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Carlos Fayad v. Clarendon National Insurance Co.

THE NEXT CASE, AND JUSTICE QUINCE WILL BE JOINING US, IS CARLOS FAYAD VERSUS CLARENDON NATIONAL INSURANCE COMPANY.

LAURI ROSS ON BEHALF OF CARLOS FAYAD.

WOULD YOU ADDRESS THE JURISDICTIONAL PLEASE.

ABSOLUTELY. THESE TWO CASES COULD NOT BE MORE IN CONFLICT, THE FAYAD CASE AND THE PHOENIX VERSUS BRANCH CASE. PHOENIX VERSUS BRANCH, THERE WAS BLASTING ACTIVITY FROM NEARBY DREDGING. THE POLICIES ARE VERY SIMILAR. IN FACT --

THAT IS MY OPINION IS THAT THE POLICIES SEEM TO BE VERY DIFFERENT, IN THAT IN PHOENIX THE POLICY INCLUDED EARTH MOVEMENT, WHICH INCLUDED BUT IS NOT LIMITED TO CERTAIN THINGS, WHILE IN THIS CASE, THE POLICY EXCLUDED EARTH MOVEMENT, MEANING CERTAIN THINGS,, AND THAT TO ME, IS A BIG DIFFERENCE BETWEEN TWO POLICIES.

IT IS DIFFERENT AND I WILL EXPLAIN WHY, BECAUSE THE EARTH MOVEMENT EXCLUSION IN THE PHOENIX CASE, HAPPENS TO BE MORE INCLUSIVE NOT MORE LIMIT BUT BROADER IN ITS SCOPE, THE EARTH MOVEMENT EXCLUSION. IT WOULD INCLUDE MORE THINGS. BUT THE FOURTH DISTRICT HELD THAT IT WAS NOT APPLICABLE AT ALL AND EXTENDED COVERAGE. HERE WE HAVE A MORE LIMITED SECLUSION THAN THAT, WITH EXPRESS DEFINITION INS IT, AND THE THIRD DISTRICT SAID COVERAGE WAS EXCLUDED. YOU COULDN'T HAVE TWO MORE IRRECONCILABLE RESULTS THAN OCCURRED IN THOSE TWO CASES ON VERY, VERY SIMILAR FACTS.

WHEN YOU SAY THAT, IF THE THIRD DISTRICT IN THIS CASE HAD SAID IT IS NOT EXCLUDED, AND THE FOURTH DISTRICT HAD, IN PHOENIX, SAID IT IS EXCLUDED, AT THAT, IN THAT CASE THERE WOULD NOT BE A CONFLICT. IF BOTH HAD REACHED OPPOSITE CONCLUSIONS, THEN IT WOULD NOT AND CONFLICT.

IT DEPENDS ON HOW THEY INTERPRETED AND THAT IS THE WHOLE PROBLEM. IT DEPENDED ON HOW THEY WOULD HAVE INTERPRETED THE COVERAGE, VIS-A-VIS THE EXCLUSION, WHICH IS THE PROBLEM.

LIKE YOU ARE SAYING NOW, BECAUSE IT SAID INCLUDING BUT NOT LIMITED TO, THE FOURTH DCA WOULD SAY THIS IS A BROAD EXCLUSION. THEREFORE EXCLUDE HERE, BUT THE THIRD DCA WOULD HAVE SAID THIS IS A VERY NARROW EXCLUSION, BLASTING IS COVERED AND THEREFORE THERE WOULD BE NO COMPENSATION IN THAT INCIDENCE.

NO, BECAUSE THERE IS A MORE FUNDAMENTAL DISTINCTION IN THOSE TWO CASES. THE REASON WHY IT WASN'T COVERED IN THE PHOENIX VERSUS BRANCH CASE IS BECAUSE THE COURT CORRECTLY CONSTRUED THE POLICY. IT CONSTRUED THE COVERAGE TERMS BROADLY T CONSTRUED THE EXCLUSIONS NARROWLY. THAT IS THE DEFINITE DISTINCTION BETWEEN THE PHOENIX INTERPRETATION IN THE THIRD DISTRICT.

THE LAW WE HAVE TO DEAL WITH, BECAUSE YOU WERE SAYING THAT THE RESULTS ARE DIFFERENT, WELL, IT REALLY ISN'T THE RESULTS THAT WE LOOK AT IT IS WHETHER OR NOT THEY APPLIED DIFFERENT PRINCIPLES OF LAW TO, BASICALLY, THE SAME SET OF CIRCUMSTANCES, SO

WHAT IS THE PRINCIPLE OF LAW THAT IS IN CONFLICT IN PHOENIX AND THIS CASE?

