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Chapter 32, Sections 69–70: California Seismic Safety Capital Access Loan Program

Bryce Fick

University of the Pacific, McGeorge School of Law

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**Chapter 32, Sections 69–70: California Seismic Safety
Capital Access Loan Program**

*Bryce Fick**

Code Sections Affected

Health & Safety Code §§ 44559.11 (amended), 44559.14 (new);
AB 2392 (Nazarian) and SB 837 (Committee on Budget and Fiscal Review);
2016 STAT Ch. 32 § 70.

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I. INTRODUCTION

Originally proposed as AB 2392 in the California Assembly¹ and then enacted as part of a larger package in SB 837,² Chapter 32, Sections 69–70 seek to address the serious risk of earthquakes³ that California and its cities face by making financing for seismic retrofitting more easily available.⁴ Illustrating this risk, Los Angeles released a list, in April 2016, of 13,500 condos that will likely need seismic retrofitting.⁵ And the risk is not limited only to Southern California: Northern California faces a serious risk of a major earthquake destroying many of its older buildings.⁶ Unfortunately, seismically retrofitting buildings is expensive,⁷ and financing can be difficult to obtain in areas still recovering from the recession.⁸ Consequently, many building owners will likely need assistance to address these grave safety concerns.⁹

*J.D. Candidate, University of the Pacific, McGeorge School of Law to be conferred May 2018; B.A., Sociology, University of California, Davis, 2014. First and foremost, I would like to thank my girlfriend, Sundas Pasha, who has loved and supported me through this writing process and law school, while also working on her own psychology doctorate. I would also like to give a well-deserved thank you to the law review staff and board of *The University of the Pacific Law Review*, as well as to the faculty at McGeorge who have been helpful throughout the law review process. And, finally, I would like to thank my parents who have made law school possible for me.

1. See A.B. 2392, 2015–2016 Sess. (Cal. 2016) (original bill creating the California Seismic Safety Capital Access Loan Program).

2. S.B. 837 § Sections 69–70, 2015–2016 Sess. (Cal. 2016) (as chaptered by Chapter 32, Sections 69–70).

3. See, e.g., Rong-Gong Lin II & Rosanna Xia, *Risk of 8.0 earthquake in California rises, USGS says*, L.A. TIMES (Mar. 10, 2015), available at <http://www.latimes.com/local/lanow/la-me-ln-chance-of-80-earthquake-in-california-rises-usgs-says-20150310-story.html> (reporting that California is at high risk of a major earthquake) (on file with *The University of the Pacific Law Review*); see also UNITED STATES GEOLOGICAL SERVICE, TOP EARTHQUAKE STATES (2012), http://earthquake.usgs.gov/earthquakes/states/top_states.php (on file with *The University of the Pacific Law Review*) (listing California as having the second most earthquakes of all 50 states).

4. Telephone Interview with Juan Reyes, Office of Assemblyman Adrin Nazarian, 46th Assembly District of California (Aug. 5, 2015) (notes on file with *The University of the Pacific Law Review*).

5. Rosanna Xia & Jon Schleuss, *L.A. releases addresses of 13,500 apartments and condos likely to need earthquake retrofitting*, L.A. TIMES (Mar. 10, 2015), available at <http://www.latimes.com/local/california/la-me-quake-risk-20160415-story.html> (on file with *The University of the Pacific Law Review*).

6. See Lisa M. Krieger, *Major earthquake predicted to hit Northern California within 30 years*, L.A. DAILY NEWS (Mar. 10, 2015), available at <http://www.dailynews.com/general-news/20150310/major-earthquake-predicted-to-hit-northern-california-within-30-years> (on file with *The University of the Pacific Law Review*) (reporting on the prediction and risks facing northern California from a major earthquake).

7. See Peter Henderson, *Special report: Big California quake likely to devastate state*, REUTERS (Mar. 15, 2011), <http://www.reuters.com/article/us-quake-california-idUSTRE72E06220110315> (reporting that retrofitting a five-unit building in San Francisco can cost \$10,000 – \$20,000 per apartment).

8. See, e.g., Dana Guzzetti, *Martinez building retrofit: positive impact versus lost business during construction*, THE HUMBOLDT BEACON (Aug. 12, 2015), available at <http://www.humboldtbeacon.com/article/ZZ/20150812/NEWS/150818749> (on file with *The University of the Pacific Law Review*) (reporting that Martinez businesses are facing difficulties with financing in the midst of lost revenue and low property values).

9. See CAL. HEALTH & SAFETY CODE § 44559.14(a)(1) (West, WestlawNext through 2016 portion of 2015–2016 Legis. Sess.) (enacted by Chapter 32, Sections 69–70, expressing the “intent of the Legislature in enacting” the section as to “assist residential property owners and small business owners in seismically retrofitting residences and small businesses.”)

II. LEGAL BACKGROUND

Chapter 32, Sections 69–70 continue the history of earthquake mitigation in the state¹⁰ and create new incentives for seismic retrofitting through the the California Capital Access Program (CalCAP).¹¹

As of 2012, the United States Geological Service reported that California is second only to Alaska for the state with the most earthquakes.¹² As a result, California has a long history of earthquake-related legislation intended to alleviate the damage caused by seismic activity.¹³ Sections 19160–19168 of the Health and Safety Code authorize local jurisdictions to enact ordinances identifying buildings that would be hazardous to life in the event of an earthquake.¹⁴ To make their cities and counties safer, local jurisdictions have offered a variety of incentives to encourage seismic retrofitting.¹⁵ In addition to these local incentives, the judicial system has created further incentives through tort liability.¹⁶

Chapter 32, Sections 69–70 go a step further by implementing a statewide program providing insurance for loans that finance seismic retrofitting construction through the existing capital access program.¹⁷

A. *California Seismic Safety Programs and Incentives*

California has a long history of seismic safety laws.¹⁸ There have been a variety of statewide and local efforts that suggested and mandated various

10. See Claire B. Rubin, 100 YEARS OF SEISMIC SAFETY IN CALIFORNIA (2006), available at http://www.seismic.ca.gov/pdf.files/100_Years_Seismic_Safety.pdf (on file with *The University of the Pacific Law Review*) (charting a timeline of the 100-year history of legislation related to seismic activity); STATE OF CALIFORNIA, SEISMIC SAFETY COMMISSION, A HISTORY OF THE CALIFORNIA SEISMIC SAFETY COMMISSION: LIVING WHERE THE EARTH SHAKES (2000) (outlining the history of earthquakes in California and policies addressing them).

11. See CAL. HEALTH & SAFETY CODE § 44559.14(a)(2) (Sections 69–70 establishing the California Seismic Safety Capital Access Program following “the terms and conditions for the Capital Access Loan Program,” as enacted by Chapter 32, Sections 69–70).

