable. There is some concern that Y2K problems may simply eliminate information from some systems, or that computer systems may interact to cause information disappearance problems. [FN9] If software from company A is somehow connected to the software of company B, then the software of A may damage the usability of the software of B. If the Y2K problem wipes out financial information, there may be economic chaos. There has been substantial concern that securities firms will not be able to do business and that benefits firms may also be in trouble. (Securities firms, of course, are firms that buy and sell *584 stocks and bonds. Benefits firms are businesses that administer employee benefit plans and similar programs.)

Financial institutions, financial advisory companies, and technology consulting professionals are not the only service companies exposed to information loss difficulties. [FN10] If Y2K wipes out the records of law firms, claims for legal malpractice may arise. [FN11] Interestingly, there may be legal malpractice liability arising from omissions that occur in the late 1990s. If a transactional lawyer has a wide-ranging relationship with a client, and it is part of the course of dealing in that relationship for the lawyer to warn the client about legal implications of historical developments, a lawyer who does not encourage his clients to attend to the Y2K problem may face liability. [FN12] Of course, legal malpractice policies are claims-made policies, so the claims will not come until the year 2000, or even after. [FN13] There is another, more immediate and pressing problem--law firm billing information may also be eliminated. Heaven forbid!

*585 II. Insurance Coverage in the Y2K Context

The Y2K situation is very uncertain. It is unknown, in a great many cases, whether computers (including microprocessors) will malfunction, how this will happen, what will occur to the rest of the system, and what the consequences of those malfunctions will be. Some commentators have even suggested that the Y2K hullabaloo is a phoney artifice created by computer consultants and law firms who intend to profit from overhaul work and the provision of legal advice. [FN14] However, most responsible people who have knowledge of the situation believe that some gloom is realistic, and they warn that real dangers are coming. [FN15] Exactly what these dangers are is unknown.

The concerns that are expressed about major, societal-wide computer malfunctions tend to conceive the Y2K problem in the aggregate. There may be individual instances in which it is antecedently known that computer systems will fail and exactly what the consequences will be. However, little is published about individual cases. Presumably, companies are internally distributing confidential reports focusing on those individual systems. Still, the thrust of the literature is that no one really knows what will happen. [FN16]

At the same time, spokesmen for the insurance industry and for various insurance companies have taken the position that coverage for *586 Y2K injuries and damages is eliminated by the Principle of Fortuity. [FN17] Insurance company spokesmen sometimes say that insurance is for risks, not certainties, [FN18] and the insuring agreements of major property policies expressly utilize the word "risk." Spokesmen for some components of the insurance industry are trying to suggest that Y2K injuries are certainties and not risks. [FN19] The general idea is that since computer users have had substantial advance warning that there may be injurious computer glitches caused by the millennial calendar change, there will be no coverage unless companies take appropriate antecedent remedial action. Obviously, business prudence dictates that such action be taken. At the same time, it is clear that spokesmen for insurance companies are trying to suggest that coverage will be barred by the Principle of Fortuity unless insureds do everything they can to correct the problem before the calendar flips at the end of 1999. [FN20]

It is axiomatic that insurance is for fortuities. [FN21] Another argument that is occasionally deployed to suggest that Y2K losses are not fortuitous pertains to the fact that chips and software will not necessarily be malfunctioning when they produce Y2K losses:

Whether a loss is considered to be "fortuitous" will be a fact-intensive question as well, and the result will vary considerably depending on the applicable law. For example, insurers will have strong arguments that, with respect to computer programmers, Year 2000 losses are not fortuitous because the software operated just as it was intended to. [FN22] Usually, in order for there to be liability insurance recovery as the result of the behavior of a product, it must be defective. (There is liability insurance coverage only if there is liability. When a product injures someone, either there is something wrong with the product, *587 or someone has done something negligent.) Product defects manifest themselves as injurious malfunctions. It is these difficulties and glitches (along with culpable human error) that constitute the injury-producing fortuities or that constitute the events that produce liability-generating fortuitous injuries. There is another type of fortuity. These are the purposeful but ill-considered (or carelessly thought through) regularities that cause injury and damages. These patterns may or may not be anomalies when viewed from the perspective of how things are usually done. [FN23]

The purpose of this Article is to explore the relationship between the Principle of Fortuity ("the Principle") and the Y2K problem. In order to do this, the Principle will be set forth and explored at some length. Some courts apply the Principle directly; sometimes it is applied through certain variants, such as the known loss doctrine and the loss-in-progress doctrine. In addition, although neither the Principle itself nor its variants are customarily expressly included in insurance contracts, they are obliquely insinuated through various exclusions or in the insuring agreement itself.

This Article will consider the Principle, its variants, and its expression in certain exclusions. In general, the thesis of this Article is that neither the Principle nor its variants will, except in the most extreme cases, bar Y2K claims. Nor will significant fortuity exclusions in liability policies bar such claims. On the other hand, a few fortuity-expressing exclusions in property policies may bar some coverage. Of course, a discussion of the Principle does not exhaust the overlap between Y2K and insurance law.

*588 III. The Principle of Fortuity

Sometimes, the Principle is called the unnamed exclusion. [FN24] In essence, the Principle requires that insurable losses be in some sense accidental. [FN25] This requirement results from a public policy so strong that the law forbids the enforcement of insurance contracts when they "provide indemnification for losses that are not fortuitous." [FN26] As formulated so far, the Principle is not rigorously defined. Instead, it is loose and general.

Attempts at precisely defining the Principle are always troubled. For example, it is often said that the Principle requires that insured losses be only those that happen by chance. [FN27] If this theory took seriously the idea that occurrence by chance is a necessary condition for fortuity and therefore for insurability, lawyers would spend part of their time in court arguing about whether the world is a deterministic system. They would inevitably get into questions about whether free will and the existence of a deterministic materialistic system are compatible. Adjudication would become mired in metaphysical issues. Instead, the requirement that losses happen by chance is a suggestive and ultimately metaphorical idea, rather than a thesis to be understood strictly and literally. Thus, for the purposes of the Principle, there can be chance events in a perfectly deterministic system.

*589 Some courts have created an epistemic version of the Principle, so that an event is fortuitous if it happens--so far as some relevant persons know--by chance. [FN28] Even the epistemic version of the Principle must be understood loosely. If an insured fervently believed that the world was a completely deterministic system, then that person would never believe that anything happened by chance. Surely, it would be inappropriate for an insurance company to argue, with respect to that insured, that no event was fortuitous; hence, the insured was never entitled to payment under his policy. No court would countenance such an argument, and--quite correctly--most insurance lawyers would find it laughable. Still, precisely because the argument is absurd, it follows that any equation between chance (even epistemically conceived) and fortuity must be loose and suggestive, rather than strict and literal.

However, there is wisdom hidden in the idea of fortuity-as-chance. To see this, we simply need to look at how we use the word "chance" in ordinary discourse. Chance events are unusual. They do not happen very often and, when they do, they puncture the routine. This idea applies quite well to airplanes crashing, ships sinking, bridges collapsing, earth quaking, and similar mass disasters. It does not apply as well to systematic injuries, such as asbestos, black lung, and similar problems. But even in those cases, if one looks at each injury as a unit, it appears to have happened by chance. Moreover, not every person who has been exposed to asbestos ended up with asbestosis or mesothelioma, displaying another element of chance.

Obviously, then, the idea of chance does not fully explain the Principle, although it may orient our thinking about fortuity. This is partly because the idea of chance itself is multifaceted. When we try to determine whether an event happened by chance, we look at a number of factors. Did somebody make the event happen, and if so, *590 who? How did they do it? Did observers of the event know it was coming? Were they surprised? How did they react? What had they done beforehand, if they had any inkling it might come? Some of these questions raise red flags about the Y2K problem.

A. Fortuity and the Concept of an Accident

One of the key aspects of the Principle is the idea of an accident. From time to time, courts have explicitly observed that the term "accident" [FN29] incorporates the familiar requirement that a loss be fortuitous. It is often said that insurance is for accidental losses. This idea, too, must be understood loosely. Many property policies insure against particular perils, but few insure against only one peril (or even two or three). Named-peril policies--policies that insure against particular perils named in the contract--almost always insure against a multiplicity of perils. Some of them (such as lightning, windstorm, and hail) are accidental. Other perils, such as fire, are mostly accidental. Still other perils are usually intentional, including vandalism, malicious mischief, and theft of various sorts.

Under the Principle, the fortuitousness of an event must be assessed from the point of view of the insured. For example, if somebody steals property belonging to an insured, there will be insurance for it, even though the theft was no accident. This is because a theft is not something an insured does. It is something that befalls an insured, something he suffers. Thefts are inflicted upon those from whom things are stolen. They are not acts performed by the insured.

Contracts of liability insurance are also closely linked to the concept of accidentality. Indeed, the insuring agreement of the Commercial General Liability (CGL) policy, a widely used form that constitutes the model for many other forms, promises to pay those sums that the insured becomes legally obligated to pay as damages because of certain kinds of injuries caused by an occurrence. [FN30] The *591 term "occurrence" is uniformly defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." [FN31] Thus, both the term "accident" and the concept of accidentality are central to the insuring agreement of one principal part of the CGL policy.

B. Coverage for Accidental Losses or Occurrences

At the same time that the CGL policy requires fortuity for coverage, the policy (and its derivatives) contain a number of departures from the requirement that insured losses be caused by accidents, as this Article demonstrates. In the end, these departures are much less significant than they may appear. Although they do not appear in the language of the policy, there are structural, behavioral, and reality-based limitations on the insurance that in the aggregate guarantee that most of the claims that must be paid will be for fortuities.

