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## New York Court of Appeals Decides Earth Movement/Excavation Coverage Issue

The New York Court of Appeals recently held that a property insurance policy exclusion for “earth movement” did not apply where building damage resulted from excavation work being performed on an adjoining parcel. *Pioneer Tower Owners Association v. State Farm Fire & Casualty Company*, N.Y. Court of Appeals, April 30, 2009, 2009 N.Y. LEXIS 761.

A neighboring lot was being excavated, and underpinning had been built to protect the foundation of the insured’s condominium apartment building. The underpinning was found to be defective, and as a result, earth slid away beneath the insured’s building causing damage to it.

Plaintiff submitted a claim to its insurer, State Farm Fire & Casualty Company, under an all-risk policy providing coverage against “accidental direct physical loss,” subject to applicable exclusions for “earth movement” and “settling [or] cracking”. The policy excluded:

earth movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not. Earth movement includes, but is not limited to earthquake, landslide, erosion and subsidence, but does not include sinkhole collapse.

State Farm denied plaintiff’s claim, and plaintiff sued. Plaintiff and defendant each moved for summary judgment. The lower court ruled in plaintiff’s favor on the issue of liability. The Appellate Division affirmed, and, based upon a stipulation to the amount of damages, the New York Court of Appeals granted leave to appeal. The Court of Appeals then affirmed.

In its decision, the Court delineated the heavy burden upon an insurer seeking to disclaim coverage:

The Law governing the interpretation of exclusionary clauses in insurance policies is highly favorable to insureds. We said in *Seaboard Sur. Co. v. Gillette Co.* (64 N.Y.2d 304 [1984]): “Whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by

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interpretation or implication, but are to be accorded a strict and narrow construction. Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears in establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation.'

The Court of Appeals described the coverage issue before it as a "close one, but we cannot say that the event that caused plaintiff's loss was unambiguously excluded from the coverage of this policy." The Court noted that, as argued by the plaintiff, excavation, which is the intentional removal of earth, is a different event from the examples set forth in the policy, i.e., earthquake, landslide, erosion and subsidence, and questioned why the insurance company had not listed excavation as an example "while less common events were listed?"

The Court also accepted the plaintiff's argument that the settling or cracking exclusion would not be thought by an ordinary reader of the policy to apply to settling or cracking from the intentional removal of earth in the vicinity of the building.

The Court pointed to two Appellate Division cases and a Federal District Court decision holding that the earth movement exclusion did not apply to damage from excavation, and the Court itself had found no cases applying the earth movement exclusion to intentional earth removal. *Lee v. State Farm Fire & Casualty Company*, 32 A.D.3d 902 (2nd Dept. 2006); *Burack v. Tower Insurance Company of New York*, 12 A.D.3d 167 (1st Dept. 2004); *Wyatt v. Northwestern Mutual Insurance Company of Seattle*, 304 F. Supp. 781(D. Minn. 1969).

This is an example of the Court of Appeals adopting a very narrow interpretation of policy exclusions in a situation where a literal reading of the policy language would appear to support the application of the exclusions. ■

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