IT IS BOTH IN THIS CASE, AND IRRECONCILABLE DIFFERENCES IN RESULTS ON VIRTUALLY SIMILAR FACTS, IS A BASIS FOR CONFLICT JURISDICTION IN THIS COURT, BUT THE PRINCIPLE OF LAW IS, WHICH THIS COURT HAS ALWAYS ABIDE BY, IS THAT YOU CONSTRUE THE TERMS OF THE POLICY, THE COVERAGE PROVISIONS BROADLY. YOU CONSTRUE THE EXCLUSIONS NARROWLY IN PHOENIX. YOU CONSTRUE THAT NARROWLY AND THE TERMS BROADLY. THE TERMS THAT WE ARE HERE ON TODAY IS WHAT IS THE TERM OF "EARTH MOVING EXCLUSION".

LET ME GET THE SITUATION STRAIGHT IN MY MIND, AT LEAST, AS TO THE CLAIM HERE IN YOUR CASE, IS THAT THE BLASTING RESULTED IN THE EARTH MOVEMENT.

NO. I DIDN'T MAKE A CLAIM THAT THERE WAS EARTH MOVEMENT. I MADE A CLAIM THAT BLASTING RESULTED IN DAMAGE TO THE HOME.

OKAY. AND, WELL, IS THAT THE, AND SO IS IT YOUR POSITION THAT EARTH MOVEMENT HAD NOTHING TO DO WITH THE DAMAGE?

YES.

IT IS THE DIRECT CONCUSSION OF THE BLASTING.

IT IS BLASTING ACTIVITY, WHICH IS CONCUSSION, WHICH IS VIBRATION. THAT IS WHAT WE ARE SAYING, AND THE EARTH MOVEMENT EXCLUSION IN THIS TERM, HAD A DEFINITION IN IT WHICH WAS EXPRESS, WHICH MAKES IT DIFFERENT FROM A LOT OF OTHER POLICIES. IT DEFINED EARTH MOVEMENT TO BE EARTHQUAKE, I AM SORRY.

THE QUESTION THAT I HAVE IS, WHY DON'T WE GET TO THE ISSUE OF EARTH MOVEMENT, IF THE CLAIM IS THAT THE CONCUSSION FROM THE BLASTING, RATHER THAN THE EARTH SINKING OR MOVING, RESULTED IN THE DAMAGE.

BECAUSE THAT WAS THE BASIS FOR THE THIRD DISTRICT'S RULING. IT WAS THE BASIS FOR THE SUMMARY JUDGMENT. THEY SAY THE EARTH MOVEMENT EXCLUSION WAS THE REASON WHY THERE WAS NO COVERAGE. OUR CLAIM IS, IT IS AN ALL-RISK POLICY, JUST LIKE IN PHOENIX. IT IS BLASTING DAMAGE, JUST LIKE IN PHOENIX, AND THE COURT MISREAD THE EARTH MOVEMENT EXCLUSION.

THAT IS WHERE I HAVE THE PROBLEM WITH THE CONFLICT, IS BECAUSE I DON'T UNDERSTAND, I REALLY DON'T UNDERSTAND THE PRINCIPLE OF LAW THAT COMES OUT OF EITHER CASE, WHERE THERE IS THIS DISCUSSION IN BOTH CASES, OF THE EARTH MOVEMENT EXCLUSION.

YES, IT DOES.

NO, IT DOESN'T. THE WAY I READ, JUDGE CROSS TALKS ABOUT THIS ALL-RISK BUSINESS, AND THEN HE ENDS UP SAYING BLASTING ACTIVITY RESULTED IN THE CRACKING OF THE WALLS, ROOF AND CEILING, THE ISSUE, ALTHOUGH NOT SPECIFICALLY RAISED IN THE PLEADING, WAS TRIED. I TAKE THAT TO MEAN THAT THE ISSUE OF WHETHER THE BLASTING CAUSED THE DAMAGE, WASN'T REALLY PLED, BUT THAT IS WHAT THEY TRIED, AND SO WE ARE GOING TO ACCEPT THAT.

THAT SON OF TWO THINGS THEY SAY, AND THE SECOND THING THEY SAY, IS THE ARGUMENT WAS BEING MADE, AND THAT THE DEFENSE OF THE CASE WAS THAT THERE WAS NO COVERAGE UNDER THE EARTH MOVEMENT EXCLUSION, WHICH IS EXPRESSLY IN THE POLICY, AND THAT WAS THE WHOLE ARGUMENT, AT PAGE 398. IT IS THE DEFINITE --

WHY ISN'T A FAIR READING OF THE FOURTH DISTRICT OPINION, THAT THIS IS AN ALL-RISK

POLICY, THOUGH YOU HAVE TO PAY ATTENTION TO THIS EXCLUSION, THAT, REALLY, WE DETERMINE HERE, THAT THE WAY THIS CASE WAS TRIED, IT DOESN'T HAVE ANYTHING TO DO WITH THE EARTH MOVEMENT EXCLUSION. THIS IS JUST STRICTLY A DIRECT BLASTING, WHICH WOULD BE COVERED BY ALL-RISK.