The very definition of "occurrence" may contain such a departure. Definitions, by their nature, invite strict and literal construction. When a contracting party gives a formal and explicit definition, everyone is entitled to read that definition literally. The term "occurrence" is defined as an accident, but that phrase is said to include the idea of continuous or repeated exposures to substantially the same general harmful conditions. [FN32] It is not said that the exposure must itself be accidental. Thus, the definition might be a technical one (i.e., a definition that is at variance with ordinary usage) so that any exposure to harmful conditions constitutes part of what is considered to be an accident. But that idea is substantially at variance with the ordinary usage of the term "accident" and the phrase "an accident"; of course, formal and explicit definitions are frequently at variance *592 with ordinary usage. Policyholders have not argued this thesis at great length, because it would require them to claim that the term "occurrence" is ambiguous at its very core. Courts are reluctant to declare that central terms in widely used policy forms are ambiguous. Hence, for strategic and tactical reasons, this is not an approach that is often taken. [FN33]

In addition, liability policies do not uniformly require that liability-generating behavior be accidental. [FN34] This will be demonstrated in detail presently. Indeed, intentional acts may generate liability under third-party policies. [FN35] If an insured performs an intentional act that has surprising and possibly unforeseeable consequences that are, in turn, injurious, and therefore generate liability, the CGL policy will provide coverage. [FN36] Moreover, if an act is intentional but somehow results from a mistake, the injury it causes may well be fortuitous. [FN37]

Further, CGL insurance policies provide their insureds with a defense if the allegedly injured plaintiffs plead behavior classifiable as an accident. It is important to remember that most liability policies contain both a duty to defend and a duty to indemnify the insured, and that these two duties are usually said to be independent. Thus, there is independent coverage for suits filed against insureds that contain certain forms of factual allegations. Plaintiffs' attorneys who are interested in triggering coverage consequently go out of their way to plead cases in such a way that there are factual allegations amounting *593 to accidentality. [FN38] If the entitlement to a defense under an insurance policy is a kind of coverage, then there is a significant aspect of liability insurance coverage that is not subject to the Principle in any straightforward way. The duty to defend is generally determined by reference to the factual pleadings in the plaintiff's complaint or petition. Presumably, the contents of the pleading are there because somebody intended them to be there. Consequently, they are not accidental, and they are not fortuitous. There is a shaky link between the Principle and the accidental, of course, because accidentality must be pleaded. Plaintiffs can fabricate allegations generating a duty to defend even though good faith pleading rules exist; however, if there are no pleadings of any accident, then there will be no duty to defend. [FN39]

There is another way in which the duty to defend is linked to the Principle. As a general rule, being sued is not a voluntary act: it is not an intended or desired event that one seeks. [FN40] Consequently, becoming a defendant in a lawsuit has a fortuitous feature. Additionally, the contents of a lawsuit are not usually within the defendant's control. Because the duty to defend is determined by the factual allegations contained in the plaintiffs' pleadings, whether an insurer has a duty to defend is not within the insured's immediate control.

The duty to defend is not the only feature of the CGL policy that has a complicated relationship with the Principle. Coverage B in Section I of the standard CGL contract provides coverage for personal injury and advertising injury.

[FN41] There is no explicit requirement that *594 these kinds of injuries be caused by anything accidental. In fact, the phrase "personal injury" in the CGL policy is not defined the same as in tort law. Roughly speaking, in tort law, a personal injury is any injury that a natural person suffers. Usually, these are physical injuries, sometimes accompanied by mental anguish, medical bills, and perhaps other financial injuries. In the world of insurance, a personal injury is a non-bodily injury [FN42] that results from one of a series of specified offenses, such as false arrest, false imprisonment, malicious prosecution, wrongful entry, wrongful eviction, defamation, and publications that violate a right of privacy. [FN43] The term "advertising injury" is similarly defined in terms of offenses that occur in the context of advertising "goods, products, or services." [FN44] These offenses include defamation, product disparagement, publication of material violating the right of privacy, misappropriation of advertising ideas, misappropriation of a style of doing business, and infringements of "copyright, title, or slogan." [FN45]

Obviously, what the insurance policy calls "offenses" are what the law calls "torts" or "causes of action," and they are uniformly classified as intentional torts. To some extent, therefore, the concept of accidentality is less central to personal injury and advertising injury coverage than it is to occurrence-based coverage, reducing the impact of the Principle to some degree. It is reduced for another reason as well. Occurrence-based coverage contains a fortuity-requiring exclusion. [FN46] Not only must the injury that triggers coverage be caused by an accident, it must neither be "expected or intended" by the *595 insured. [FN47] Thus, if the producing event is accidental, but the injury was intended or even expected, coverage is eliminated. For example, suppose A intends to injure B by shooting him. A shoots, but he hits C instead of B. C falls into B, thereby knocking him into a swimming pool where B drowns. Hence, the mode of B's injury is accidental, but A intended that the injury itself occur. Under these circumstances, there would be no coverage for A under an occurrence-based policy. Conversely, offense-based coverages contain no expected or intended exclusion, thus displacing the Principle.

The Principle is not eliminated, however. CGL coverage is for businesses, and, for the most part, businesses do not commit offense-based coverage torts with the intent of injuring anyone. Sometimes they commit them by mistake, thinking they are doing a permissible act. For example, businesses do not generally falsely imprison people in order to injure them; they do it because they are trying to catch shoplifters. False arrest and malicious prosecution should be thought of in the same way. Business executives do not prosecute those they believe to be shoplifters simply for the joy of it. Likewise, financial institutions usually do not wrongfully evict people in order to hurt them; they are trying to foreclose on mortgages or other security interests that they believe to be legitimate. They have made some sort of inadvertent mistake, failing to note the receipt of a payment or putting the wrong address on the eviction papers, and so on. These kinds of errors are usually fortuitous. In that sense, the Principle is built into most of the predictable coverages.

Defamation is a little different. Interestingly, Coverage B, the offense-based coverage, contains an exclusion providing that insurance does not apply to the "publication of material, if done at or by the direction of the insured with knowledge of its falsity . . ." [FN48] In other words, defamation is not covered if the speaker knows that what he is saying is false. In effect, this exclusion embodies the Principle in that covered speech that is false may be deliberate, but deliberate false speech is not covered. The speech itself is intentional, but the falsity of the speech is fortuitous.

*596 Not only is fortuitousness virtually guaranteed by standard business practice, it is bolstered by the law of agency. Suppose the security guard in a grocery store falsely arrests and falsely imprisons a customer of the store, not because he believes that the customer is shoplifting but because he hates the customer and wishes to do her harm. That security agent is probably acting outside the scope of his employment, which may have implications for insurance coverage. The case is similar for all of the personal injury offenses.

It is a similar story with advertising injuries. Occasionally an employee who has run amok might invade the right to privacy of those about whom he writes. That kind of misconduct is not usually chargeable to the business because the executive is acting outside the scope of his authority, and such conduct is almost never part of business policy. In fact, most businesses have policies requiring bland recommendations and do not even tolerate invasive internal memos. For example, gossipy e-mail is almost never part of a legitimate business function and is almost never within the scope of the employee's agency. Furthermore, businesses do not intentionally infringe the copyrights of others in the context of advertising, usually because there is a high probability of being caught. After all, advertising is by its very nature public. Thus, the restriction of this coverage to the advertising context itself tends to guarantee the presence of fortuity.

These behavior-based and probabilistic devices for insuring fortuity are not as successful as direct applications of the

Principle itself, and they are not likely to be as successful as an appropriate exclusion would be. Given the usual patterns of business conduct, in my experience, few nonfortuitous losses arise; nevertheless, when they do emerge, they are quite expensive. Coverage for personal injury and advertising injury is still in its childhood, if not infancy, and it will be interesting to see how these coverages evolve over time. Insurers will probably devise more refined ways to incorporate the Principle into these coverages.

Thus, although the Principle is an axiom of insurance law, and although there must be a fortuitous element or dimension in every injury-producing process which is insurable, those processes (the producing cause, the causal process, the effect, and the injury) need not be fortuitous through and through. Intentional acts have unexpected consequences. Intentional acts may not be completely *597 understood. Intentional acts can be based upon mistakes, even though they are, from a rather narrow point of view, fully intentional. Mistakes are by their nature fortuitous, and an act predicated upon a mistake takes on a fortuitous dimension. These complications are present in every insurance policy. It is therefore both simple-minded and erroneous to claim that injury-causing events are covered by insurance only if they are completely fortuitous.

Consequently, exponents of the insurance industry have no business saying that injury-causing events which may be part of the Y2K problem are not insurable because they are not fortuitous. People may have designed software knowing in theory that it might involve Y2K problems, but also firmly believing that the software would be replaced long before the turn of the century. The fact that software is still in place long after they thought it would be removed is fortuitous. Companies using the software may never have realized the problems they were facing. When they began to realize the problems they were facing, they may not have fully appreciated them. They may have hesitated. These characterizations do not destroy the fortuitous character of the type of events that will make up Y2K.

C. General Observations on the Principle of Fortuity

Several general observations should be made about the Principle. First, the Principle has the look of a minimalistic doctrine. There are two ways to think about the Principle. One way is to divide the world into two categories. On the one side are nonfortuitous injuries, which are deliberately caused injuries and acts that predictably lead to injuries if a person performs such an act. On the other side are all other injuries and acts. In a diagram, the situation looks very simple.