12. UNITED STATES GEOLOGICAL SERVICE, TOP EARTHQUAKE STATES (2012), http://earthquake.usgs.gov/earthquakes/states/top_states.php (on file with *The University of the Pacific Law Review*).

13. See Rubin, *supra* note 10 (charting a timeline of the 100-year history of legislation related to seismic activity). See generally SEISMIC SAFETY COMMISSION, *supra* note 10 (outlining the history of earthquakes in California and policies addressing them).

14. CAL. HEALTH & SAFETY CODE §§ 19160–68 (enacted by 1979 Cal. Stat. ch. 510, subsequently amended by 2005 Cal. Stat. ch. 525.).

15. See CALIFORNIA OFFICE OF EMERGENCY SERVICES, BAY AREA REGIONAL EARTHQUAKE PREPAREDNESS PROJECT, SEISMIC RETROFIT INCENTIVE PROGRAMS: A HANDBOOK FOR LOCAL GOVERNMENTS (1992) (discussing a variety of programs offered throughout California intended to help mitigate earthquake damage).

16. See *Myrick v. Mastagni*, 185 Cal.App.4th 1082, 1085 (2010) (recognizing that a jury could find a building owner negligent for not completing a seismic retrofit after notified of its hazardous nature).

17. CAL. HEALTH & SAFETY CODE § 44559.14 (West, WestlawNext Current with urgency legislation through Chapter 248 of 2016 Reg. Sess.) (enacted by Chapter 32, Sections 69–70).

programs and incentives.¹⁹ In addition to government policies, the possibility of tort liability for failing to seismically retrofit a building provides another financial incentive to building owners.²⁰

1. Statewide Legislation for Seismic Safety

Statewide legislation for seismic safety primarily arises in response to large and destructive earthquakes.²¹ For example, there are statewide seismic building requirements for public schools as a result of the March 10, 1933, Long Beach earthquake.²² In fact, since 1975, the legislature has enacted over 200 seismic safety laws.²³

One significant piece of legislation is the 1989 Unreinforced Masonry Building Law (URML), which requires all local jurisdictions to establish mitigation programs to seismically retrofit “potentially hazardous” buildings constructed with unreinforced masonry.²⁴ Even though the legislature prohibited unreinforced masonry buildings from being built after 1933, such buildings were nevertheless still being used for dwellings in areas at high risk of earthquakes.²⁵ Despite the new requirements created by the URML, as of 2006 there were still approximately 8,000 unreinforced masonry buildings in California that were not seismically retrofitted,²⁶ and it is unlikely that this number has changed significantly.²⁷ With the actual regulation and enforcement of the seismic retrofit requirements left to local jurisdictions, the efforts have had mixed results.²⁸

18. See Rubin, *supra* note 10 (charting a timeline of the 100-year history of legislation in response to seismic activity).

19. See Rubin, *supra* note 10 (charting a timeline of 100-year history of statewide legislation in response to seismic activity); CALIFORNIA OFFICE OF EMERGENCY SERVICES, *supra* note 15 (outlining different incentive and programs to encourage seismic retrofitting).

20. See *Mastagni*, 185 Cal.App.4th. at 1085 (recognizing, implicitly, that a jury could find a building owner negligent for not completing a seismic retrofit after notified of its hazardous nature); Lee Kanon Alpert, *Acts of God: Who's Liable?*, ALPERT BARR & GRANT BLOG (Aug. 14, 2014), <http://www.alpertbarr.com/acts-of-god-whos-liable> (discussing *Myrick v. Mastagni*).

21. See Rubin, *supra* note 10 (charting a timeline of the 100-year history of legislation in response to seismic activity). See generally SEISMIC SAFETY COMMISSION, *supra* note 10 (outlining the history of earthquakes in California and policies addressing them).

22. William A. Bryant, *History of the Alquist-Priolo Earthquake Fault Zoning CT, California, USA*, 16 ENV'T & ENGINEERING GEOSCIENCE 7, 7 (2010).

23. Rubin, *supra* note 10.

24. CAL. GOV. CODE §§ 8875, 8877 (as enacted by Chapter 250 in 1986).

25. See 1986 CAL. STAT. CH. 250, § 1.

26. See SEISMIC SAFETY COMMISSION, STATUS OF UNREINFORCED MASONRY BUILDING LAW 1, 9 (2006), available at <http://www.seismic.ca.gov/pub/CSSC%202006%20URM%20Report%20Final.pdf> (on file with *The University of the Pacific Law Review*) (“About 70 percent or 18,144 of these [unreinforced masonry] buildings have reportedly either been retrofitted or demolished. The remaining buildings are still at significant risk of collapse and life loss.”)

27. See Hector Becerra, James Barragan, & Rong-Gong Lin II, *Thousands of California's brick buildings face quake danger*, L.A. TIMES (Aug. 26, 2014), available at <http://www.latimes.com/local/lanow/la-me-ln-quake-safety-thousands-of-brick-buildings-still-not-retrofitted-20140826-story.html> (on file with *The University*

2. Local Programs

Local jurisdictions have attempted to address the issue of hazardous buildings with a variety of incentives,²⁹ including tax breaks, zoning incentives, and lower cost financing options.³⁰ But despite the efforts of local jurisdictions to require seismic retrofitting, not all potentially hazardous buildings are safely retrofitted.³¹

One example of a local jurisdiction that did not quickly follow through with its mitigation program is the city of Paso Robles where, shortly after the URM was enacted, the city passed an ordinance requiring building owners to seismically retrofit their buildings.³² Taking into account the difficulty of financing, however, the City of Paso Robles extended the original deadline for building owners to seismically retrofit their buildings from 2008 to 2018.³³ Sadly, when an earthquake hit the city in 2003, a building owned by the defendants in *Myrick v. Mastagni* collapsed and resulted in the death of two people.³⁴ The building in the case was at medium risk but was not retrofitted.³⁵ In response to the two deaths, survivors of the deceased filed suit, and the Second District Court of Appeal recognized a negligence cause of action for building owners who chose to not seismically retrofit their building after being notified of the building's hazardous nature in the resulting case.³⁶

of the Pacific Law Review) (“The number probably has not changed significantly since, commission Executive Director Richard McCarthy said.”)

28. See *id.* (explaining that several cities have no mandatory rules on seismically retrofitting unreinforced masonry buildings).

29. See generally CALIFORNIA OFFICE OF EMERGENCY SERVICES, *supra* note 15 (discussing a variety of local incentives in California).