NUMBER ONE, CAUSATION WAS NOT THE ISSUE, AND LET ME EXPLAIN WHY. IN THIS CASE, THE INSURANCE COMPANY ACTUALLY SUED THE LASTING IT COMPANY FOR INDEMNITY, CLAIMING THAT THE DAMAGES WERE DUE TO BLASTING, AND SEEKING TO SUBROGATE ITSELF TO THE RIGHT. THAT IS THE FIRST AND THE SECOND IS THAT EXPRESS LANGUAGE THAT THE COURT REJECTED EXCLUSION. THE ARGUMENT IS THE PLAINTIFF'S LOSS IS NOT COVERED AND COMES WITHIN THE EXPRESS EXCLUSION ALLUDED TO IN THE ABOVE, WHICH IS EXACTLY WHAT I HAVE BEEN CITING. IT IS TRUE THE PLAINTIFFS PLEADED THE LOSS WITHIN THEIR HOME WAS THE RESULT OF NUMEROUS CRACKS AND FRACTURES AND THAT THE CRACKS WERE THE RESULTS OF DREDGING OPERATIONS. THEY REJECTED THE EXCLUSION'S APPLICABILITY IN ITS ENTIRETY. THAT IS WHY THE CASE IS AN EXCLUSION CASE, SO THAT IS WHY THE TWO CASES, YOU COULDN'T HAVE MORE OPPOSITE RESULTS, WITH REGARD TO AN EARTH MOVEMENT EXCLUSION, THAN WHAT CAME UPON IN THIS CASE, SO IF WE LOOK AT THE EXCLUSION IN THIS CASE, WHICH THE THIRD DISTRICT CONSTRUED EXPANSIVELY, RATHER THAN RESTRICTIVELY, AS THIS COURT HAS ALWAYS SAID, WHAT THIS EXCLUSION SAYS, IS, IT IS NOT AN ILLUSTRATIVE EXAMPLE. IT IS AN EXCLUSION THAT SAYS EARTH MOVEMENT MEANS THIS. EARTHQUAKE, LANDSLIDE, MINE SUBSIDENCE AND LAND FLOW. NOW, THE THIRD DISTRICT, THE FOURTH TIME IN ITS OPINION, ACKNOWLEDGES THAT ALL OF ITS LANGUAGE RELATES TO NATURAL EFFECTS, WHERE THE THIRD DISTRICT WENT ON AND WHERE THE MISTAKE IS, THEY GO ON AND APPLY THE EXCEPTION TO THE EXCLUSION. THEY APPLY THE ENSUING LANGUAGE.

WHAT DO YOU THINK THAT THAT EXCEPTION IS REFERRING TO?

OKAY. AND IT IS A GREAT QUESTION, BECAUSE IT GOES TO THE HEART OF WHAT THE THIRD DISTRICT DID. WHEN YOU ARE TALKING ABOUT THE EXCEPTION TO THE EXCLUSION, LET'S ASSUME, FOR A SECOND, THAT YOU HAVE EXACTLY WHAT THE EXCLUSION ENCOMPASSES, WHICH IS YOU HAVE GOT A VOLCANIC ERUPTION, ON, WHICH RESULTS IN LAVA FLOWING, WHICH RESULTS IN FIRE FROM THE LAVA FLOWING, AND THE FIRE IMMEDIATELY DESTROYS A HOME, LIKE IN CALIFORNIA IT HAPPENS ALL THE TIME, WHERE YOU HAVE GOT FIRE THAT HITS THE HOME. THEN YOU WOULD HAVE A COVERED LOSS, BASED ON THE ENSUING LANGUAGE, BECAUSE YOU HAVE GOT THE EXCEPTION, WHICH IS THE EARTH MOVEMENT EXCLUSION, VOLCANIC ERUPTION, BUT THEN YOU HAVE GOT THE EXCEPTION TO THAT, WHICH IS FIRE EMANATING FROM THE EXCLUSION.

BUT YOUR POINT IS THAT YOU CAN'T EVEN POSSIBLY GET TO THE EXCEPTION TO THE EXCLUSION, IF YOU ARE, FIRST, NOT WITHIN THE EXCLUSION.

ABSOLUTELY.

YOU GO BACK. THIS IS AN ALL-RISK POLICY, WHICH YOU BROADLY CONSTRUE. AND THEY DON'T, I MEAN, THIS IS, THE THIRD DISTRICT, SEEMS TO, SO THEY FOCUS ON AN EXCLUSION. IT ONLY COVERED MAN-MADE, I MEAN, NATURAL EFFECTS.

