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## PROPERTY INSURANCE COVERAGE WHEN MAN-MADE FORCES CAUSE EARTH MOVEMENT

*[Ref. Homeowners: Property Coverages, Para. 3.01;  
Commercial Property Coverage, Para. 2.07]*

### THE EARTH MOVEMENT EXCLUSION

Insurance policies that provide first party property damage coverage for homes and commercial buildings on an open perils basis, sometimes called “all-risk” policies, limit coverage through exclusions. One of those exclusions is for damage caused by earth movement. Historically the exclusion was intended to protect an insurer from catastrophic loss exposure in the event of a natural disaster such as an earthquake. Over time the language of the exclusion was broadened to include mine subsidence – a man-made cause of earth movement – opening the door to the argument that the exclusion is not limited to natural occurrences and leaving it to courts to interpret the policy language to determine its scope.

The earth movement exclusion has resulted in considerable litigation over the years. As is always the case, the validity of an insurer’s coverage denial will depend on the facts of the loss, the specific language in its policy, and a court’s interpretation of that language.

### EXCLUSION INTERPRETED TO APPLY ONLY TO NATURAL EARTH MOVEMENT

In *Espedito Realty, LLC v. National Fire Ins. Co. of Hartford*, 849 F. Supp. 2d 179 (D. Mass. 2012), the court, applying Massachusetts law, considered the application of the earth movement exclusion in a Business Owners Policy (BOP). A pipe in the ceiling between the first and second floors of a commercial building owned by Espedito burst. Water leaked from the pipe for several days before being discovered. The water pooled along one side of the building’s first floor and seeped between the concrete floor and an external wall. This caused the sand sub-base under the concrete floor to subside and the building’s floor to sink. National Fire paid for the water damage to

the walls and ceiling but denied coverage for the damage to the floor, arguing that the damage was caused by excluded earth movement. Espedito sued.

National Fire sought summary judgment, arguing that “once the earth ‘moves,’ whatever the cause, the analysis is over” because the earth movement exclusion applies. The court found that whether the exclusion applied was not as simple as National Fire suggested. The court had to consider whether the exclusion was clear in its intent. The exclusion at issue applied to loss “caused by earthquake, landslide, mine subsidence, and volcanic eruption.” It also applied to “earth sinking (other than sinkhole collapse), rising or shifting, including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty.” The policy exclusion defined soil conditions to include “the action of water under the ground surface.” The court reviewed cases from other jurisdictions that addressed the natural vs. man-made distinction in applying the exclusion as well as the coverage expectations of a reasonable insured. The court found that the policy language defining soil conditions to include the action of water underground did nothing to clarify how the earth movement exclusion applied to this claim, stating:

A reading of this additional verbiage from the viewpoint of an “objectively reasonable insured,” however, only compounds the confusion. With regard to the impact of water – the force most relevant to the case at hand – the exclusion limits itself to the action of water under the ground surface.” It is very difficult to see how a reasonable insured could read this language to apply to water coming down from a burst pipe on a second floor and seeping into the ground from above.

The court observed that most earlier Massachusetts decisions limited the earth movement exclusion to naturally occurring events. While some courts applied the exclusion in the broad manner espoused by National Fire, the court distinguished those cases because they involved water that originated and flowed underground causing damage that occurred over a period of time. The court concluded that if the insurer intended that the exclusion apply to common situations, such as a burst pipe and water from the pipe that caused a floor to sink, the insurer should have more specifically stated that in the exclusion. Based on the ambiguity in the policy language and the reasonable expectations of the insured, the court denied the insurer’s motion for summary judgment.

Ambiguity is a common basis for a court to find that the earth movement exclusion does not apply to earth movement from a man-made source. Applying Pennsylvania law, the court in *Forester v. Allstate Ins. Co.*, 2014 U.S. Dist. LEXIS 17997 (M.D. Pa. 2014), considered the earth movement exclusion in a case that involved the sudden and accidental implosion of a basement wall. The insureds heard a loud noise and discovered that portions of the foundation wall in the home’s basement had “imploded, collapsed or cracked, causing water and mud to pour into the basement.” Allstate denied the insureds’ claim two days after the loss occurred and they sued.