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The Principle makes everything in the right half of the box uninsurable. When viewed in this manner an enormous number of affairs are nonfortuitous and therefore uninsurable.

*598 The other way to look at the Principle is to begin with fortuities that are insurable and then look at close cases which may or may not involve fortuities. It is as if these cases are arranged around the edges of the class of all fortuitous states of affairs; we then ask whether these cases are insurable. Most legal discussion proceeds in this manner. Viewed in this way, the class of all fortuities looks much larger than the class of nonfortuities.

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When this second picture is utilized, not very many acts or injuries appear to be nonfortuitous and therefore uninsurable. This is especially true when one looks at the universe of actual injurious acts and actual injuries. The fact is that in a peaceable society, for the most part, fortuitous injuries vastly outnumber nonfortuitous injuries. This certainly applies to the injuries about which there is public knowledge. When looked at in this second way, the Principle does not exclude very much; in the former way, however, the universe of possible nonfortuitous acts and injuries is quite large.

It is unlikely that the Principle will ever play much role in litigation over coverage for offense-based torts. This coverage is a relatively recent invention. [FN49] The organizations that draft policies asked state legislatures for permission to use them, and that permission has either been widely granted or scarcely withheld for this type of coverage. Insurance companies had to understand that by providing coverage for personal injuries and advertising injuries they were providing coverage for intentional torts. The offenses were exactly some of the canonical intentional torts. Courts would be very *599 impatient with insurers that now try to eliminate that coverage after promulgating it, adopting it, getting it approved by various insurance commissioners, and charging money for it. Although personal injury and

advertising injury coverage are written into liability insurance policy forms available to businesses, they are also available by endorsement for homeowner's policies. Probably, courts would be similarly impatient with insurers utilizing the Principle to avoid payment under those endorsements, expecting insurers to guarantee fortuitousness through the underwriting process.

Second, the Principle in general applies to losses. It does not apply to acts or to their consequences, except where those consequences themselves constitute losses. This point is sometimes missed because there are categories of actions (like A punching B hard on the nose) which are so closely related to losses, that one can simply displace the application of the Principle from the loss to the act. Changing the accent, however, can be misleading in other cases where the focus belongs on the loss. This happens when the causal chain linking the act (or omission) to loss is longer.

Third, to the extent that one looks at contingent indicia of fortuity--what somebody knew before a loss, what somebody did or did not expect, whether it sounds right in ordinary English to say that the event happened by chance--one should look at it from the point of view of the insured. Was the insured surprised? What did the insured know beforehand? Would the average person in the position of the insured be inclined to say that the event happened by chance? The fact that somebody other than the insured was or was not surprised by a loss is completely irrelevant to the insurability of the loss.

Finally, the Principle explains why many courts are skeptical about the insurability of punitive damages. [FN50] In general, punitive damages are imposed when the tortfeasor meant to injure the victim. This intent can be found in the deliberateness of the tortfeasor's act--in the actor's intent to injure or in his recklessness. If a tortfeasor acts in conscious disregard of the dangers that he is creating *600 for a potential victim, he is acting recklessly and is subject to punitive damages. When a person consciously disregards the dangers he is creating for someone else, he is aware of the potential victim's exposure to danger and he says to himself, "To hell with that fellow! I'm going to do as I please." All of the mental attitudes that generate punitive damages bump up against the Principle. [FN51]

D. Fortuity as the Foundation for Inclusion or Exclusion

The Principle represents something of a procedural quandary. In general, insureds bear the burden of bringing themselves within the insuring agreement (i.e., within the coverage), while insurers bear the burden of demonstrating the application of an exclusion. One would think that satisfying the Principle is an antecedent to the existence of any coverage. For this reason, some courts have held that insureds must prove that the losses for which they seek coverage are fortuitous. [FN52] Other courts, however, treat the Principle as an exclusion and so allocate the burden of proof to the insurer. [FN53] It is probably appropriate to require insurers to prove a violation of the Principle. Insurance lawyers tend to think of the Principle as exclusionary, and insurers are usually required to prove the applicability of exclusions. Moreover, because it comes up rarely, and negates coverage even less often than it comes up, it makes sense to require the entity most familiar with insurance to carry the burden *601 of proof. After all, it would be inequitable to permit insurers to require that insureds prove potentially complex and nuanced matters in order to get their claims paid. The possibility for oppression here is obvious. To some degree, this point hinges on the relative infrequency with which insurers have invoked the Principle. The weakness of the Principle in practice is to some degree illustrated by the variety of injuries that have been held to be fortuitous.

For example, most environmental damage is held to be fortuitous, even if the disposal was intentional, systematic, and prolonged. [FN54] Environmental litigation and related insurance litigation are illustrative. It is a complex phenomenon that has involved heavy-duty litigation over the last quarter of a century. Undoubtedly, if there is substantial litigation over the Y2K problem, courts will look to environmental litigation for analogies.

Courts look at the injury and loss and observe that no one expected those kinds of losses. In the heyday of free-wheeling waste disposal, everyone thought the earth would simply cause the waste to disappear; there is surely something right about seeing historic waste disposal practices as causing fortuitous environmental injuries. Indeed, in my experience, most large companies did not dump toxic waste in places where they believed they would do substantial damage to valuable assets. Sometimes, I have observed that some corporate decision-makers were (and are) ignorant about environmental matters, but ignorance almost always brings conduct within the Principle.

Thus, as applied to actual environmental cases, the Principle is extremely limited. [FN55] In one case, a waste hauler

was hired to dispose of paint materials contained in storage drums. [FN56] It crushed them and *602 spewed their contents onto the ground, which then soaked into the soil. The court said the loss was fortuitous. [FN57] The conduct was quite deliberate, but the insured failed to realize that he was doing anything that would cause any harm. This case is no anomaly. Courts rarely find that an environmental (or toxic) loss is nonfortuitous. [FN58] In another case, a university tore down a building in order to replace it and had to engage in asbestos abatement. [FN59] The court found that there was no coverage for cleaning up the asbestos because the demolition of the building was deliberate, and the insured knew they would have to deal with asbestos. [FN60] Similarly, a court found that a business foreclosure upon property in the context of a commercial debtor-creditor relationship was not a fortuitous event. [FN61]

Historically, property insurance did not cover defects inherent in property, just as it did not cover ordinary wear and tear. [FN62] Currently, latent defects are covered because current property insurance policies as applied to realty tend to cover (all) risk of physical loss unless expressly excluded. [FN63] It is fortuitous when a building contains an inherent defect, present from the beginning that later causes damage to the building or to a person in the building; therefore, covering such sources of loss does not violate the Principle. Certainly this is true if no one knows about the defect, if the defect was not intentionally placed with the knowledge that it would cause havoc, and if it causes problems at a surprising time. At the margin, *603 it is difficult to distinguish between creeping damage from an inherent defect and ordinary wear and tear, but that is a topic better addressed in a different article.

These considerations will probably influence how the courts think about fortuity in the context of Y2K. It is axiomatic that acts or omissions which are fully understood and fully intentional are not fortuitous and therefore not insurable if they cause (by well understood mechanisms) consequences that were fully envisaged and fully embraced. If somebody does what he means to do, understands what he does, causes the result he wants, causes it by means he understands, and all of this results in a loss, it is not insurable because it is not fortuitous. However, while the Principle is axiomatic, it is relatively narrow. It is also, for the most part, applied to a world that involves features and dimensions that are not fully intended. When fortuity and non-fortuity are mixed together in a loss, courts mostly find coverage. The recent flood of environmental insurance litigation illustrates this point, and that vast storehouse of lawsuits and opinions will constitute one of the ready-to-hand analogs for analyzing Y2K problems.

E. Discretion in Interpreting the Principle

Because the Principle looks metaphorical, it is clear to me that courts are endowed with substantial discretion with respect to determining whether an event is fortuitous. Discretion is not set forth straightforwardly in the legal rule or in the standard of review. When legal rules silently grant courts discretion, it is likely that judges will decide issues in accordance with their general outlook. Such comprehensive visions of reality may or may not be conscious or articulate. They may or may not be systematically formulated or well-founded. Sometimes they are sophisticated; at other times they are simple-minded. This is an unfortunate situation for anyone who wants the law to be rational and objective--a body of rules "out there"--rather than a series of subjective preferences. The Principle is simply too fundamental to be susceptible of a rigorous formulation. Lawyers are better advised to abandon all hope of rigor than to proceed the way Wittgenstein did in thinking about fundamental concepts (i.e., to look for "family resemblances" instead of defining *604 criteria). [FN64] Lawyers should look for family resemblances between fortuitous events and cases subject to question.

IV. Variations on the Principle of Fortuity

The principal variants on the Principle are the known loss doctrine and the loss-in-progress doctrine. There has been substantial discussion of both these rules in recent years. Because environmental injuries accumulate slowly, and because companies come to know about them gradually, both of these doctrines have been significant in environmental coverage litigation. Similarly, they have been important in toxic tort personal injury litigation where the effects accumulate slowly. There is also a substantial amount of discussion of these doctrines surrounding the Y2K problem. [FN65]

A. Fortuity and Retroactivity

In general, people and businesses insure against losses they are going to sustain. This means that insurance is always future-oriented; it does not mean that insurance is always for losses based on events that happen in the future. Sometimes,

an insured can suffer an injury on Day One, buy insurance on Day Two, and find out about the injury on Day Three. In general, these kinds of losses are insured, so long as Day One is within the policy period. Thus, insurance can be purchased in a somewhat retroactive way. Sometimes this happens when a person or a business forgets to buy insurance for an interval. Once in a while it happens because the insured knows he has suffered a loss, but he does not know how extensive the loss is.