RIGHT.

WAS THIS, WAS THE PHOENIX CASE ARGUED TO THE --

YES. IT WAS CITED IN THE COURT BELOW. IT WAS NOT MENTIONED IN THE OPINION, AND THEY JUST GO OFF ON, WE RULED IN CASTILLO. WE CAME TO THE SAME RESULT, BUT THEY GO OFF ON THIS ENSUING LANGUAGE.

THEY AGREE THAT CASTILLO IS THE EXCEPTION TO THE POLICY.

ABSOLUTELY.

THAT STATE FARM LANGUAGE IS VERY DIFFERENT AND CLEARLY COVERS --

CORRECT. THE STATE FARM LANGUAGE IS UNIQUE, AND IT HAS BEEN RECOGNIZED UNIQUE ALL OVER THE COUNTRY, AND THE ANALYSIS THAT I AM MAKING OF THIS POLICY, IS NOT A UNIQUE ANALYSIS. IT IS THE, BY FAR, THE MAJORITY RULE IN FEDERAL AND STATE COURT, NATIONWIDE, HAS REACHED THE SAME CONCLUSION, WITH REGARD TO THE SAME TYPES OF EXCLUSIONS FOR ARGUMENT.

AS YOU POINTED OUT, THOUGH, AND I WILL ASK YOUR OPPONENT ON THIS, THIS ONE ACTUALLY SAYS EARTH MOVEMENT, IT DOES NOT SAY INCLUDING BUT LIMITED TO SOMETHING, IT SAYS EARTH MOVEMENT, MEANING EARTHQUAKE.

EXACTLY. NOW, I POINTED THAT OUT BECAUSE I POINTED IT OUT REPEATEDLY. IT IS A DEFINITION. IT IS NOT A SUBSTANTIVE EXAMPLE.

IS THIS A QUASI-MAN-MADE OCCURRENCE?

THAT IS A VERY INTERESTING ARGUMENT, AND IF IN FACT, MINE SUBSIDENCE COULD BE EITHER MAN-MADE OR A NATURAL EVENT, YOU WOULD STILL CONSTRUE IT AS MAN-MADE, BECAUSE THE TERMS OF THE EXCLUSION GET INTERPRETED WITH REGARD TO THE LANGUAGE, THE WORDS GET INTERPRETED TOGETHER --

YOU SAID INTERPRETED. YOU SAID MAN-MADE.

I AM SORRY. A NATURAL EVENT. IT WOULD BE INTERPRETED AS A NATURAL EVENT, BECAUSE THE CONTEXT THAT IS IN THE EXCLUSION, AND BECAUSE YOU ARE REQUIRED TO GIVE IT A NARROW MEANING, AND BECAUSE HISTORICALLY THAT, IS HOW IT HAS BEEN CONSTRUED, FOR THESE TYPE OF POLICIES, AS A NATURAL EVENT, NOT A MAN-MADE EVENT. IT IS OLD MINES THAT BASICALLY DISINTEGRATE AND COLLAPSE IN ON THEMSELVES. THAT IS WHAT WE ARE TALKING ABOUT.

IT IS NOT LIMITED TO OLD MINES, THOUGH, IT COULD BE NEW MINES, RIGHT?

YES, BUT UNDER THE CONTEXT, THEY ARE TALKING ABOUT, WHEN THEY ADD THAT LANGUAGE, TO AN EXCLUSION, WHICH, AGAIN, GETS INTERPRETED STRICTLY, THEY ARE TALKING ABOUT NATURAL MINE SUBSIDENCE. WHEN MINE SUBSIDENCE IS COVERED, AND I HAVE GIVEN YOU AN ISO FORM APPLICATION, WHEN MINE SUBSIDENCE IS COVERED, THE WAY IT IS DONE IS IT IS DONE BY I KNOW DOORSMENT, AND THEN -- IT IS DONE BY ENDORSEMENT, AND THEN THEY SPECIFICALLY DEFINE IT, WHICH IS WHAT I AM TALKING ABOUT.