30. See CALIFORNIA OFFICE OF EMERGENCY SERVICES, *supra* note 15, at 4 (“The Handbook was conceived as part of an effort to find sources of financing for retrofit of privately owned hazardous buildings”); FEDERAL EMERGENCY MANAGEMENT AGENCY, UNREINFORCED MASONRY BUILDINGS AND EARTHQUAKES: DEVELOPING SUCCESSFUL RISK REDUCTION PROGRAMS 24 (Oct. 2009) (providing a summary of different local incentives).

31. See Becerra, *supra* note 27 (explaining that several cities have no mandatory rules on seismically retrofitting unreinforced masonry buildings).

32. *Myrick v. Mastagni*, 185 Cal.App.4th 1082, 1086 (2010).

33. PASO ROBLES, CAL., ORDINANCE NO. 740 (1998), available at http://www.prcity.com/government/city_council/ordinances/1998_cc_ord_740.pdf (“[T]he City Council has determined that longer periods of time are necessary to arrange for the substantial amounts of financing necessary to complete” required seismic retrofitting) (on file with *The University of the Pacific Law Review*).

34. Opening Brief of Appellant at *8, *Myrick v. Mastagni*, 185 Cal.App.4th 1082 (2010) (No. B2098452) (on file with *The University of the Pacific Law Review*).

35. See *id.* (“The [hazardous building that struck and killed the decedents] was classified as medium risk.”)

36. *Mastagni*, 185 Cal. App. 4th at 1086.

3. Tort Liability for Earthquakes in California

Myrick v. Mastagni was the first published case acknowledging negligence liability for damages resulting from an earthquake in California, but as early as the 1992 earthquake, mitigation organizations were aware of the potential liability to both private and public building owners for knowingly failing to seismically retrofit their buildings.³⁷ While existing literature recognized potential liability from failure to retrofit, little to no case law existed to directly support a cause of action against building owners for failing to seismically retrofit their buildings, even ones that the owners knew were hazardous to human life.³⁸

This is in spite of, or possibly the result of, the general acknowledgment that there could be a risk of liability.³⁹ For instance, the Association of Bay Area Governments warned of the risk of liability for building owners who fail to seismically retrofit in its manual discussing seismic retrofitting buildings.⁴⁰ Nevertheless, when the survivors of the decedents in *Myrick v. Mastagni* sought legal assistance, they had difficulty finding an attorney in 2008 because deaths resulting from an earthquake were widely considered an “act of God.”⁴¹ Ultimately, however, the plaintiffs secured representation and won a judgment for negligence against the building owners.⁴² The result of the case is that property owners cannot rely on timelines set by municipalities and counties to seismically retrofit their buildings; instead, they must consider any notice that their buildings are seismically unsafe as creating a duty to retrofit their building, lest they face potential liability in the aftermath of an earthquake.⁴³

B. California Capital Access Program (CalCAP)

Created in 1993⁴⁴ by legislation supported by the California Bankers Association, CalCAP encourages loans to small businesses that would otherwise

37. CALIFORNIA OFFICE OF EMERGENCY SERVICES, *supra* note 15, at 121.

38. CALIFORNIA OFFICE OF EMERGENCY SERVICES, *supra* note 15, at 122–23 (conducting a 50-state review of cases in 1992 and not a single case of tort liability for failing to seismically retrofit was found).

39. *See* CALIFORNIA OFFICE OF EMERGENCY SERVICES, *supra* note 15, at 121–23 (discussing hypothetical cases that could result in liability for building owners).

40. *See* CALIFORNIA OFFICE OF EMERGENCY SERVICES, *supra* note 15, at 121–23 (discussing hypothetical cases that could result in liability for building owners).

41. Rong-Gong Lin II, Rosanna Xia, & Doug Smith, *Liability for quake losses a big concern for L.A. property owners*, L.A. TIMES (MAY 4, 2014), available at <http://www.latimes.com/local/la-me-earthquake-liability-20140505-story.html> (on file with *The University of the Pacific Law Review*); *see* BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “act of God” as “[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado.”)

42. *Myrick v. Mastagni*, 185 Cal. App. 4th 1082, 1093 (2010).

43. Alpert, *supra* note 20.

44. CAL. HEALTH & SAFETY CODE §§ 44537.5, 44559–44559.7 (as enacted by 1993 Cal. Stat. ch. 1164).

not qualify for financing.⁴⁵ The original purpose of the program was to assist small businesses in complying with environmental regulations.⁴⁶ It was then amended in 1994 to include assistance for small businesses to establish and expand.⁴⁷

Currently, the program insures loans that can be used by small businesses to “finance the acquisition of land, construction or renovation of buildings, start-up costs, the purchase of equipment or inventory, other capital projects and working capital.”⁴⁸ An eligible lender has a loss reserve account established when it makes its first loan, and lenders and borrowers pay the premiums, which are then matched by CalCAP.⁴⁹ Should a lender have a loan default, it can have up to 100 percent of the losses covered by the loan reserve account and, if the lender does recover anything from the defaulted loan, those funds are put back into the account.⁵⁰

III. CHAPTER 32, SECTIONS 69–70

Chapter 32, Section 70 adds § 44559.14 to the Health and Safety Code to establish the California Seismic Safety Capital Access Loan Program (Program) administered by the California Pollution Control Financing Authority (Authority).⁵¹ This new program, which is administered under the same terms as CalCAP, covers losses on loans that participating lenders extend to a “qualified small business” or “qualified residential property owner” for “seismic retrofit construction.”⁵² To establish the framework for the creation of the Program, Chapter 32, Section 69 amends Section 44559.11 of the Health and Safety Code to provide specific powers to the Authority to adopt emergency regulations to allow it to use funds beyond its fee revenue.⁵³

Chapter 32, Sections 69–70 provide flexible definitions for the terminology used in its section⁵⁴ while still providing a framework for implementing the

45. ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY AND ECONOMIC DEVELOPMENT, ASSEMBLY BILL 1496 ANALYSIS, 1993–1994 Reg. Sess. (Cal. 2011).

46. CAL. HEALTH & SAFETY CODE § 44559 (as enacted by 1993 Cal. Stat. ch. 1164).

47. CAL. HEALTH & SAFETY CODE § 44559(B) (as amended by 1994 Cal. Stat. ch. 1163, § 1).

48. *California Capital Access Program*, CALIFORNIA POLLUTION CONTROL FINANCING AUTHORITY, available at <http://www.treasurer.ca.gov/cpcfca/calcap/sb/summary.asp> (last visited Jul. 2, 2016) (on file with *The University of the Pacific Law Review*).

49. *Id.*

50. *Id.*

51. CAL. HEALTH & SAFETY CODE § 44559.14 (West, WestlawNext Current with urgency legislation through Chapter 248 of 2016 Reg. Sess.) (enacted by Chapter 32, Sections 69–70).

