Is the “Act of God” Dead?

Southwestern Association of Law Libraries
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OUTLINE

I. Introduction

II. Why the “Act of God” Defense Fails

III. Why and how the “Act of God” Defense May Retain Vitality
Part I:
Introduction
There will be great earthquakes, and in various places famines and pestilences. And there will be terrors and great signs from heaven. Luke 21:11
“God Is Dead”
- Friedrich Nietzsche (1882)

… And we have killed him. What was the holiest and mightiest of all that the world has yet owned has bled to death under our knives: who will wipe this blood off us? What water is there for us to clean ourselves?
THE END OF NATURE

BILL MCKIBBEN

WITH A NEW INTRODUCTION BY THE AUTHOR

Author of The Age of Missing Information

“[McKibben] may well already have taken his place next to Rachel Carson and Silent Spring.”
— Baltimore Sun
The “Act of God” Is Dead

“The time has come to recognize the act of God defense for what it is: … anachronistic…."

The “Act of God” Is Dead.


Is the “Act of God” Dead?

**THESIS:**

The Act of God defense is *not* dead and can provide a valuable incentive for preparing for events in the future.
Part II:
Why the “Act of God” Defense Fails
“[I]t would be unreasonable that those things which are inevitable by the Act of God, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person....”

_Shelley’s Case_ (1581)
For the Act of God defense to obtain, “the earth must be convulsed, the lightning must kindle the fire, the air must blow in tempests or tornadoes … by the forces of nature, uncontrolled and unaided by the hand of man…. The natural forces must be “inevitable” and “irresistible.”

Polack v. Pioche, 35 Cal. 416, 417 (1868)
CERCLA Sec. 101(1): The term “act of God” means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.
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CERCLA Sec. 107(b): An otherwise responsible party shall not be liable if the defendant can prove, by the preponderance of the evidence, that the release or discharge was “caused solely by—
(1) an act of God;
(2) an act of war;
(3) an act or omission of a third party....”
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Photo: Vincent Laforet, AP Photo
Murphy Oil Spill
St. Bernard Parish, LA, September 2005
Part III:

Why and how the “Act of God” Defense May Retain Vitality
Why?

The term “act of God” means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.
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San Francisco Earthquake: April 18, 1906
THE REALLY BIG ONE

An earthquake will destroy a sizable portion of the coastal Northwest. The question is when.

By Kathryn Schulz

When the 2011 earthquake and tsunami struck Tohoku, Japan, Chris Goldfinger was two hundred miles away, in the city of Kashiwa, at an international meeting on seismology. As the shaking started, everyone in the room began to laugh. Earthquakes are common in Japan—that one was the third of the week—and the participants were, after all, at a seismology conference. Then everyone in the room checked the time.

Seismologists know that how long an earthquake lasts is a decent proxy for its magnitude. The 1989 earthquake in Loma Prieta, California, which killed sixty-three people and caused six billion dollars’ worth of damage, lasted about fifteen seconds and had a magnitude of 6.9. A thirty-second earthquake generally has a magnitude in the mid-sevens. A minute-long quake is in the high sevens, a two-minute quake has entered the eights, and a three-minute quake is in the high eights. By four minutes, an earthquake has hit magnitude 9.0.
April 19: 2011: Wildfire near Possum Kingdom, TX
June 2011: Wallow Fire, Arizona/New Mexico
May 20, 2013: Moore, OK, EF5 tornado
May 20, 2013: Moore, OK, EF5 tornado
Photo: Sue Ogrocki, AP
May 31, 2013: El Reno, OK, EF5 tornado

Photo: Nick Nolte
June 2013: Black Forest Fire, Colorado

Photo: christianpost.com
Sept. 2013: Colorado floods
Why?
How?
How may the “Act of God” defense retain vitality?

- Canons of construction
- Enforcement discretion
- Plain language
Canons of Construction

If possible, every word and every provision is to be given effect.

Scalia & Garner, Reading Law (2012)
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Enforcement Discretion

The quality of mercy is not strained . . .
Enforcement Discretion
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Sierra Club v. Whitman, 268 F.3d 898 (9th Cir. 2001)
Enforcement Discretion

“[I]t will take between one and three months … to restore electricity, a month to a year to restore drinking water and sewer services, six months to a year to restore major highways, and eighteen months to restore health-care facilities.”

Kathryn Schultz, The Really Big One, The New Yorker, July 20, 2015
Enforcement Discretion

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“Act of War”
“Act or omission of a third party”
Plain Language

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The “Act of God” is not dead.

Prof. Cliff Villa

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