I AM HAVING A HARD TIME WITH THIS CASE ON THE MERITS OF THE CASE, WHICH IS THAT, AGAIN, THIS IS AN ALL-RISK POLICY, WHICH IS A BROAD POLICY, AND HERE WE HAVE HAD THESE CASES FOR ALL OF THESE YEARS, TELLING INSURORS THAT THIS TYPE OF EXCLUSION IS GOING TO BE, MOST LIKELY, NARROWLY CONSTRUED AGAINST THEM. WHAT, WAS THERE, IS THERE ANYTHING IN THE RECORD, WHAT IS SO HARD ABOUT PUTTING IN THAT THIS EXCLUDES ALL NATURAL MAN-MADE DISASTERS? I MEAN, BLASTING AND SEEMS TO BE SUCH A DISTINCTIVE THING FROM THESE CATASTROPHIC OTHER EFFECTS, I JUST --

THAT IS PART OF OUR POINT, WHICH IT IS NOT LIKE THE STATE FARM EXCLUSION HAS NOT BEEN AROUND FOR YEARS T HAS BEEN, AND HAD CLARENDON CHOSEN TO WRITE A SIMILAR EXCLUSION, THERE WOULD BE NOTHING TO TALK ABOUT, BUT THEY CHOSE NOT TO. THIS STATE FARM VERSUS CASTILLO, LEAD-IN LANGUAGE THAT HAS BEEN CONSIDERED UNIQUE, THIS HAS

NOT BEEN AROUND JUST RECENTLY.

YOU STILL HAVE TO PROVE THAT THE BLASTING CAUSED SOMETHING, BECAUSE ORIGINALLY, THEY DENIED COVERAGE ON THE BASIS THAT THIS WAS SETTLEMENT SHRINKAGE AND THERMAL EFFECTS. THAT IS NOT AN ISSUE IN FRONT OF US.

NOT ON THIS APPEAL. THERE WERE MULTIPLE DIFFERENT EXCLUSIONS THAT THEY WERE ARGUING. THE ONLY ONE THAT WAS EVER RULED UPON, WAS THE EARTH MOVEMENT EXCLUSION.

SO IF THIS IS QUASHED, THEN IT GOES BACK AND THEY STILL CAN ARGUE OTHER EXCLUSIONS?

THEY CAN ARGUE OTHER CAUSATION. THEY CAN ARGUE OTHER CAUSATION. THEY CAN ARGUE THIS, IN FACT, WAS DUE TO SHRINKAGE VERSUS BLASTING. THAT IS WHAT THEY WILL ARGUE, AND WE WILL HAVE TO PROVE THAT IT WAS DUE BLASTING, SO THAT IS WHAT IT WOULD BE REMANDED ON, BUT WITH REGARD TO THE INTERPRETATION OF THIS POLICY, THE THIRD DISTRICT GOT IT WRONG, AND YOU CAN SEE THAT, IN THE INTERPRETATION OF THE SEPARATE PART OF THE POLICY, WHICH IS THE PERSONAL PROPERTY, WHICH IS THERE IS NO EXPLANATION FOR. THE PERSONAL PROPERTY, IS A SPECIFIC PERIL PROPERTY COVERAGE, AND THE SPECIFIC PERIL, WHICH IS COVERED, IS EXPLOSION. IT IS COVERED. AND THE THIRD DISTRICT SAYS, WELL, WE DON'T WANT TO INTERPRET THE PROVISIONS OF THE POLICY INCONSISTENTLY, THERE FOR WE ARE EXCLUDING THE PERSONAL COVERAGE, ON THE SAME BASIS AS WE EXCLUDED THE REALTY COVERAGE, WHICH MAKES, AND THEY RESORTED TO THE SAME ENSUING LANGUAGE. AGAIN, WE DON'T GET TO THE ENSUING, AND I WANT TO GO BACK TO JUDGE QUINCE'S EXAMPLES AGAIN, BECAUSE I THOUGHT OF ANOTHER EXAMPLE LAST NIGHT, TOO, WITH REGARDS TO THE ENSUING LANGUAGE, THAN IS THE EXPLOSION. ENSUING, THE EARTH MOVEMENT EXCLUSION, EXCLUDES MINE SUBSIDENCE, UNLESS CAUSED BY DIRECT EXPLOSION. SO LET'S TALK ABOUT MINE SUBSENENCE AND IT EXPLODE. MINE SUBSIDENCE OCCURS. YOU HAVE AN EXPLOSION, WHICH AN OLD GAP IS BEING LEFT IN IT AND IT DAMAGES PROPERTY NEARBY. THAT IS WHEN YOU WOULD REACH THE ENSUING LANGUAGE. IN THIS CASE, WE DON'T FALL WITHIN THE EXCLUSION ALL TOGETHER. IF IT IS BLASTING ACTIVITY, IT IS NOT EXCLUDED, AND IT WOULD NOT HAVE BEEN DIFFICULT FOR THEM TO HAVE REWRITTEN THE POLICY, TO HAVE WRITTEN A DIFFERENT POLICY EXCLUSION, BUT THAT IS NOT WHAT WE ARE HERE ON.

LET ME ASK YOU ABOUT PHOENIX. IF WE RULE IN YOUR FAVOR, AND DISAPPROVE THE DECISION BELOW, WOULD WE HAVE TO APPROVE PHOENIX, BECAUSE THAT LANGUAGE SEEMS A LOT MORE SIMILAR TO THE STATE FARM LANGUAGE THAN IT DOES TO THIS LANGUAGE.