52. *Id.* §§ 44559.14(2), (b)(3) (West, WestlawNext Current with urgency legislation through Chapter 248 of 2016 Reg. Sess.) (introducing the program Sections 69–70 and defining “eligible project” as enacted by Chapter 32, Sections 69–70).

53. *Id.* §§ 44559.11, 44559.14(e) (enacted by Chapter 32, Sections 69–70).

54. *See id.* § 44559.14(b) (introducing the meanings of phrases used and applied to the section “unless the context requires otherwise,” as enacted by Chapter 32, Sections 69–70).

Program. This will ensure Program funds are used for seismic retrofitting and not the physical expansion of homes or businesses.⁵⁵

The Program is limited to projects that “substantially mitigate seismic damage”⁵⁶ to buildings.⁵⁷ A building is a “qualified building” after it has been “certified by the appropriate local building code enforcement authority . . . as . . . hazardous and in danger of collapse in the event of a catastrophic earthquake.”⁵⁸ Loans for eligible projects are limited to \$250,000.⁵⁹ Loans may be made to qualified small businesses, which are businesses that are or plan to occupy a qualified building⁶⁰ and are authorized to conduct business in the state,⁶¹ with “its primary business location” in California.⁶² Loans are also available to a qualified residential property owner, which “means either an owner and occupant of a residential building that is a qualified building or a qualified small business that owns one or more residential buildings”⁶³

Chapter 32, Sections 69–70 also set forth directives to the Authority on the use of funds and creation of regulations to effectuate the Program.⁶⁴ The directives include limiting administrative expenditures to “5 percent [of] the initial appropriation plus 5 percent” of recaptured money.⁶⁵ Also, Chapter 32, Sections 69–70 limits coverage to up to 10 years.⁶⁶ To allow the use of alternative sources of funds,⁶⁷ Chapter 32, Sections 69–70 grants the Authority the ability to create emergency regulations.⁶⁸

IV. ANALYSIS

The potential benefits of more easily available financing for making buildings safer should be fairly self-evident, so the analysis in this article will

55. *See id.* § 44559.14(a)(1) (expressing the intent of the Legislature in adding Section 44559.14 as enacted by Chapter 32, Sections 69–70).

56. *Id.* §§ 44559.14(b)(1), (b)(3) (emphasis added) (defining “seismic retrofit construction” Sections 69–70 and defining “eligible project” as enacted by Chapter 32, Sections 69–70).

57. *See id.* § 44559.14(b)(2)(G) (excluding from the program the costs of “[b]racing or securing nonpermanent building contents,” as enacted by Chapter 32, Sections 69–70).

58. *Id.* § 44559.14(4) (defining “qualified building,” as enacted by Chapter 32, Sections 69–70).

59. *Id.* § 44559.14(5) (enacted by Chapter 32, Sections 69–70).

60. *Id.* § 44559.14(6) (defining “qualified small business,” as enacted by Chapter 32, Sections 69–70, by cross-referencing to CAL. HEALTH & SAFETY CODE §§ 44559.1(i) & (m)).

61. *Id.* § 44559.1(i)(1).

62. *Id.* § 44559.1(i)(2).

63. *Id.* § 44559.14(7).

64. *See id.* § 44559.14(c)–(e) (setting forth restrictions on the use of funds for the program, directing the authority to adopt certain regulations, and granting the authority the ability to adopt emergency regulations for the program, as enacted by Chapter 32, Sections 69–70).

65. *Id.* § 44559.14(c)(2)(B) (enacted by Chapter 32, Sections 69–70).

66. *Id.* § 44559.14(d)(5) (enacted by Chapter 32, Sections 69–70).

67. *Id.* § 44559.11(b).

68. *Id.* § 44559.14(e).

focus on potential concerns.⁶⁹ Chapter 32, Sections 69–70 will likely have the strongest impact in the area of negligence because of a potential increase in the risk of liability for business owners, based on the negligence calculus to determine whether there was a breach of the standard of care expected of business owners.⁷⁰ There are also other potential issues, such as misuse of Program funds by specialists responsible for the retrofits.⁷¹

A. Potential Increase in Building Owners' Risk of Liability

Building owners already face the risk of liability for damages resulting from an earthquake,⁷² and Chapter 32, Sections 69–70 may increase that risk by expanding the number of buildings that are seismically retrofitted.⁷³ Building owners already face possible liability in the result of an earthquake if they have been notified the building is potentially dangerous.⁷⁴ If it is easier for building owners to seismically retrofit their buildings and more building owners are doing so, then a building owner who does not retrofit is more likely to be found negligent.⁷⁵ The ease with which seismic retrofitting may be accomplished and the increase in building owners retrofitting may also establish or reinforce a new industry custom.⁷⁶ These factors could even open up building owners to punitive damages.⁷⁷ In the end, however, Chapter 32, Sections 69–70 may turn out to be just another effort in a long line of earthquake mitigation legislation, and may not

69. *Supra* Part I (discussing the high-risk of earthquakes and the large number of buildings needing retrofitting).

70. *Infra* Part IV.A. (discussing the potential effects on the liability of property owners).

71. *Infra* Part IV.B. (discussing the risk of misused funds); see e.g., Carol Pogash, *Thousands of Dollars of Work Offers Shaky Assurance*, N.Y. TIMES (Dec. 22, 2011), available at http://www.nytimes.com/2011/12/23/us/seismic-retrofits-offer-shaky-assurance-in-california.html?_r=0 (on file with *The University of the Pacific Law Review*) (reporting that professionals are not providing sufficient seismic retrofitting construction to building owners, who are unaware until subsequent inspections); see also OFFICE OF INSPECTOR GENERAL, DEPT. OF THE TREASURY, OIG-SBLF-12003, STATE SMALL BUSINESS CREDIT INITIATIVE: CALIFORNIA NEEDS TO IMPROVE ITS OVERSIGHT OF PROGRAMS PARTICIPATING IN THE STATE SMALL BUSINESS CREDIT INITIATIVE (2012) (concluding in 2012 that California needed better oversight of its capital access program).

72. *Infra* Part IV.A.1 (discussing recognized potential for liability).

73. *Infra* Part IV.A.2–3 (discussing changes in assessing potential liability).

74. See *Myrick v. Mastagni*, 185 Cal. App. 4th 1082, 1087 (2010) (stating that a building owner who was aware its building was unsafe could be held liable even though the deadline set by local ordinance to seismically retrofit its building had not passed); Lin II, *supra* note 41 (reporting on the *Myrick v. Mastagni* case); CALIFORNIA OFFICE OF EMERGENCY SERVICES, *supra* note 15, 121-23 (1992) (describing scenarios where building owners could be potentially liable).