There are two ways to describe the loss-on-Day-One situation. One method is to say that the insured has suffered an injury about which he does not know, but that he does not sustain a loss until he *605 comes to know about the injury. This way of speaking is attractive because it makes loss relative to knowledge in somewhat the same way that the Principle makes chance relative to knowledge. However, a deficiency in this premise is that it makes perfect sense to say that an insured has sustained a loss about which he does not know. A second way to describe the insured's situation is to say that he may cover losses that have already occurred, so long as he does not know about them. This is probably the better and more accurate method, because it conditions insurability upon the insured's knowledge.

These observations entail that the relationship between knowledge and insurability is very complicated. Some knowledge with regard to losses does not limit insurability. Some knowledge that there will probably be losses--or that there may very well be losses--does not limit insurability. Obviously, these considerations dramatically impact how insurers may legitimately think about Y2K.

B. Risk, Knowledge, and Fortuity

In theory, it is always possible to insure known risks. Some risks are quite likely and the price of insuring those risks is correspondingly high. If a ship is uninsured and in the middle of a patch of icebergs, the ship is insurable as long as it has not already sunk. It might even be insurable if it has taken on some water, so long as the situation is not irreversible. In former days, when ships were overdue, one could purchase insurance in the overdue market. The risk that an overdue ship had already sunk was quite large, but it was still insurable if the insured did not know that the ship had sunk. Notice that it is the loss which must be fortuitous.

It is interesting to note that the reverse of the fortuity principle does not apply. For example, if an insurer knows that a loss will not happen, it may still sell insurance to an insured who thinks it might. In previous centuries, in the overdue market, insurers would post sentries on the south coast of England; when they sighted ships, they would race to London to tell the insurers. A fearful ship owner might try to insure that very ship. While the insurer would know that the ship was safe, the insured would not. Yet, the Principle would not be violated.

*606 Thus, if an insured owns a building in a remote location and the building sustains damage, but the insured does not know about it for months, he can still purchase insurance that will cover the loss. What an insured may not do is purchase insurance for a loss about which he is already fully aware. If a person knows something, then whatever he knows is a fact. If a person knows a proposition, he automatically knows that the proposition is true. A person cannot know something that is false; he can know that a proposition is false, but knowing that a proposition is false is knowing that its denial is true. Thus, knowledge is linked to truth. Consequently, insuring a known loss--a loss that one knows has happened and about which one has extensive knowledge-- is an insurance monstrosity. [FN66]

However, the mere fact that a loss occurs before the interval of time in which an insurance contract begins does not imply that the insured knows about the loss at the point that he applies for the insurance or at the point of contract formation. To be sure, if an insured is aware of an ongoing progressive loss at the time the policy is purchased, then there is a known loss and insurance should be prohibited. [FN67] Some courts go further and say that if the insured should have been aware of the ongoing loss, then coverage is forbidden. [FN68] But this is not the correct rule from the point of view of the Principle. The mere fact that an insured negligently fails to know that a loss has begun does not render the loss uninsurable. The insured must have actual awareness of the commencement of the loss to render it uninsurable. In addition, the insured should have--at least roughly speaking-- a correct apprehension of the character of the loss. If the insured thinks it is a minor loss, but it turns out to be a major one, then perhaps there should be coverage for a difference between the major and the minor loss. Of course, this conception may create more administrative headaches than it is worth, or it might *607 invite fraud in the application for insurance as well as fraud in the claim.

One of the great dangers arising from progressive losses is that the insured will know more than he admits, such as the

probable size of the impending loss, but conceals it from the insurer. Such conduct should not be permitted. At the same time, this prohibition results from requirements having to do with full disclosure in applications rather than with the Principle. Although the known loss doctrine and the loss-in-progress doctrine are variants on the Principle, they have other roots as well. Insureds are supposed to disclose known losses to insurers up front. Concealment in an application for insurance can cause the voidance of the insurance contract, because affirmative misrepresentations and requirement violative omissions constitute a kind of fraud. Hence, the known-loss doctrine and the loss-in-progress doctrine are, to some extent, fraud-based defenses. [FN69]

C. Known Losses and Losses-in-Progress

Property policies constitute the historical home of the known-loss doctrine and the loss-in-progress doctrine. The general idea is that an insured cannot buy coverage for his building if he already knows it has sustained a loss; he need not know the exact nature and character of the loss. [FN70] In addition, an insured may not buy coverage for his building if he knows it is undergoing a loss. [FN71] Even if the insured does not know that he has sustained a loss or does not know that he has a loss-in-progress, if he has a well-founded belief that to a substantial probability there has already been a loss, then insurance is unavailable. Rulings centering upon substantial probability, as opposed to knowledge, are probably reasonable.

If an insured has a reason to know that a loss has occurred, then the loss is uninsurable. However, rulings that allow coverage on the *608 basis of fortuity because of the fact that an insured merely had reason to know, are a mistake. If having reason to know that a loss has occurred is not sufficient to render the loss uninsurable, proving concealment would become more difficult in some situations. Requiring some sort of actual knowledge will also create a moral hazard, thus blurring the application. [FN72] Of course, there is no reason not to put an exclusion in the policy for losses that begin before the policy period and about which the insured has reason to know. An elimination of coverage in such situations is not, however, required by the Principle.

Other courts require that the insured had actual subjective knowledge. [FN73] There is a difference, of course, between knowing that a proposition is true and knowing that it is highly probable. These differences are not usually crucial to legal decision-making, even in the area of insurance. Nevertheless, merely knowing of a risk is insufficient to defeat insurability. One must know that the loss has occurred or started to occur, or else know to a high degree of probability that the loss has occurred or begun. [FN74]

D. Certain Impending Losses

What should be said about impending losses that are certain to occur, but which have not begun at the time of the insurance *609 application or of contract formation? These should certainly not be treated under the known-loss doctrine, because there is no loss about which to know. Similarly, they should not be treated under the loss-in-progress doctrine, since the loss has not commenced and therefore cannot be in progress. Given the contingency (even zaniness) of the empirical world, there will be very few such situations; however, they do exist.

Perhaps the classic situation is that of rising waters. Suppose that someone owns a house next to a body of water, and the surface is rising rapidly. He buys insurance on Day Two, even though the water control authorities have announced that the upstream dams must release an amount of water that will cause the inundation of the house. In this case, he knows that it is highly probable that the house will suffer a flood loss soon—in this situation, a flood loss is virtually certain. The owner of this property should not be permitted to purchase flood insurance under these circumstances because the Principle forbids it. However, this does not result from an application of either the known loss doctrine or the loss-in-progress doctrine. Instead, the Principle itself should apply. [FN75]

What is characteristic about the impending flood loss situation is the inevitability of the loss and the virtually certain knowledge of the inevitability of the loss, making the Principle applicable. If the loss is not inevitable and if there is not virtually certain knowledge of its inevitability, the Principle would not apply. Where there are substantially conflicting views about whether the loss will occur, that is, whether the waters will continue to rise, the Principle would not apply and the last minute purchase of insurance would be permissible. A rational insurance company, of course, would charge exorbitant premiums for such insurance. High risk insurance invites substantial prices.

The problem of rising waters and uninsurability for non-fortuity has implications for the Y2K problem. There are substantially conflicting views over whether particular losses will occur, and how probable the complex of losses will be. In the rising water situation, where there was uncertainty as to whether the waters would continue *610 to rise, the Principle would not apply. Genuine uncertainty tends to establish fortuity.

E. Liability Insurance and Fortuity

The above mentioned considerations apply to property insurance. However, the known-loss doctrine and the loss-in-progress doctrine do not apply so neatly to liability insurance. There has been substantial controversy in the courts over how to apply these variants of the Principle to liability insurance. These controversies have arisen in the area of environmental insurance disputes. [FN76] Of course, what the insured knew, with what degree of certainty the insured knew it, and when the insured acquired its knowledge are always issues in these cases.

Some courts will not apply the Principle in liability insurance contexts without the insured having actual, subjectively available knowledge of a loss. [FN77] Some courts employ a broader criteria for applying the Principle, holding that if an insured knows that he has already inflicted injury upon someone (whether in the form of property damage or bodily injury), or if the insured knows that it is substantially probable that such an injury has been inflicted, then the insured may not subsequently obtain liability insurance for that injury. If the injury has manifested itself, then both the occurrence and the injury will precede the policy, unless the insured has obtained retroactive coverage. On the other hand, if only the occurrence has taken place, but not the injury, then--as a matter of logical necessity--the insured could not know that he has injured someone (or caused them property damage), precisely because he has not. In the real world, most of the time one cannot know, even to a substantial probability, that what one did yesterday will result in injury tomorrow.