The insureds’ expert testified that the damage resulted from the accidental failure of a storm water system that affected several homes in the area before it was repaired by the township. Allstate took the position that the damage resulted from heavy rain saturating the ground causing earth and hydrostatic pressure to develop and collapse the foundation wall. Allstate argued that this was a natural event and sought summary judgment based on the earth movement exclusion. In response the insureds argued that there were questions of fact about whether the cause of the collapse was natural or a failure of the storm water system, and that the exclusion applied only to natural events. The court explained that the Pennsylvania Supreme Court had previously held that an earth movement exclusion that is ambiguous about whether it applies to both natural and non-natural occurrences is to be interpreted to exclude coverage only for natural occurrences. The exclusion at issue applied to losses:

... consisting of or caused by ...

Earth movement of any type, including but not limited to earthquake, volcanic eruption, lava flow, landslide, subsidence, mudflow, pressure, sinkhole, erosion, or the sinking, rising, shifting, creeping, expanding, bulging, cracking, settling or contracting of the earth. This exclusion applies whether or not the earth movement is combined with water.

Allstate argued that the exclusion is unambiguous because it refers to “earth movement of any type.” The court, however, disagreed finding that the phrase is “not materially distinct” from similar language previously considered by Pennsylvania courts and found to be ambiguous. The court observed that the insurer could have more clearly phrased its exclusion by specifying events that could only be interpreted as man-made or by stating the exclusion was not limited to natural events. The court concluded that the exclusion applied only to natural events and, based on the disagreement between the experts about what occurred, denied the insurer’s motion for summary judgment.

Another case involved earth movement that resulted from water used in firefighting efforts to save the insureds’ home. The court considered ambiguity and public policy to determine the application of the exclusion in *Miller v. American Family Mutual Ins. Co.*, 104 F. Supp. 3d 1232 (D. Colo. 2015). The insureds’ home was damaged during the Waldo Canyon Fire in 2012. In an effort to prevent the house from burning, the insureds cleared brush and removed trees from around the house. The fire, however, reached the insureds’ garage. Firefighters tried to save the insureds’ home, choosing to do so because the efforts the insureds had made to protect the home made it more likely the home could be saved. The firefighters used approximately 20,000 gallons of water to extinguish the fire at the insureds’ home. The insureds offered evidence that this water entered the soil beneath their home, which caused the soil to swell and damage the home’s foundation. American Family and the insureds agreed that if the earth movement was not related to the fire, the foundation damage was not covered. They disagreed, however, about whether the damage was covered if it was caused in whole or part by the water used to extinguish the fire.

The homeowners policy at issue stated that the insurer did not insure:

... for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

1. Earth Movement, meaning any loss caused by, resulting from, contributed to or aggravated by earthquake; landslide; subsidence; sinkhole; erosion; mud flow; earth sinking, rising, shifting, expanding or contracting; volcanic eruption, meaning the eruption, explosion or effusion of a volcano,

This exclusion applies whether or not the earth movement is combined with water or rain.

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The court explained that to interpret the exclusion it was obligated to answer two questions. First, it had to determine whether the policy covered the foundation damage if the earth movement was caused solely by the fire and fire-fighting efforts. Second, it had to decide whether any portion of the foundation damage was covered if the earth movement was caused in part by natural causes and in part by the fire and fire-fighting efforts.

The court found that the policy language contained a “critical ambiguity.” The court explained that all of the listed examples of earth movement appeared to be “naturally occurring phenomena.” The court held that the exclusion was ambiguous “because the earth movement provision does not make clear that the exclusion applies regardless of whether the cause of the earth movement is man-made.” The court went on to explain that the overwhelming majority of courts to consider earth movement exclusions that did not include language excluding coverage for damage from earth movement regardless of the cause have held that the exclusions apply only to naturally occurring earth movement. As such, the exclusion at issue applies only to damage resulting from naturally occurring earth movement.

Having found that the exclusion was ambiguous the court next considered the cause of the insureds’ foundation damage. If the foundation damage was solely the result of the fire-fighting efforts it was clearly covered because fire was covered under the policy. Fire damage includes loss caused by reasonable fire-fighting efforts. The court also found that the earth movement exclusion would be unenforceable as a violation of public policy if it was held to apply to damage caused by fire-fighting efforts. This is because, were the exclusion to apply, the insureds would have been better off if the house had not been saved but had been allowed to burn to the ground. This would have provided the insureds with a disincentive to protect the house, since they would have been covered in full if the house had been destroyed by the fire. The court said “an insurance policy that creates such an incentive contravenes public policy” because “there is a public policy interest in not creating incentives for insureds to destroy their insured property.”

The court, however, did find that if it was proved that natural earth movement was a cause of the foundation damage, even if only a partial cause, the exclusion would apply. This is because the exclusion unambiguously applies to damage caused by naturally caused earth movement. In Colorado, anti-concurrent causation language is to be interpreted as written, with the result that coverage is excluded if any cause that contributes to the damage is excluded under the policy.