75. *Infra* Part IV.A.1 (discussing current basis for liability).

76. *Infra* Part IV.A.2 (discussing the potential use of custom in tort liability for property owners).

77. *Infra* Part IV.A.3 (discussing how not retrofitting an at risk building may be more egregious as seismic retrofitting is made easier).

end up being the tipping point that changes the landscape of liability for building owners.⁷⁸

1. *Recognized Risk for Liability upon Notice of a Dangerous Building*

As early as 1992, city governments in California, which were responsible for mitigation programs, were aware of the possible liability that building owners could face in the event of an earthquake.⁷⁹ Once it is established that the defendant had a duty to exercise a level of care, that the defendant was the cause-in-fact and proximate cause of the harm, and that there was proof that the harm actually occurred, the final element is whether an appropriate level of care was exercised.⁸⁰

Chapter 32, Sections 69–70 will likely affect the final element of negligence by establishing a burden on building owners to seismically retrofit their buildings, which is included in the generally accepted formula used to determine a breach of the standard of care.⁸¹ Building owners who choose not to seismically retrofit their building could challenge whether they were the legal cause of the harm, by arguing that an earthquake is an “act of God,” and that any harm resulting from the building was a result of that otherworldly act.⁸² But, this may not completely excuse a building owner from a duty of care, which leads to a standard of care analysis.⁸³

78. *Infra* Part IV.A.4 (concluding that time will tell how the new Program affects liability).

79. See CALIFORNIA OFFICE OF EMERGENCY SERVICES, *supra* note 15, at 121–22 (explaining potential scenarios where building owners could face liability in the event of an earthquake).

80. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 6 cmt. b, (AM. LAW INST. 2010) (explaining the duty of land possessors to use reasonable care and the element of the scope-of-liability of land possessors); see also Cal. Civ. Code § 1714(a) (“Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.”)

81. See generally, RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 cmt. e (“[An] actor’s conduct is hence negligent if the magnitude of the risk outweighs the burden of risk prevention. The burden of precautions can take a very wide variety of forms. In many cases, it is a financial burden borne originally by the actor . . .”).

82. See 1 AM. JUR. 2D ACT OF GOD §§ 1, 15 (“An event may be considered an act of God when it is occasioned exclusively by the violence of nature” but “[a]n act of God defense applies to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them . . . An act of God, if established, will be a complete defense to liability for negligence.”)

83. See *id.* § 15 (“Since an act of God requires that natural forces constitute the sole proximate cause of the harm sustained, the defendant usually will be liable for the full amount of damages if his or her negligence was a contributing cause, along with the forces of nature alleged to constitute an act of God, of the harm.”) (footnotes omitted); CALIFORNIA OFFICE OF EMERGENCY SERVICES, *supra* note 15, at 124 (“If the natural catastrophe is one which is reasonably foreseeable and for which reasonable precautions can be taken, then the ‘act of God’ defenses not available.”)

The standard of care analysis is based on whether a defendant acted as a reasonable person would under same or similar circumstances.⁸⁴ The analytical framework, or calculus, used to analyze whether a party acted reasonably was articulated by Supreme Court Justice Learned Hand in *United States v. Carroll Towing Co.*; specifically, if the burden of preventing a harm is less than the probability of the harm multiplied by the potential magnitude of the harm should the harm occur, then the party in a negligence suit has failed to meet the standard of care exercised by a reasonably prudent person, thereby satisfying this element of negligence.⁸⁵ The trier of fact is assumed to use this calculus in evaluating the reasonableness of a party's behavior, and this calculus is also useful as a part of evaluating whether the defendant owed any duty to the plaintiff, decided by a judge as a matter of law.⁸⁶

Using this calculus, the building owner could either argue that the burden of preventing the harm, specifically making a building safer in the event of an earthquake, outweighed the probability or the magnitude of the potential harm caused by an earthquake.⁸⁷ The high-cost and little return on seismically retrofitting a building makes it relatively difficult to afford the necessary construction⁸⁸—partly because of the high cost, which can be a burden on building owners.⁸⁹ Additionally, the added time that some businesses will need to close to perform the necessary construction makes it even more expensive, even if it will eventually raise property values.⁹⁰ For these reasons, the burden on a building owner to seismically retrofit a building can be quite high.⁹¹ Further, because of the unpredictability and infrequency of severe earthquakes, the probability of an earthquake causing serious damage to a building in a particular accounting period is arguably small—even if it is virtually certain over the lifetime of a building.⁹² Thus, even if the potential magnitude of harm resulting

84. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7(a) (“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”)

85. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

86. *Id.*

87. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 cmt. e (discussing the balancing test).

88. See Guzzetti, *supra* note 8 (reporting that Martinez businesses are facing difficulties with financing in the midst of lost revenue and low property values).

89. See, e.g., Guzzetti, *supra* note 8 (reporting that Martinez businesses are facing difficulties with financing in the midst of lost revenue and low property values). See Shane Downing, *Earthquake Retrofit Law Adds New Costs For Struggling Tenants*, HOODLINE, <http://hoodline.com/2016/02/earthquake-retrofit-law-adds-new-costs-for-struggling-tenants> (last visited Aug. 5, 2016) (discussing how rising cost for building owners is increasing rent to tenants).

90. See Guzzetti, *supra* note 8 (reporting that Martinez businesses are facing difficulties with financing in the midst of lost revenue and low property values).

91. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 cmt. e (“[An] actor’s conduct is hence negligent if the magnitude of the risk outweighs the burden of risk prevention. The burden of precautions can take a very wide variety of forms. In many cases, it is a financial burden borne originally by the actor . . .”).

92. See Krieger, *supra* note 6 (reporting that a major earthquake is highly likely to happen).

from a building that is not seismically retrofitted is high, a building owner may be able to successfully argue that the burden was too great, therefore escaping negligence liability if his or her building causes injury or death in an earthquake.⁹³

Chapter 32, Sections 69–70 primarily addresses the financial burden of seismically retrofitting buildings by providing banks an incentive to provide financing to small businesses and residential building owners.⁹⁴ Specifically, the new law provides assurance to lenders by covering losses on qualified loans with public money and with funds from the borrower.⁹⁵ This arrangement allows banks to make loans to near-credit-worthy businesses, which the bank can continue to make money from through interest and other profit-instruments built into the loan, but is insured from the potential losses of a defaulted loan.⁹⁶

This extra incentive should make affordable financing more available to building owners, thus lowering the burden on building owners to seismically retrofit their buildings.⁹⁷ This lower burden could place a serious damper on building owners' arguments that the burden of seismically retrofitting their building was too high; this increased risk of liability will hopefully make seismically retrofitting a building a better financial decision than ignoring the risk, and this in turn will increase seismic retrofitting and increase safety to those living and working in those buildings.⁹⁸

2. *New Custom Setting a Higher Standard of Care*

The increase in seismically retrofitted buildings could also lead to a new established custom of building owners seismically retrofitting their buildings, which could raise the standard of care.⁹⁹ In negligence cases, industry custom can serve as evidence of a low burden, a high probability of harm, and a high potential magnitude of harm, effectively setting the standard of care at that particular industry custom.¹⁰⁰ This means that the more building owners seismically retrofit their buildings, the more other building owners will be

93. Guzzetti, *supra* note 8 (reporting that Martinez businesses are facing difficulties with financing in the midst of lost revenue and low property values).