NO. IT, THERE IS ONLY ONE REAL DISTINCTION BETWEEN PHOENIX AND THIS ONE.

THAT IS INCLUDING BUT NOT LIMITED TO.

INCLUDING BUT NOT LIMITED TO.

THAT IS A PRETTY BIG DISTINCTION.

I DON'T THINK SO. IT IS NOT A TERM OF LIMITATION. YOU WOULD STILL, IT IS NOT A TERM OF LIMITATION.

IT SAYS INCLUDING BUT NOT LIMITED TO.

BUT YOU WOULD STILL HAVE TO APPLY ADJUNCT GENEROUS. YOU WOULD STILL BE TALKING ABOUT NATURAL EFFECTS!

IF IT EXCLUDES ALL EARTH MOVEMENT INCLUDING BUT NOT LIMITED TO THESE CERTAIN THINGS.

IT WOULD STILL HAVE TO BE NATURAL.

I DON'T THINK THAT CASES SAY YOU HAVE TO, IN, YOU HAVE TO USE THAT CANON OF CONSTRUCTION, WHERE IT SAYS INCLUDING BUT NOT LIMITED TO.

YES. ACTUALLY THERE ARE A WHOLE SLEW OF CASES, AND I HAVE CITED THEM TO YOU, WHERE THE POLICY HAS THAT LANGUAGE IN IT, INCLUDING BUT NOT LIMITED TO. THIS POLICY IS DIFFERENT, IN THAT IT IS A SPECIFIC DEFINITION, BUT SOME OF THE CASES CITED THAT I HAVE REFERRED TO IN THE BRIEF, WHEN I COLLECTED THEM, HAVE THAT INCLUDING BUT NOT LIMITED TO LANGUAGE IN IT. AND THEY HAVE STILL SAID YOU CONSTRUE THE EXCLUSION, BY REFERENCE TO ADJUNCT GENEROUS. IT IS STILL NATURAL EFFECTS, AND THEREFORE IT WOULD STILL BE THE SAME TYPE OF EFFECTS, VOLCANIC ERUPTION, SIMILAR EFFECTS, SO, YES, YOU WOULD HAVE TO --

I GUESS YOU ARE SAYING THAT WE WOULD HAVE TO APPROVE PHOENIX.

YOU WOULD HAVE TO APPROVE PHOENIX.

THERE IS NO WAY WE CAN DISAPPROVE THIS CASE WITHOUT APPROVING PHOENIX?

I DON'T THINK SO. I THINK THEY ARE DIRECTLY IN CONFLICT. THANK YOU, AND I WOULD RESERVE ANY TYPE I HAVE FOR REBUTTAL. THANK YOU.

CHIEF JUSTICE: MR. PEOPLES. GO AHEAD.

I AM SORRY. MAY IT PLEASE THE COURT. I AM MARC PEOPLES, FOR CLARENDON NATIONAL INSURANCE COMPANY AND BESIDE ME IS GUY BURNETTE JR.

AND IF THE LIGHT GOES ON, YOU NEED TO KNOW THAT YOU ARE INTO HIS TIME. EYE WILL DO MY BEST. THANK YOU. IT IS QUITE SIMPLE. BLASTING CAUSED VIBRATIONS, AND FOR PURPOSES OF SUMMARY JUDGMENT, THEY ASSUMED THAT THESE VIBRATIONS CAUSED THE LOSS.

LET ME ASK YOU THIS. WE ARE ON SUMMARY JUDGMENT HERE. AND THEY ARE CLAIMING THAT BLASTING CAUSED THE DAMAGE TO THE HOUSE, CORRECT? I MEAN, IS THAT WHAT THEY ARE CLAIMING? THEY ARE CLAIMING THAT BLASTING CAUSED THE DAMAGE TO THE HOUSE.

THERE IS A UNFORTUNATE TENDENCY TO GET LOOSE IN THE LANGUAGE, AND I AM NOT DESCRIBING ANYTHING --

BUT WE OR SUMMARY JUDGMENT, AND SO THE QUESTION THAT I HAVE IS, HOW, ON SUMMARY JUDGMENT, DO YOU REACH THE CONCLUSION, AS A MATTER OF LAW, THAT THE DAMAGE WAS SUSTAINED BY REASON OF EARTH MOVEMENT, AS OPPOSED TO CONCUSSION FROM THE DREDGING.

I BELIEVE THAT I JUST HEARD COUNSEL SAY THAT VIBRATION CAUSED THE LOSS. VIBRATION FROM THE BLASTING.

RIGHT.

CAUSED THE LOSS.