*611 A number of cases have recently considered the known loss doctrine and the loss-in-progress doctrine in the context of liability insurance. [FN78] In 1992, the Illinois Supreme Court explored the known-loss doctrine in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.* [FN79] In 1976, the insured received an administrative order from the Environmental Protection Agency, stating that its discharge of PCBs presented "an imminent and substantial danger to the health and welfare of persons living adjacent to and utilizing the waters of Lake Michigan" [FN80] A month or so later, the insured purchased liability insurance. Much later, persons claiming they were adversely affected by the PCBs in question sued the insured. The question of interest here is whether that insurer owed the insured a defense. The Supreme Court of Illinois held that it did not and affirmed a summary judgment in favor of the insurer upon the grounds of the known-loss doctrine. [FN81] The actual words of the court in this case are important:

If the insured knows or has reason to know, when it purchases a CGL policy, that there is a substantial probability that it will suffer or has already suffered a loss, the risk ceases to be contingent and becomes a probable or known loss. Where the insured has evidence of a probable loss when it purchases a CGL policy, the loss is uninsurable under that policy (unless the parties otherwise contract) because the "risk of liability is no longer unknown." Therefore, the insurer has no duty to defend or indemnify the insured with respect to the known loss of ab initio, unless the parties intended the known loss to be covered. [FN82] The holding of the Illinois Supreme Court was that the EPA's administrative order of February 1976 gave the insured "knowledge *612 of a substantial probability that claims would be made against it for [the] PCB pollution" it had caused. [FN83]

Interestingly, the legal principles posited by the court in *Outboard Marine* are substantially broader than the one applied in the holding. First, the court distinguishes between definitively knowing that a state of affairs exists and knowing that there is a substantial probability that the state of affairs exists. [FN84] Furthermore, the court distinguishes between knowing that a state of affairs will exist and knowing that there is a substantial probability that it will exist. [FN85] Finally, the court distinguishes between knowing any one of these four things and having a reason to know any one of them. [FN86] However, the court did not set forth what it means to have a reason to know something. Presumably, what this means is that if someone has knowledge of the implications of a particular situation, the person would know something he does not in fact know. Apparently, the derivation of what is not known from what is known must be fairly short and relatively simple. Were this restriction not placed upon the idea of having reason to know, everyone would have reason to know the entirety of higher mathematics, and that idea is substantially at variance with the way we all normally look at the world. Perhaps when someone has reason to know something he does not know, he is guilty of a negligent failure to infer.

Outboard Marine is subject to serious criticism because the case appears to imply the following propositions:

1. If A (the insured) has reason to know that a loss has already taken place, the loss is uninsurable.
2. If A has reason to know that there is a substantial probability that the loss has already taken place, then the loss is uninsurable.
3. If A has reason to know that he will suffer a loss in the future, then the loss is uninsurable.
4. If A has a reason to know that there is a substantial probability that he will suffer a loss in the future, then the loss is uninsurable.

*613 Each of these four propositions seems false. A person can have some reason to know something but never have drawn the inference and, hence, not technically know it. From his point of view, the loss-causing event and the loss itself are still both contingent. There is nothing uncommon about insuring people against their own negligence, and one form of negligence is a person's failure to draw inferences from what he already knows. As a result, disallowing A insurance in the above situation seems inconsistent with general themes underlying insurance coverage.

In 1995, the Supreme Judicial Court of Massachusetts resolved a similar case in a like manner. [FN87] In *SCA Services v. Transportation Insurance*, the insured operated a landfill in Illinois. [FN88] In 1977, nearby residents brought a class action to enjoin the insured's operation of the site. In 1978 a trial court declared that the landfill was a "present and prospective public nuisance," and it enjoined any further use of the fill. [FN89] In 1981, the Illinois Supreme Court affirmed the trial court's decision. [FN90] In 1982, residents living near the landfill filed a class action against the insured for various kinds of injuries. The insured sought a defense from an indemnity company liability insurer with whom it had contracted beginning in January 1980. [FN91]

The insurer argued that at the point when the contract became effective, the insured knew of the loss, and hence the loss was uninsurable. [FN92] The court provided a comprehensive discussion of the Principle as expressed in the known-loss doctrine:

[T]he basic purpose of insurance is to protect against fortuitous events and not against known uncertainties. Parties wager against the occurrence or nonoccurrence of a specified event; the carrier insures against a risk, not a certainty. It follows from this general principle that an insured cannot insure against the consequences of an event which has already begun. Once the risk is eliminated, the contract for insurance no longer exists. Courts have found that the insurable risk is eliminated in the instance where an insured knows, when it purchases a policy, that there is a substantial probability that it will *614 suffer or has already suffered a loss. At that point, the risk ceases to be contingent and becomes a probable or known loss. When the insured has evidence of a probable loss when it purchases the policy, the loss is uninsurable under that policy. [FN93] This discussion contains the same confusion present in *Outboard Marine*. Like the previous case, upon which the court in *SCA Services* relied, the insurability of a risk is eliminated if the insured has a reason to know a loss has already begun. Moreover, this court says that "an insured cannot insure against the consequences of an event which has already begun." [FN94] Taken just by itself, this remark is incongruent with the known-loss doctrine. At the same time, the holding in *SCA Services* is sensible. The insured fully knew that it had a massive problem before it purchased the liability insurance. [FN95] This is neither a reason-to-know situation, nor a situation in which the insured had sustained a loss about which it had no clue. A court had already declared the waste facility a public nuisance, [FN96] and that decision had already been affirmed by the supreme court of the state in which the facility was located. [FN97] Hence, the loss was uninsurable at the inception of the liability insurance policy.

In the two cases discussed above, *Outboard Marine* and *SCA Services*, the courts looked to the loss-generating conduct, and the situation created by that conduct, to determine whether the Principle had been satisfied. Those courts, however, did not look towards the injuries or to the insured's liability exposures. According to these cases, a loss is nonfortuitous if an insured knows that loss-generating conduct has been engaged in and understands the nature of that conduct before insurance is purchased. It is important to remember that both *Outboard Marine* and *SCA Services* concern actions arising out of liability policies.

California, on the other hand, has an entirely different approach. In *Montrose Chemical Corp. v. Admiral Insurance Co.*, [FN98] the issue *615 was also whether the insurer had a duty to defend. [FN99] *Montrose* manufactured DDT

from 1947 through 1982. Admiral issued four successive CGL policies from late 1982 to early 1986. A number of lawsuits had been brought against Montrose because of the infamous Stringfellow site, where Montrose and many others disposed of hazardous wastes. The Stringfellow site opened in 1956 and closed in 1972. Montrose dispatched waste chemicals there only from 1968 to 1972. In 1970, two years before the site closed, someone discovered the seepage of toxic waste, and a regional water quality control board declared the site a public nuisance in 1975. The insurer took the position that the insured's knowledge fit the pattern established in *Outboard Marine*. [FN100] The insured even pointed out that Montrose received a Potentially Responsible Party Letter from the EPA some six weeks before the inception of the first policy at issue. [FN101]

In California, by statute, risks are insurable only if they are "contingent or unknown." [FN102] Thus, a version of the Principle is built into the California Insurance Code. As in other jurisdictions, the Principle is not a powerful principle; indeed, it is somewhat minimalistic. "[A]ll that is required to establish an insurable risk [from the point of view of the Principle] is that there be some contingency." [FN103]

Chief Justice Lucas of the California Supreme Court, writing for a six-person majority, thought that this was the wrong approach. "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." [FN104] In all likelihood, Montrose knew that it was more probable than not that it would be sued at the point of policy inception; it did not know, however, that it would be liable. [FN105]

*616 The majority reasoned that if indemnity coverage was not negated by the Principle, then neither could the duty to defend be negated by the Principle. Whether an insurance company has a duty to defend or not is determined by reference to whether the insured is potentially liable, that is, whether the plaintiff's pleadings render the insured potentially liable. [FN106] It must be remembered that the loss that is to be considered with reference to the Principle is not the liability-generating occurrence or injury. Instead, it is the insured's actual liability. That loss is established not only by an occurrence and an injury, but by litigation. The course of litigation, however, is extremely uncertain, and it can seldom be known in advance whether liability will be established. Consequently, the loss-in-progress doctrine and the known-loss doctrine can only seldom be used to defeat duty-to-defend coverage.

There are a number of things wrong with this view. First, it makes it possible to purchase liability insurance while a trial is going on, or even after, thus triggering the insurer's duty to defend. [FN107] After all, the reality of liability is not established until the judgment becomes final. Sometimes, tortfeasors know that they are liable, but they do not know what the damages will be and are therefore trying the case to determine damages. It would be remarkable to suggest that under those circumstances an insured can purchase liability insurance for a known liability when it is only the amount of the loss that has not been fixed. Moreover, lawyers are of different quality. An insured defendant might know that he is liable when the plaintiff's lawyer is a very capable one. He might know this because he rationally predicts that he will lose on liability. On the other hand, if the plaintiff's lawyer is a bumbling fool, the insured might not know that he is liable because he might rationally predict that he is going to win the case. These are not the sort of considerations which should affect the Principle.