94. See CAL. HEALTH & SAFETY CODE §§ 44559.14(a)(1) (West, WestlawNext Current with urgency legislation through Chapter 248 of 2016 Reg. Sess.) (enacted by Chapter 32, Sections 69–70, expressing intent to assist property owners in financing seismic retrofitting).

95. CALIFORNIA CAPITAL ACCESS PROGRAM, CalCAP Lender Manual II-1 (April 2016) (outlining matching funds from CalCAP).

96. *Id.*

97. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 cmt. e (describing balancing analysis of negligence).

98. *Id.* (describing balancing analysis of negligence).

99. See *id.* § 13 (discussing the use of custom in negligence action).

100. See *id.* (discussing the use of custom in negligence action).

expected to do the same.¹⁰¹ If Chapter 32, Sections 69–70 successfully increases the number of people seismically retrofitting their buildings, then other owners who have buildings identified as potentially harmful will face an even greater risk of liability, making seismic retrofits more economical.¹⁰²

3. Punitive Damages

Chapter 32, Sections 69–70 could lead to increased liability for building owners in the form of punitive damages.¹⁰³ Punitive damages are awarded when a defendant is particularly egregious in the conduct that led to the eventual harm; this involves a conscious disregard for the safety of others.¹⁰⁴ While Chapter 32, Sections 69–70 may or may not lead to a new custom for seismically retrofitting buildings, it most certainly is a demonstration of the State’s recognition of the high risk posed by earthquakes in California.¹⁰⁵ Accordingly, this recognition of the dangers posed by earthquakes to buildings that are not seismically retrofitted could lead juries and courts to conclude that building owners who ignore this risk have not only negligently placed peoples’ lives at risk, but have deliberately ignored a high potential risk of harm to human life.¹⁰⁶ In *Penner v. Falk*, for example, the court held that punitive damages could be awarded against a landlord for failing to provide certain security measures to make his property safe.¹⁰⁷ In reaching its holding, the court noted that the landlord had known for two years that the physical conditions of the premises created a danger of tenants

101. *Id.*

102. *Id.* § 3 cmt. e (describing balancing analysis of negligence).

103. CAL. CIV. CODE § 3294(a) (authorizing punitive damages for acts involving “malice”). Note, however, that punitive damages may not be recovered in a wrongful death action, so punitive damages were unavailable for the plaintiffs in *Myrick*. See CAL. CODE CIV. PRO. § 377.61 (prohibiting punitive damage awards in wrongful death action by cross-referencing to California Code of Civil Procedure 377.34). Malice necessary to award punitive damages is also referred to as recklessness. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 2 cmt. b (“[I]n certain tort cases even the plaintiff who receives full compensatory damages may be able to recover punitive damages as well. While a showing of negligence generally suffices for compensatory damages, the standard for awarding punitive damages commonly refers to the defendant’s reckless conduct—or reckless indifference to risk, or reckless disregard for risk.”)

104. CALIFORNIA TORT GUIDE § 14.6(a); Malice (3d ed Cal. CEB 2016) (defining malice in California Law); see also RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 2 cmt. a (AM. LAW INST. 2010) (defining malice in law generally); Civ. § 3294(c)(1) (defining malice as “conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.”); Taylor v. Superior Court, 24 Cal.3d 890, 895–96 (1979) (holding that “malice” is not limited to deliberately harming a plaintiff).

105. See CAL. HEALTH & SAFETY CODE §§ 44559.14(a)(1) (West, WestlawNext Current with urgency legislation through Chapter 248 of 2016 Reg. Sess.) (enacted by Chapter 32, Sections 69–70, expressing intent to assist property owners in financing seismic retrofitting).

106. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 2 cmt. b (“While a showing of negligence generally suffices for compensatory damages, the standard for awarding punitive damages commonly refers to the defendant’s reckless conduct—or reckless indifference to risk, or reckless disregard for risk.”).

107. *Penner v. Falk*, 153 Cal.App.3d 858, 867 (1984).

becoming victims of crime.¹⁰⁸ Despite this knowledge, the landlord “failed to take corrective and curative measures” and therefore could face punitive damages.¹⁰⁹

4. *Despite the Above Sections, Chapter 32, Sections 69–70 May Not Be the Tipping Point in Increasing Liability*

Admittedly, the Program created under Chapter 32 is only the most recent effort in a long list of earthquake-related legislation and regulations that arguably have not, up to this point, led to a sharp increase in liability as outlined above.¹¹⁰ Nevertheless, the Program is a step towards increased liability for building owners and time will tell to what extent it will affect their liability, especially for owners who have been notified of their building being at-risk.¹¹¹

B. *Potential for Misuse*

Chapter 32, Sections 69–70 raises another potential issue: the misuse of funds.¹¹² California has already had (albeit small) problems with oversight of CalCAP.¹¹³ The administration of this new program leaves it vulnerable to misleading, if not fraudulent, conduct concerning the misuse of loan funds.¹¹⁴ It is possible that professionals, specifically engineers and architects, may profit from providing misleading or false information to potential borrowers.¹¹⁵ Borrowers may receive benefits otherwise unavailable to them by providing misleading or false information,¹¹⁶ and lenders may ultimately profit by ignoring misuse of funds to increase the number of insured loans that they can make.¹¹⁷

Although oversight issues will likely be small, the issues for the Program are not unprecedented.¹¹⁸ There may also be issues of misuse of funds because of the

108. *Id.*; United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

109. *Id.*

110. See Lin II, *supra* note 41 (implying that the significance of *Myrick* in creating new potential liability for building owners).

111. See *Myrick v. Mastagni*, 185 Cal. App. 4th 1082, 1085–86 (2010) (explaining how the defendants were notified of the risk and the suit was brought based on negligence).

112. See CAL. HEALTH & SAFETY CODE § 44559.14(b)(2) (West, WestlawNext Current with urgency legislation through Chapter 248 of 2016 Reg. Sess.) (outlining program restrictions); OFFICE OF INSPECTOR GENERAL, *supra* note 72, 6 (describing misuse of federal funds by capital access program).