RIGHT.

NOW, OUR EXPERT FOUND THAT THERE WAS VIBRATION AT THE HOUSE, BUT IN HIS OPINION, THERE WAS NO, THAT VIBRATION DID NOT CAUSE THE LOSS. FOR PURPOSES OF SUMMARY JUDGMENT, THEY IGNORED THAT AND THAT IS PROPER. TO ANSWER YOUR QUESTION, THE COUNSEL AD AT SUMMARY JUDGMENT HEARING, SAID THAT THE CASE WAS IDENTICAL

FACTUALLY, TO CASTILLO, IN WHICH THE UMPIRE SAID --

WHAT I AM TRYING TO GET TO IS THE FACT THAT, HERE YOU HAVE A SITUATION IN WHICH THERE WAS DREDGING GOING ON, CORRECT?

THAT IS MY UNDERSTANDING.

AND WHAT WAS HAPPENING WAS THE DREDGING THAT THERE WAS SOME BLASTING GOING ON, IS THAT CORRECT?

YES, SIR.

OKAY. SO WE WOULD NORMALLY CONSIDER BLASTING TO BE SOME TYPE OF AN EXPLOSION, RIGHT?

YES.

SO EITHER YOU HAVE GOT A SITUATION THAT, FOR SOMEBODY FACTUALLY TO DETERMINE, AS TO WHETHER THE, WHAT HAPPENED, THE DAMAGE WAS BECAUSE THE EARTH MOVED OR BECAUSE THERE WAS AN EXPLOSION, AND THAT, IN FACT, RESULTED IN THIS DAMAGE. I MEAN, ISN'T THAT A FACTUAL DETERMINATION?

THERE IS NO CONTENTION THAT THE HOUSE BLEW UP, IF THAT IS WHAT YOU ARE SAYING.

BUT THAT THE CONCUSSION FROM THE BLASTING, IN MY NORMAL LOOKING AT THINGS, I WOULD THINK THAT THERE WOULD BE, COULD BE, REALISTICALLY, SOME DEGREE OF CRACKING AND DAMAGE, IF THERE IS BLASTING, NOT FROM THE FACT THAT THE EARTH BECAME UNSETTLED BUT FROM THE FACT THAT THERE WAS SOME KIND OF VIBRATION.

SOME KIND OF VIBRATION IN THE EARTH. RIGHT. THE QUESTION BEFORE THE COURT IS WHETHER THAT VIBRATION IS EARTH MOVEMENT, AS THAT DETERMINES USE IN THE POLICY.

SO THERE COULDN'T AND VIBRATION THAT IS NOT EARTH MOVEMENT? I THINK THAT IS THE GIST OF THE QUESTION HERE, IS THERE COULD BE A VIBRATION THAT REALLY ISN'T EARTH MOVEMENT. IS THAT POSSIBLE OR NOT?

I AM NOT A PHYSICIST. I COULDN'T SAY, BUT MY, ESSENTIALLY THE VIBRATION --

YOU COME AROUND TO THIS IS ALL A FACTUAL QUESTION THAT NEEDS TO BE DEVELOPED AT TRIAL.

NO. I DON'T THINK SO. THE, AS COUNSEL JUST SAID, VIBRATIONS CAUSED THIS LOSS. THE VIBRATIONS WERE TRANSMITTED THROUGH THE EARTH, AND THAT WOULD HAVE SHIFTED THE EARTH, WHICH --

DOESN'T NECESSARILY CAUSE SHIFTING IN THE EARTH. THE VIBRATION DAMAGE, BY CLEAR READING OF THE POLICY, IS LIMIT TO DO THAT THAT FALLS UNDER VOLCANIC ERUPTION.

NO.

THEN IT SAYS, OR, EXCUSE ME, MEANING EARTHQUAKE, SO THERE IS NO QUESTION THERE WASN'T AN EARTHQUAKE.

MEANING EARTHQUAKE, LANDSLIDE.

SO THE SHOCKWAVES OR TREMORS THAT FOLLOW AN EARTHQUAKE ARE EXCLUDED, RIGHT?

AS I DEMONSTRATED ON THE BRIEF ON PAGE 12 OF RESPONDENT'S BRIEF, THE EXCLUSION SHOULD BE DIVIDED BY THE SEMICOLONS, AND THAT MEANS EARTH MOVEMENT, MEANING, FIRST, EARTHQUAKE, INCLUDING LAND SHOCKWAVES, SECOND, LANDSLIDE. THIRD --

LET'S GO COMMENTS. IT SAYS INCLUDING EARTH TREMORS OR LANDSLIDES BEFORE, DURING OR AFTER A VOLCANIC ERUPTION.

AND THOSE BEFORE, DURING OR AFTER A VOLCANIC ERUPTION, MODIFIES EARTHQUAKE.