Second, the California statute makes it quite clear that a contract of insurance is a "contract whereby one undertakes to indemnify *617 another against loss, damage, or liability arising from a contingent or unknown event." [FN108] It is erroneous to say that a tortfeasor's liability arises from the judgment as opposed to the acts and omissions leading to the judgment. Moreover, a judgment is not an event. It would also be strange and misleading to say that a tortfeasor's liability arises from the event of the entry of the judgment or the event of the judgment becoming final. Clearly, the California statute is keyed to loss-generating conduct and omissions. Those are the events that matter for the purposes of the statute. As Justice Baxter said in his concurring opinion in *Montrose Chemical*, "it is the event or events which produce liability, not merely the liability itself, which must remain 'contingent or unknown' at the time the insurance contract is created." [FN109]

V. Implications for Insurance Coverage of Y2K Claims

There is substantial uncertainty as to what will happen to computers when the calendar changes from 1999 to 2000. Many people fear cataclysmic catastrophe, while others believe that not much will happen at all. [FN110] Responsible insurance authorities estimate that there may be \$1 trillion in total exposure, but no one really knows how much or where the worst problems will arise. [FN111] The average business decision-maker, therefore, simply does not know what

will happen, and therefore is not in the situation of the man who *618 owns the house next to the body of water where the flood is rising. Y2K losses may be inevitable, but the general public does not know that they are inevitable, and the average business decision-maker does not know this either. It is certain that the principal variants on the Principle will not apply. No losses have been incurred yet, so there can be neither a known-loss nor a loss-in-progress. Consequently, if insurers attempt, across the board, to invoke the Principle Fortuity as a bar to all or most of Y2K claims, that move will most likely fail. [FN112]

On the other hand, some businesses may know for sure that they will sustain Y2K losses and what those losses are. In this situation, the Principle should apply. Both property and liability insurers would be well-advised, however, to be quite selective when invoking the Principle. Of course, there is nothing wrong with making an inquiry about what the insured knew and when the insured knew it. Nevertheless, in the vast majority of cases, especially those pertaining to smaller businesses, insurers should be skeptical of whether the Principle will eliminate coverage. This is also true with the much larger businesses that have worked to correct the problem. If a business has worked to correct a Y2K problem and has failed, this will almost certainly guarantee that whatever loss it experiences is a fortuitous one. This conclusion is true even in cases where there is substantial debate inside the business with regard to the very loss that the business experiences.

With respect to some of the examples with which this Article began, there is almost certainly coverage for these in the absence of an application of the Principle. It would be surprising if that principle bars coverage in many of these fact patterns. Some proponents of the view that Y2K losses are barred by the Principle have confused that Principle either with the tort-based duty that victims have to mitigate their damages, or with the insurance contract duty that insureds have to prevent their losses from increasing. Correcting potential Y2K *619 problems has nothing to do with either of those well-founded legal duties. Whether there is insurance for Y2K generated losses will depend upon the language of the policy, the character of the loss, and in a few cases, the Principle. However, in all likelihood, in the absence of specially tailored exclusions embodying the Principle, it will not play a significant role in eliminating coverage.

It should be noted that there is another insurance problem that may come up in the context of failed medical devices. As is customary in products liability suits, everyone in the chain of distribution will be sued, including doctors. It would not be surprising if the physicians' medical malpractice carriers seek contributions to their defense costs from the manufacturers' CGL carriers. It is not uncommon for manufacturers to have insurance contracts containing vendor's endorsements. These are designed to provide coverage for everyone in the chain of distribution. [FN113] Physicians usually like to take the position that they are not vendors of medical devices. Nevertheless, it is alleged that they are vendors, so their medical malpractice insurers will take the position that they are owed a defense by the manufacturer's insurer. Of course, the manufacturer's insurer will take the position that the physicians are not vendors. The non-vendor position has been sustained in the context of breast implant litigation. [FN114] Both the physicians and the insurers of the manufacturer wanted to take the position that accusations of medical malpractice and accusations of product liability are mutually exclusive. [FN115] This position is unsatisfying in various ways. First, physicians might actually sell the goods. Second, if a physician negligently inserts a defective product, and the price of the product is part of the service fees, then the physician should be treated as a vendor of the object. Some cases have perpetuated this false dichotomy. In *Barbee v. Rogers*, [FN116] there was nothing allegedly *620 defective about the product. [FN117] It was the optometrist's services that were alleged to be defective in prescribing the wrong product. Similarly, in *Gormley v. Stoffer* [FN118] a set of false teeth were not alleged to be defective. [FN119] Rather, the plaintiff alleged that the dentist had prescribed the wrong ones. In both cases the problem arose out of a service component of the doctor/patient relationship, not a defective product. Alternatively, pacemakers with embedded chips that stop suddenly at the Year 2000 will become defective. The same is true for other medical devices.

VI. Conclusion

Many executives in the insurance industry sincerely believe that insurance money should not pay for Y2K losses. Maybe they are right. Maybe they are wrong. The press reports that many insurance executives--both in the United States and abroad [FN120]--believe that the Principle releases insurers from paying for Y2K losses. The thesis of this Article has been that this position is more of a wish than a fact. This Article has demonstrated that the Principle is a complicated and nuanced concept. The Principle is axiomatic, but it is narrow, and it must be applied with finesse. It is therefore extremely unlikely that the Principle will carte blanche release insurers from Y2K obligations. It may work here or there, and some courts may go along. In the long run, however, rational courts should not use the Principle as a fortress to protect insurers from Y2K losses. Instead, rational courts should require that the character of these losses

be delineated carefully, then compared and contrasted in some detail both with the Principle abstractly formulated and with the way that Principle has been applied for the last quarter of a century in, for example, environmental insurance litigation.

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[FN1]. See, e.g., Capers Jones, *The Year 2000 Software Problem* (1998); Jeffrey W. Stempel, *Law of Insurance Contract Disputes* §23.01 et seq. (2d ed. 1999); Edward Yourdon & Jennifer Yourdon, *Time Bomb 2000* (1998).

[FN2]. See Edward Yourdon & Jennifer Yourdon, *Time Bomb 2000* 292, 296-97 (1998).

[FN3]. See *id.* at 219; Barnaby J. Feder, *The Millennium Glitch, and Life and Death*, *N.Y. Times*, Jan. 24, 1999, at 12 (discussing the implications of Y2K on selected aspects of the health care industry).

[FN4]. See Feder, *supra* note 3, at 12.

[FN5]. See Yourdon & Yourdon, *supra* note 2, at 86-92.

[FN6]. See *id.* at 238-39.

[FN7]. See generally **Michael Sean Quinn**, *Bungled Inspections: A Polemic Against Insurer Liability* (with Special Reference with Boilers), 4 *Tex. Ins. L. Rep.* 17 (1986) (noting that courts have found no duty running from insurers for the protection of insureds under Texas common law, which states that one cannot be liable without affirmative actions that increase risk, because of considerations of public policy such as the increased cost of commercial insurance).

[FN8]. See Yourdon & Yourdon, *supra* note 2, at 359-61.

[FN9]. See *id.* at 192.

[FN10]. See David E. Dukes et al., *Consultant Liability for Year 2000 Problems--A Professional by Any Other Name*, in *The Defense Practitioner's Guide to the Year 2000 Problem* 75 (Barbara C. Neff ed., 1998) (stating computer consultants should also confer with legal counsel to develop risk management plans).

[FN11]. See Martin C. Loesch et al., *Surveying Cyberspace: A Guide to Insurance Defense and Coverage in the Age of Technology* 45-49 (1998) (pointing out the type and extent of insurance coverage that would be implicated from Y2K crashes.) See generally Anthony E. Davis & Robert H. Spencer, *The Year 2000 Problem and the Legal Profession: Managing the Risks* (1998) (highlighting specific problems law firms could face).

[FN12]. After all, lawyers are guilty of actionable legal malpractice when they cause injury as the result of conduct that is not reasonable. See David J. Beck, *Legal Malpractice in Texas*, 50 *Baylor L. Rev.* 547, 613 (1998). Since we now live in the Computer Age, lawyers must act prudently given the socio-economic world in which they live.

[FN13]. One way to distinguish among different kinds of liability insurance policies is by reference to what triggers coverage under a given policy. Under one type of policy, what matters is when an injury took place. Under other types of policies, it does not matter when the injury took place; what matters is when the claim was reported to the insurance company. This latter type of insurance policy is called a claims-made policy. See Zuckerman v. National Union Fire Ins. Co., 495 A.2d 395 (N.J. 1995); Sparks v. St. Paul Ins. Co., 495 A.2d 406 (N.J. 1985). Claims-made policies are characteristic of professional malpractice insurance. See Robert H. Jerry, II, *Understanding Insurance Law* § 62A[e], at 364 (2d Ed. 1996).

[FN14]. See Stempel, *supra* note 1, §23.02, at 23-7. The skeptics have their opposition. Some people think a huge catastrophe is coming. Many analysts of this style of thinking classify it as a new form of "millennialism," a kind of superstition to the effect that great things will happen as the millennium turns. But see Richard Lacayo, *The End of the World as We Know It?*, *Time*, Jan. 18, 1999, at 60 (concluding that the millennium will not be apocalyptic).

[FN15]. See Jason Coomer, *The Y2K Millennium Bug*, 62 *Tex. Bar J.* 282, 288 (1999).

[FN16]. See Deborah Pitts, *Year 2000 Liability and Insurance: Is Your Insurer on the Hook?*, *The Year 2000 Computer Crisis: The Litigation Summit* (conference materials) (Fulcrom Information Services, Inc., New York, N.Y.) (1997). Arguably, in the Year 2000 problem, there is nothing fortuitous about either the injury causing event or the resulting harm. The original decision to code dates to six digit fields was intentional and clearly done as a cost saving device. See *id.* at 5.

[FN17]. See Joan Hartnett-Barry, *Cat Code: Y2K, Claims*, Jan. 1999, available at <<http://www.claimsmag.com/cat.html>>. This is a monthly magazine specifically for the insurance industry.

[FN18]. For one court's treatment of this statement, see Domtar, Inc. v. Niagara Fire Co., 563 N.W.2d 724, 737 (Minn. 1997) (stating that insurance cannot be issued for a known loss).

[FN19]. See Hartnett-Barry, *supra* note 17.

[FN20]. See *id.*

[FN21]. See Stempel, *supra* note 1, §1.05[a], at 1-32 ("[I]nsurance exists to provide indemnity for fortuitous losses only....").

[FN22]. Walter J. Andrews & Leslie A. Plat, *Insurance Coverage for the Millennium Bug*, 8 *Coverage* 36, 37 (1998).