113. See OFFICE OF INSPECTOR GENERAL, *supra* note 71, at 6 (reporting potential oversight issues in California).

114. CAL. CODE OF REGS. TIT. 4, § 8072 (regulations outlining loan enrollment under the California Capital Access Program).

115. *Infra* Part IV.B.1 (discussing the potential risk of professionals misusing Program funds).

116. *Infra* Part IV.B.2 (discussing the potential risk of property owners misusing Program funds).

117. *Infra* Part IV.B.3 (discussing the potential risk of financial institutions misusing Program funds).

118. See generally OFFICE OF INSPECTOR GENERAL, *supra* note 71 (reporting potential oversight issues in California).

specialized knowledge necessary to provide seismic retrofits¹¹⁹ and the self-certifications from borrowers and lenders.¹²⁰ Despite the requirements that lenders provide periodic reports under CalCAP, interested parties may still profit by providing misleading or false information.¹²¹

1. Engineers and Architects

The ease with which potential borrowers could receive financing under the Program may lead professionals to mislead borrowers to encourage them to use and pay for the professionals' services.¹²² The more people who need to seismically retrofit their buildings, the more people who will need an engineer or an architect.¹²³ And because the cost of engineering or architectural design work is a part of the qualified cost that may be paid for with a loan provided under the Program, building owners will more easily be able to finance payments to professionals.¹²⁴ Combine this ease of financing with the high risk of liability and the moral urge to protect life and limb, customers will likely be more willing to pay the costs of an engineering or architectural professional.¹²⁵ Thus, a professional can encourage unnecessary work, under the guise of necessary seismic retrofitting, to increase payments for his or her services.¹²⁶

Engineers or architects, however, would be unlikely to provide misleading information because they would be committing a crime¹²⁷ and risking their licenses.¹²⁸ Providing false information to obtain payment for work would be

119. See CAL. BUS. & PROF. CODE § 6704 (requiring engineers be licensed to practice in California); CAL. BUS. & PROF. CODE § 5510.1 (mandating minimum requirements be set for architects to work in California); Pogash, *supra* note 71 (reporting that professionals are not providing sufficient seismic retrofitting construction to building owners, who are unaware until subsequent inspections).

120. CAL. CODE OF REGS. TIT. 4, § 8072 (regulations outlining loan enrollment under the California Capital Access Program).

121. *Infra* Part IV.B.1 (discussing engineers and architects).

122. See Pogash, *supra* note 71 (reporting that professionals are not providing sufficient seismic retrofitting construction to building owners, who are unaware until subsequent inspections).

123. *Id.* (discussing that professionals are needed to seismic retrofit construction).

124. CAL. HEALTH & SAFETY CODE § 44559.14(b)(2) (West, WestlawNext Current with urgency legislation through Chapter 248 of 2016 Reg. Sess.).

125. See Pogash, *supra* note 71 (reporting that building owners are willing to pay professionals for follow-up work resulting from insufficient construction done before).

126. See Pogash, *supra* note 71 (reporting that some people are paying for seismic retrofits that are nothing more than decorative).

127. See CAL. PENAL CODE § 484(a) (stating that any person who "fraudulent representation or pretense, defraud any other person of money" is guilty of theft).

128. See CAL. BUS. & PROF. CODE § 6775(b) (stating that an engineer may face disciplinary action for fraud or misrepresentation); CAL. BUS. & PROF. CODE § 5583 (stating that an architect may face disciplinary action for fraud or deceit).

theft.¹²⁹ And providing misrepresentations can result in disciplinary actions for licensed engineers and architects.¹³⁰

Even though it is unlikely that an engineer or architect would purposely mislead a borrower because of the disincentives to do so, it is nevertheless a potential issue resulting from the Program.¹³¹ There have already been issues with professionals providing unnecessary or ineffective seismic retrofitting.¹³² Chapter 32, Sections 69–70’s limited scope focuses on construction that would likely necessitate the services of engineers and architects, and the likelihood that some less scrupulous professionals may take advantage of this system is a concern to potential borrowers and the taxpayers, who are contributing to the insurance on the loans.¹³³

2. Borrowers

Borrowers also have an opportunity and an incentive, albeit a smaller one, to provide misleading information.¹³⁴ The incentive is smaller because the Program does not provide “free” money, such as a subsidy, to borrowers but instead creates a debt.¹³⁵ Rather than providing payment, the Program provides insurance for lenders, which incentivizes them to make loans that the borrowers still need to pay back, with interest.¹³⁶ Nevertheless, there may still be those who believe that they can make misrepresentations to receive financings that they would not otherwise qualify for and, sometimes, never plan to pay the loan back.¹³⁷ People may choose to do this despite the likelihood that misrepresenting how they intend

129. CAL. PENAL CODE § 484(a).

130. CAL. BUS. & PROF. CODE § 6775(b) (stating that an engineer may face disciplinary action for fraud or misrepresentation); CAL. BUS. & PROF. CODE § 5583 (stating that an architect may face disciplinary action for fraud or deceit).

131. Pogash, *supra* note 71 (reporting that professionals are not providing sufficient seismic retrofitting construction to building owners, who are unaware until subsequent inspections).

132. *See* Pogash, *supra* note 71 (reporting that some people are paying for seismic retrofits that are nothing more than decorative).

133. *See* CALIFORNIA CAPITAL ACCESS PROGRAM, *supra* note 95, II-1 (outlining matching funds from CalCAP).

134. *See* CAL. CODE OF REGS. TIT. 4, § 8072 (regulations outlining loan enrollment under the California Capital Access Program).

135. *See* CAL. HEALTH & SAFETY CODE 44559.14(a)(2) (West, WestlawNext Current with urgency legislation through Chapter 248 of 2016 Reg. Sess.) (explaining purpose of Program is to cover losses on “qualified loans”).

136. *California Capital Access Program*, CALIFORNIA POLLUTION CONTROL FINANCING AUTHORITY, available at <http://www.treasurer.ca.gov/cpcfca/calcap/sb/summary.asp> (last visited Jul. 2, 2016) (on file with *The University of the Pacific Law Review*).