### **EXCLUSION INTERPRETED TO APPLY TO NATURAL AND MAN-MADE EARTH MOVEMENT**

Many insurers now include language in the earth movement exclusion that broadens the exclusion to apply regardless of what caused the earth movement. Generally, when a court finds that this language is clear it will be given effect.

In *Erie Insurance Property & Casualty Co. v. Chaber*, 801 SE2d 207 (W. Va. 2017), the state high court considered a claim for damage to a five-unit rental building. The damage occurred when a mass of soil and rock slid down a steep slope behind the insured building. Erie denied the claim based on the policy’s exclusion for earth movement, which excluded damage caused by landslide, including any earth sinking, rising, or shifting related to such event. After identifying specific forms of earth movement that are excluded, the policy states that the exclusion applies regardless of whether the specified excluded earth movement is “caused by an act of nature or is otherwise caused.” The insureds sued Erie for breach of contract and sought a declaratory judgment that there was coverage for the loss.

Erie hired an expert who initially indicated that the landslide was caused by improper excavation of the hillside behind the property, but the expert’s formal report said that the damage was caused by a rockfall resulting from seasonal climate change. The insureds’ expert said the cause of the rockfall was improper excavation of the highwall area behind the building. Erie argued that it made no difference whether the earth movement resulted from a natural or man-made cause, the exclusion applied either way.

The state high court found that the lower court had relied on cases in which the policy language

was markedly different from that found in the Erie policy. Specifically the high court found that the “caused by an act of nature or is otherwise caused” language in the Erie policy was absent from the policies at issue in the other cases. This policy language had been developed in 2013 by the Insurance Services Office “to minimize confusion regarding the scope of coverage and the nature of earth movement exclusionary language.” While the language had not been widely litigated because it was fairly new, it had been considered in several cases and none of the courts to consider the new language had held it to be ambiguous. The court agreed with Erie that “whether the event was triggered by natural forces or improper excavation of the hillside at the rear of the property, the exclusion applies.” The court held it was unnecessary to consider the policy’s anti-concurrent causation language, efficient proximate cause arguments, or the reasonable expectations of the insured, because the earth movement exclusion clearly applied to bar coverage for the loss.

A Michigan appeals court considered an earth movement exclusion in a BOP in *Home-Owners Ins. Co. v. Andriacchi*, 903 NW2d 197 (Mich. App. 2017). A major street repair project caused the supporting soil under the concrete slab floor of the insured’s office building to move resulting in damage to the slab. Home-Owners denied coverage based on an exclusion for “any earth movement.” The insurer argued the earth movement exclusion was clear and unambiguous. Andriacchi countered that the exclusion did not apply to man-made earth movement. He argued the phrase “any earth movement” had to be read in conjunction with the other language used in the exclusion, all of which referred to naturally occurring earth movement. Alternatively, Andriacchi argued that the exclusion was ambiguous because it is subject to more than one interpretation.

The policy excluded “any earth movement (other than sinkhole collapse), such as earthquake, landslide, or earth sinking, rising or shifting,” with an exception for damage from specified types of ensuing loss. The court focused on the use of “any” in the exclusion. While the word is not defined in the policy, the court found it is commonly understood to mean “every” or “all.” The court found that as used in the policy, “any earth movement” means every or all movement of the earth without restriction or distinction in type, either natural or man-made. Andriacchi argued that earth movement is restricted by the use of “such as” followed by examples of types of excluded earth movement that are all natural in nature. The court held that the use of “such as” preceding the list didn’t limit the types of earth movement excluded under the policy. Rather, the list provided some examples of earth movement and was not intended to be all-inclusive. The court observed that some of the listed types of earth movement, such as landslide, could be caused by nature or by man.

## CONCLUSION

Whether an earth movement exclusion will bar coverage for damage when the earth movement was caused by an act of man will depend on the language of the particular exclusion and a court’s interpretation of it. Absent a clear indication that the exclusion applies to both natural and man-made incidents of earth movement, most courts will restrict the exclusion to naturally occurring earth movement. The addition of specific words to expand the exclusion to man-made incidents of earth movement may or may not be sufficient for a court to hold that the exclusion applies to earth movement regardless of its cause, as evidenced by the opposite conclusions reached by the courts in the *Forester* and *Andriacchi* cases. Ultimately the outcome will depend on how courts in the jurisdiction interpret the specific policy language.