[FN23]. See The T. J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) ("[T]here are precautions so imperative that even their universal disregard will not excuse their omission.").

[FN24]. See Fidelity & Guar. Ins. Underwriters, Inc. v. Allied Realty Ltd., 384 S.E.2d 613, 615 (Va. 1989) (discussing the development of the fortuity doctrine); S. Cozen & R. Bennett, Fortuity: The Unnamed Exclusion, 20 *Forum* 222, 222 (1985) (elaborating on concepts associated with the fortuity doctrine).

[FN25]. See Robert H. Jerry, II, *Understanding Insurance Law* 382-84 (2d ed. 1996) (explaining that the principle of

fortuity is a fundamental requirement of insurance law that generally excludes intentional conduct from coverage).

[FN26]. Robert E. Keeton & Allan I. Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrine, and Commercial Practices* 476 (Practitioner's ed. 1988).

[FN27]. See Stempel, *supra* note 1, §1.05[a], at 1-32; M. Elizabeth Medaglia et al., *The Status of Certain Nonfortuity Defenses in Casualty Insurance Coverage*, 30 *Tort & Ins. L.J.* 943 (1995). "The principle that insurance covers only fortuitous losses has long been universally recognized. Generally speaking, the concept of fortuity provides that a policyholder can receive coverage only for those losses that are unknown and occur by chance." Medaglia, 30 *Tort & Ins. L.J.* at 943.

[FN28]. See *University of Cincinnati v. Arkwright Mut. Co.*, 51 F.3d 1277, 1281 (6th Cir. 1995) (quoting *Restatement of Contracts* § 291, cmt. A (1952), which defines a fortuitous event as one "which so far as the parties to the contract are aware, is dependent on chance"); *Intermetal Mexicana, S.A. v. Insurance Co. of N. Am.*, 866 F.2d 71, 77-78 (3d Cir. 1989) (describing an approach for evaluating fortuitous losses and stating that "[i]t is generally recognized that it is against public policy to allow insurance against a certainty").

[FN29]. *Fox v. Country Mut. Ins. Co.*, 964 P.2d 997, 1002 (Or. 1998).

[FN30]. See generally Reference Handbook on the Comprehensive General Liability Policy: Coverage Provisions, Exclusions and Other Litigation Issues (Peter J. Neeson ed., 1995) (surveying the CGL contract in a series of essays).

[FN31]. CGL contract forms are reprinted in many places. Huge numbers of businesses have such forms in their possession, as do all insurance agents. A convenient place where virtually all of the CGL forms are collected is Jack P. Gibson et al., *Commercial Liability Insurance* (1999). This is a 3-volume loose leaf collection that includes both policy forms and annotations. The currently used CGL policy is to be found in Volume I at § IV.T.83ff. The definition of "occurrence" is to be found at § IV.T.93.

[FN32]. See Gibson et al., *supra* note 31 § IV.T.93.

[FN33]. But see Roger C. Henderson & Robert H. Jerry, II, *Insurance Law* 654 (1996) ("The term 'accident' [is] ambiguous in several respects.").

[FN34]. Professional malpractice policies, for example, do not require accidental conduct. They begin by insuring negligent conduct, and they do not require that. Other types of conduct are also insured. Legal malpractice policies illustrate this point. See ABA Standing Committee on Lawyers' Professional Liability, *Selecting Legal Malpractice Insurance* 2-3 (1999); Ronald E. Mallen et al. *Legal Malpractice: The Law Office Guide to Purchasing Legal Malpractice Insurance* § 16.2.10, at 74 (1996); see also Duke Nordlinger Stern & JoAnn Felix-Retzki, *A Practical Guide to Preventing Legal Malpractice* § 9.19 (1983).

[FN35]. See *State Farm Fire & Cas. Co. v. S.S. & G.W.*, 858 S.W.2d 374, 378-80 (Tex. 1993) (discussing possible liability of a homeowners' policy insurer whose insured may have intentionally spread genital herpes).

[FN36]. See *id.*

[FN37]. See *id.*

[FN38]. See, e.g., *Fitzpatrick v. American Honda Motor Co.*, 575 N.E.2d 90 (N.Y. 1991) (noting that "[i]t is well established that a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may meritless or not covered"). It should also be noted that if a plaintiff wishes to deny the defendant a defense from his insurer, the plaintiff can similarly strategically engineer the pleadings for that result.

[FN39]. See *Waller v. Truck Ins. Exch.*, 900 P.2d 619, 628-35 (Cal. 1995) (describing the allegations necessary to trigger a duty to defend such as covered occurrences that cause bodily injury or tangible property losses).

[FN40]. Sometimes, in business strategy, a company will try to provoke someone else to sue them, but this is rare. For the most part, business litigants try to control venue, and therefore try to be plaintiffs.

[FN41]. See Gibson et al., *supra* note 31 § IV.T.86.

[FN42]. The term "bodily injury" is routinely defined in CGL policies and in other liability policies as "bodily injury, sickness or disease sustained by any person, including death resulting from any of these at any time." See *id.* § IV.T.92. The definition begins in a circular manner; however, the definition is not completely circular, because in ordinary language we often distinguish between sickness and disease on the one hand and injury on the other. In the CGL, death that does not result from an injury to the body, sickness, or disease, is not bodily injury, while, in ordinary language, death is not an injury to the body at all. Additionally, in many jurisdictions, mental anguish unaccompanied by any obvious harm to the body does not constitute bodily injury.

[FN43]. See *id.* § IV.T.93.

[FN44]. *Id.* § IV.T.91.

[FN45]. See *id.*

[FN46]. See Peter J. Kalis et al., *Policyholder's Guide to the Law of Insurance Coverage* §6.03 (1997); Stempel, *supra* note 1, § 1.05[a], at 1-39 through 1-43.

[FN47]. See Gibson et al., *supra* note 31 § IV.T.83.

[FN48]. *Id.* § IV.T.86.

[FN49]. See Peter J. Kalis, et al., *Policy Holder's Guide to the Law of Insurance Coverage* § 8.01, at 8-3 (1997) (noting that such coverage was initially offered as a supplement to the standard CGL policy through the publishing of a Broad Form Comprehensive General Liability Endorsement by ISO in 1976).

[FN50]. For a recent discussion of this problem, see **Michael Sean Quinn**, *Punitive Damages and Liability Insurance: Whither Texas?*, 18 *Ins. Litig. Rep.* 121 (Mar. 1996). See also Stempel, *supra* note 1, § 1.05[a][B], at 1-57 (explaining

the split in jurisdictions on whether insurance should cover punitive liability).

[FN51]. For a recent case considering these problems, see Hartford Ins. Co. v. Powell, 19 F. Supp. 2d 678, 696 (N.D. Tex. 1998) (denying insurance coverage for punitive damage awards against an injured tortfeasor for gross negligence as against public policy).

[FN52]. See Persian Galleries, Inc. v. Transcontinental Ins. Co., 38 F.3d 253, 257 (6th Cir. 1994) (requiring that the insured prove that a fortuitous event caused loss); Adams-Arapahoe Joint School Dist. v. Continental Ins. Co., 891 F.2d 772, 778 (10th Cir. 1989) (holding that an insurer's claim of the insured's knowledge was not an affirmative defense, but rather was proffered to prevent the insured from meeting the burden of proving fortuitousness).

[FN53]. See Koppers, Inc. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1447 (3d Cir. 1996) (stating that as with exclusions in an insurance policy itself, when an insurer relies on public policy to deny coverage of a claim, the insurer must bear the burden). But see Intermetal Mexicana, S.A. v. Insurance Co. of N. Am., 866 F.2d 71, 77 (3d Cir. 1998) (containing an implication that the insured may have to prove fortuity if the issue arises).

[FN54]. See Koppers, 98 F.3d at 1445-47 (indicating that systematic disposal at 150 plants and waste sites is fortuitous if the insured can prove that it neither expected nor intended the harm).

[FN55]. Of course, in the universe of conceivable environmental conduct, there are many nonfortuities. Someone who committed mass murder by spraying a village with a death-causing pollutant, the properties of which the sprayer understood, and the consequences of which he envisaged and desired, would be an example of this sort of thing. Perhaps this could be called eco-terrorism.

[FN56]. See Inland Waters Pollution Control, Inc. v. National Union Fire Ins. Co., 997 F.2d 172, 178 (6th Cir. 1993) (illuminating a variant of the fortuity doctrine--the loss-in-progress doctrine--which applies only when the insured has foreknowledge of or is aware of a threat of loss so immediate that it could be said that the loss was in progress, thus precluding coverage).

[FN57]. See *id.*

[FN58]. For a tabulation and review of this general point, see M. Elizabeth Medaglia, Gregory H. Horowitz, and Gina S. Love, The Status of Certain Nonfortuity Defenses in Casualty Insurance, 30 *Tort & Ins. L.J.* 943 (1995).

[FN59]. See University of Cincinnati v. Arkwright Mut. Co., 51 F.3d 1277 (6th Cir. 1995).

[FN60]. See *id.* at 1280.

[FN61]. See Intermetal Mexicana, S.A. v. Insurance Co. of N. Am., 866 F.2d 71, 78 (3d Cir. 1988) (concluding that the taking of equipment based on a valid court order is not a fortuitous event).