137. *See e.g.*, Hagai Schaffer, *This is why loan fraud is running rampant*, HOUSINGWIRE (July 28, 2015), <http://www.housingwire.com/blogs/1-rewired/post/34603-loan-fraud-is-running-rampant> (on file with *The University of the Pacific Law Review*) (reporting that 74% of loans reported in 2013 involved some fraud in or misrepresentation, citing to LexisNexis 2014 Mortgage Fraud report).

to use the loan, or their intention to not pay it back, is the crime of false pretenses or, if the loan is secured by real estate, mortgage fraud.¹³⁸

3. *Lenders*

Participating lenders have the incentive and opportunity to ignore misuse of funds because the more loans a lender makes, the higher potential for profits.¹³⁹ This is admittedly the goal of the Program, but within certain parameters.¹⁴⁰ Upon leaving the Program, lenders will receive the remaining reserve account funds based on the proportion of both the lender and the borrowers' contributions, which means a potential windfall.¹⁴¹ Lenders will also have the opportunity to provide misleading information and misuse funds because the Program only requires a certification by both the lender and the small business.¹⁴² Furthermore, it is not unprecedented for lenders to provide misguided loans in hopes of profit when the lack of oversight presents the opportunity, as was seen with the 2008 mortgage crisis.¹⁴³

A lender knowingly allowing funds to be misused is, however, unlikely because the opportunity to allow funds to be misused does not outweigh the benefits of adhering to the Program requirements.¹⁴⁴ For one thing, lenders are not limited to making loans under the Program for seismic retrofitting; they can also make loans to qualified small businesses for a large number of qualified uses.¹⁴⁵ Further, if lenders violate the provisions of the Program, they risk being terminated from the Program altogether—thus, losing the opportunity to increase

138. See CAL. PENAL CODE § 532(f) (stating that deliberate misstatements or misrepresentations to obtain a loan secured by real estate are mortgage fraud).

139. See Stephen D. Simpson, C.F.A., *The Banking System: Commercial Banking - How Banks Make Money*, INVESTOPEDIA, <http://www.investopedia.com/university/banking-system/banking-system3.asp> (last visited Aug. 5, 2016) (“[B]anks basically make money by lending money at rates higher than the cost of the money they lend.”)

140. See CAL. HEALTH & SAFETY CODE §§ 44559.14(a)(1)-(2), (b)(1)-(7) (West, WestlawNext Current with urgency legislation through Chapter 248 of 2016 Reg. Sess.) (outlining intent and parameters of program, as enacted by Chapter 32, Sections 69-70).

141. See CAL. CODE OF REGS. TIT. 4, § 8076(b) (lenders will get the amount in the loss reserve account less the State's share based upon the state's proportional contribution).

142. Compare A.B. 2392 (as amended May 16, 2016) with CAL. HEALTH & SAFETY CODE § 44559.14, Sections 69-70 (as enacted by Chapter 32, Sections 69-70).

143. See e.g., THE FINANCIAL CRISIS INQUIRY REPORT, FINANCIAL CRISIS INQUIRY COMMISSION xxiii (Jan. 2011), available at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (on file with *The University of the Pacific Law Review*) (“[W]e clearly believe the crisis was a result of human mistakes, misjudgments, and misdeeds that resulted in systemic failures for which our nation has paid dearly.”)

144. See HEALTH & SAFETY § 44559.14(a)(2) (creating a loan insurance pool, which should encourage lenders to make loans they would not otherwise make, as enacted by Chapter 32, Sections 69-70).

145. See *id.* § 44559.14(b) (outlining eligibility of various provisions of the Program, as enacted by Chapter 32, Sections 69-70).

their number of small business loans with the safety net of the reserve account insurance pool.¹⁴⁶

One unique feature of Chapter 32, Sections 69–70 that may provide additional incentive to mislead, though, is granting loans to residential building owners.¹⁴⁷ The other sections of the CalCAP program do not permit loans for passive real estate investment, which includes real estate investment for the purpose of collecting rent.¹⁴⁸ Chapter 32, Sections 69–70 expands the definition of qualified businesses to include residential building owners, whether occupants or landlords, under the Program.¹⁴⁹ This would be the one portion of the market that the lenders would not otherwise be able to make qualified loans to under the rest of the Program.¹⁵⁰

Ultimately though, the risk of the lender being terminated from the entire Program likely outweighs any potential profit from making loans that are misused for purposes other than seismic retrofitting.¹⁵¹

V. CONCLUSION

Increased access to financing for seismic retrofitting will hopefully help prevent tragedies like that in the *Myrick* case by allowing building owners to more quickly seismically retrofit their buildings, which outweighs the potential negative effects raised in this article.¹⁵²

The Program may lead to increased risk of liability for building owners as the burden of seismically retrofitting buildings is lowered, a new custom is potentially created, and the liability rises to a risk of punitive damages.¹⁵³ Even if Chapter 32, Sections 69–70 is not the tipping point that will make owning an un-retrofitted building prohibitively expensive, it will likely increase the number of building owners retrofitting their building.¹⁵⁴

146. See REGS. TIT. 4, § 8076(c)(1)–(4) (outlining why a lender might terminate a lender from the Program).

147. HEALTH & SAFETY § 44559.14(b)(7) (as enacted by Chapter 32, Sections 69–70).

148. See CAL. CODE OF REGS. TIT. 4, §§ 8070(m), (s)(2) (defining and stating that a qualified loan does not include passive real estate investment).

149. See CAL. HEALTH & SAFETY CODE § 44559.14(c)(1) (As enacted by Chapter 32, Sections 69–70) (“For purposes of this section, the references in Sections 44548 and 44549 to “small business” shall include “qualified residential property owner,” as defined in this section.” As enacted by Chapter 32, Sections 69–70).

150. Compare HEALTH & SAFETY § 44559.14 (as enacted by Chapter 32, Sections 69–70), with REGS. TIT. 4, § 8070(s).

151. See REGS. TIT. 4, § 8076(c)(1)–(4) (outlining why a lender might terminate a lender from the CalCAP program).

152. See generally, PASO ROBLES, CAL., ORDINANCE NO. 740 (1998), available at http://www.prcity.com/government/city_council/ordinances/1998_cc_ord_740.pdf (on file with *The University of the Pacific Law Review*) (“[T]he City Council has determined that longer periods of time are necessary to arrange for the substantial amounts of financing necessary to complete” required seismic retrofitting).

153. *Supra* Part IV.A.1.

154. *Supra* Part IV.A.4.

There is also the potential for professionals, borrowers, and lenders to cause or allow the misuse of loan funds under the Program, which would be driven by profit.¹⁵⁵ There are, however, plenty of disincentives to discourage professionals, borrowers, and lenders from misconduct, which makes the likelihood of purposeful misuse of funds unlikely.¹⁵⁶

The Program should benefit California by helping building owners make their buildings safer for workers and residents.¹⁵⁷ Overall, the Program created by Chapter 32, Sections 69–70 should be a step forward in making California safer during an earthquake.¹⁵⁸

155. *Supra* Part IV.B.1.

156. *Supra* Part IV.B.1–3.

157. *See* Telephone Interview with Juan Reyes, *supra* note 4 (discussing benefits of Program).

158. *See id.* (discussing benefits of Program).