[FN62]. See Chute v. North River Ins. Co., 214 N.W. 473, 474 (Minn. 1927) (holding that an insured could not recover under a policy when a gemstone cracked not because of outside force but an inherent vice in the gem); Avis v. Hartford Fire Ins. Co., 195 S.E.2d 545, 547-48 (N.C. 1973) (discussing a previous court's holding that "all risks" insurance does

not cover inherent wear and tear); Fidelity & Guar. Ins. Underwriters, Inc. v. Allied Realty Co., 384 S.E.2d 613, 615 (Va. 1989) (stressing that a fortuitous loss is one that does not result from inherent defects or ordinary wear and tear).

[FN63]. See Stempel, *supra* note 1, § 15.01, at 15-4 through 15-5.

[FN64]. Ludwig Wittgenstein, *Philosophical Investigations* 31e-32e (1953).

[FN65]. See William F. Campbell & Matthew S. Covington, *The Year 2000 Timebomb: Will There Be Coverage?*, Coverage, Mar.-Apr. 1998, at 1, 19 (discussing liability associated with Y2K non-compliance and the problems Y2K defendants will encounter when seeking coverage for such liabilities from their insurers).

[FN66]. See Burch v. Commonwealth County Mut. Ins. Co., 450 S.W.2d 838, 840-41 (Tex. 1970) (holding that applying for and obtaining a policy knowing a loss has already occurred and failing to disclose that fact constitutes fraud).

[FN67]. See Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co., 124 F.3d 508, 516 (3d Cir. 1997) ("The known loss doctrine will bar coverage only when the legal liability of the insured is a certainty."); Summers v. Harris, 573 F.2d 869, 872 (5th Cir. 1978) ("When a loss already is in progress at the time a policy is issued, the contract of insurance does not take effect.").

[FN68]. See Pittston Co., 124 F.3d at 518.

[FN69]. See Domtar v. Niagra Fire Ins. Co., 563 N.W.2d 724, 737 (Minn. 1997) (observing that since known-loss is a fraud-based defense in Minnesota, an insurer must prove the insured withheld material information).

[FN70]. See Jerry, *supra* note 13, § 63, at 383.

[FN71]. See Sentinel Ins. Co. v. First Ins. Co. of Haw., 875 P.2d 894, 919 (Haw. 1994) (explaining the known-loss doctrine and the loss-in-progress doctrine).

[FN72]. On the problem of moral hazard, see Alan R. Miller, *Moral Hazard and Property Insurance--A Social, Economic, Historical and Normative Analysis* 9, 17 (1990) (unpublished L.L.M. thesis, Harvard Law School) (on file with the Harvard University Law Library) (defining moral hazard as "a characteristic of the insured that increases the probability of loss arising from the dishonesty of the insured," and explaining the way it interacts with economically rational conduct of the insured). See generally Tom Baker, On the Genealogy of Moral Hazard, 75 *Tex. L. Rev.* 237 (1996) (tracing the origins of the concept of moral hazard and criticizing its use as a means to reform tort law, worker's compensation, health insurance, or social welfare programs).

[FN73]. See Hillhaven Properties, Ltd. v. Sellen Constr. Co., Inc., 948 P.2d 796, 804 (Wash. 1997) (determining that how much the insured must know to bar coverage under first party property policies is an issue for the fact-finder).

[FN74]. See K. Abraham, *Environmental Liability Insurance Law* 129-45 (1991) ("[T]he mere fact that the insured knew of a risk at the time of purchase is not a basis, standing alone, for denying coverage of liability for harm resulting from the risk."); see also Stempel, *supra* note 1, § 1.05[a][2]- [3].

[FN75]. But see Summers v. Harris, 573 F.2d 869, 873 (5th Cir. 1978) (holding that the loss-in-progress principle applies to bar recovery even though flooding did not impact the insured until a week after the policy was published).

[FN76]. See, e.g., Montrose Chemical Corp. v. Admiral Ins. Co., 913 P.2d 878 (Cal. 1995).

[FN77]. See Public Util. Dist. No. 1 v. International Ins. Co., 881 P.2d 1020, 1030 (Wash. 1994) ("The known risk defense is premised on the principle that an insured cannot collect on an insurance claim for a loss that the insured subjectively knew would occur at the time the insurance was purchased.").

[FN78]. It is important to remember that liability insurance often involves two separate types of coverages. There is coverage for getting sued (the duty to defend) and there is coverage for payment of some damages (indemnity or pay-on-behalf-of coverage).

[FN79]. 607 N.E.2d 1204 (Ill. 1992).

[FN80]. See id. at 1210-11 (emphasis omitted).

[FN81]. See id. at 1211.

[FN82]. Id. at 1210 (citations omitted). The court did not say that all of the insured's liability insurers lacked a duty to defend. For several of the liability insurers, that issue was a matter of fact upon which there would have to be a trial. "There is no bright-line test to determine whether and at what point in time the insured knew or had reason to know of the substantial probability of the loss at issue. The extent of the insured's knowledge of the loss must be determined on a case-by-case basis." Id. This indicates that many duty-to-defend cases in which a known-loss doctrine is the issue may have to be defended.

[FN83]. Id. at 1211.

[FN84]. See Outboard Marine Corp., 607 N.E.2d at 1210.

[FN85]. See id. at 1212.

[FN86]. See id. at 1211-12.

[FN87]. See SCA Servs., Inc. v. Transportation Ins. Co., 646 N.E.2d 394 (Mass. 1995).

[FN88]. Id. at 395.

[FN89]. Id. at 396.

[FN90]. See Village of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 841 (Ill. 1981).

[FN91]. See SCA Servs., 646 N.E.2d at 397.

[FN92]. See id. at 396.

[FN93]. Id. at 397.

[FN94]. Id.

[FN95]. See id. at 396.

[FN96]. See SCA Servs., 646 N.E.2d at 396.

[FN97]. See Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1214 (Ill. 1992).

[FN98]. 913 P.2d 878 (Cal. 1995).

[FN99]. Id. at 880.

[FN100]. See id. at 904.

[FN101]. See id. at 882-83.

[FN102]. Cal. Ins. Code §§ 22, 250 (West 1993).

[FN103]. Montrose Chem., 913 P.2d at 904 (emphasis added).

[FN104]. Id. (emphasis added); see also Astro Pak Corp. v. Fireman's Fund Ins. Co., 665 A.2d 1113, 1117 (N.J. Super. Ct. 1995) (holding that the known-loss and loss-in-progress doctrines did not defeat insurance coverage when the insured was not aware of its potential liability at the time the policy was signed).

[FN105]. See Montrose Chem., 913 P.2d at 904.

[FN106]. See Gray v. Zurich Ins. Co., 419 P.2d 168, 176 (Cal. 1966) (finding that the insurer is obligated to defend a suit that potentially sticks damages within the policy limits).

[FN107]. Justice Baxter makes some of these points in his concurring opinion. See Montrose Chem., 913 P.2d at 908 (Baxter, J., concurring).

[FN108]. Cal. Ins. Code § 22 (West 1993).

[FN109]. Montrose Chem., 913 P.2d at 908 (Baxter, J., concurring) (emphasis added). For an interesting discussion of fortuity, the known loss, and the loss in progress doctrines in a coverage context, see Two Pesos, Inc. v. Gulf Ins. Co., 901 S.W.2d 495, 501-02 (Tex. App.--Houston [14th Dist.] 1995, no writ) (holding that the fortuity requirement applies to supplemental damages for advertising injuries such as trade dress infringement because it was a "known loss" or "loss in progress"). See also Tour 18 Ltd. v. Zurich Ins. Co., No. H-97-803, slip op. at 9-11 (S.D. Tex. Jan. 5, 1999) (juxtaposing the known loss and loss in progress rules with the "first publication" exclusion of Coverage B because the ongoing trade dress infringement began before the policy period).

[FN110]. See Richard Lacayo, The End of the World as We Know It?, Time, Jan. 18, 1999, at 60-70; Chris Taylor, The History and the Hype, Time, Jan. 18, 1999, at 72.

[FN111]. See Jeffrey Dunsavage, Only Natural Disaster Is Likely to Cost More than Y2K, Best's Review, Jan. 1999, at 90.

[FN112]. See Stempel, *supra* note 1, at §23.01 et seq. Professor Stempel's chapter is one of the only balanced treatments of the subject available. It is absolutely amazing how ideological lawyer articles are on this subject. Lawyers who work mainly for insurance companies write polemical ersatz briefs pushing what they think is the insurance company line, whereas lawyers who work mainly for policyholders write similarly shrill pieces on behalf of the opposite point of view. This kind of legal screeching gets no one anywhere, and it ought to stop. As our mothers taught us all, "If you do not have anything constructive to add, do not say anything."

[FN113]. See generally Donald S. Malecki & Jack P. Gibson, The Additional Insured Book (3d ed. 1997) (reporting such endorsements and discussing vendor's endorsements in context); **Michael Sean Quinn**, Vendor's Endorsements, 18 Ins. Litig. Rep. 375 (1996) (providing a survey of vendor's endorsement cases and the theoretical rationale for the existence of such endorsements).

[FN114]. See Texas Medical Liab. Trust v. Zurich Ins. Co., 945 S.W.2d 839, 843 (Tex. App.--Austin 1997, writ denied).

[FN115]. See id. at 842.

[FN116]. 425 S.W.2d 342 (Tex. 1968).

[FN117]. Id. at 346 (holding that a practitioner who prescribes the wrong treatment cannot be held liable on a products liability theory).

[FN118]. 907 S.W.2d 448 (Tex. 1995).

[FN119]. Id. at 450 (holding that the law of implied warranties did not apply when a dentist prescribed false teeth that did not fit).

[FN120]. See Carolyn Aldred, European Y2K Risk Not Yet Managed, Bus. Ins., Mar. 22, 1999, at 19.

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