YOU ARE SAYING THAT YOU THINK AN INSURED WHO HAS BOUGHT AN ALL-RISK POLICY, IS NOW GOING TO LOOK AT THIS AND SEE THERE IS A COMMA AVERT QUAKE BUT A SEMICOLON AFTER "ERUPTION", AND THAT IS THE WAY CLARENDON THINKS THAT THEY ARE CLEARLY AND UNAMBIGUOUSLY EXCLUDING ANY NATURAL EVENT, WHETHER IT IS NATURAL OR MAN-MADE, THAT THIS CLEARLY, THIS SUBSECTION B, OR LET ME ASK YOU THAT, DOES IT CLEARLY AND UNAMBIGUOUSLY EXCLUDE IT, OR IS THERE AN AMBIGUITY?

THERE IS NO AMBIGUITY.

YOU MEAN, YOU CAN'T HAVE A REASONABLE PERSON, NOT A LAWYER BUT JUST A REASONABLE PERSON COULD NOT LOOK AT THIS AND REACH TWO CONCLUSIONS? THAT IS IMPOSSIBLE. IS THAT WHAT YOU ARE SAYING?

THESE TWO CONCLUSIONS, BEING WHAT?

MULTIPLE CONCLUSIONS?

THE CONCLUSION THAT SHOULD BE DRAWN IN READING THIS, IS THAT EARTH MOVEMENT MEANS EARTHQUAKE, LANDSLIDE, MINE SUBSIDENCE, EARTH RISING, SINKING, MINING? IT DOESN'T SAY ANYTHING ABOUT EXPLOSION?

NO. THE EXPLOSION IS NOT INCLUDED. THE EXPLOSION CAUSED EARTH MOVEMENT, IN THE FORM OF VIBRATIONS.

IT SAYS EARTH MOVEMENT, MEANING EARTHQUAKE. DID IT SAY LANDSLIDE -- WAS THERE A LANDSLIDE?

NO.

WAS THERE MINE SUBSIDENCE?

NO.

WAS THERE LAND SHRINKING?

BY THE COURT'S DEFINITION, THERE WAS.

WHAT IS TO BE DONE WITH MORE THAN ONE CONCLUSION?

WHEN MORE THAN ONE REASONABLE CONCLUSION CAN BE DRAWN FROM REVIEW OF THE LANGUAGE.

I JUST WANT TO UNDERSTAND THIS.

YES, MA'AM.

THAT A NONLAWYER OR EVEN A LAWYER READING THIS, COULD ONLY COME TO ONE CONCLUSION, THAT BLASTING IS INCLUDED WITHIN THIS.

AGAIN, THE BLASTING IS NOT INCLUDED IN THIS. THE BLASTING, THE EARTH MOVEMENT CAUSED BY BLASTING IS INCLUDED IN THIS, AND THAT IS WHAT WE ARE FOCUSING ON. AND, AGAIN --

WELL, LET'S SEE, SO IF THE BLASTING BLEW UP THE HOUSE, SO WHAT BLASTING WOULD BE -- IF IT BLEW UP THE HOUSE.

BUT THEN WOULD YOU ARGUE THAT IT WASN'T THE BLAST, IT WAS THE WIND MOVING CAUSED BY THE BLASTING? I MEAN, IF WE ACCEPT YOUR ARGUMENT, THERE IS BLASTING OCCURRING WHICH CAUSE VIBRATION TO GO THROUGH THE EARTH, AND THAT BLASTING IS TRANSMITTED INTO THE HOUSE AND THE HOUSE IS DAMAGED. HOW ARE YOU ARGUING THAT A BLAST OCCURRED WHICH CAUSED A CONCUSSION TO TRAVEL THROUGH THE AIR, AND IT WAS THE WIND AND THE MOVEMENT THROUGH THE AIR THAT CAUSED THE DAMAGE?

THAT IS NOT WHAT WE ARE FOCUSING ON HERE.

ISN'T THERE A SIMILAR ARGUMENT? ISN'T THERE ANY EVIDENCE THAT THE EARTH SHIFTED OR MOVED, OTHER THAN BY THE MOLECULAR VIBRATION OF THE BLASTING CONCUSSION WAVES MOVING THROUGH THE EARTH?

IS THERE ANY EVIDENCE THAT THE EARTH SHIFTED OR MOVED, OTHER THAN --

OTHER THAN VIBRATING CAUSED BY THE CONCUSSION OF THE BLAST, JUST AS HAPPENS IN AN EXPLOSION IN THE AIR?

NO. I DON'T BELIEVE SO.

SO THERE IS NO SHIFTING OR MOVING.

NO. THE EARTH SHIFTED OR MOVED, BECAUSE OF THE VIBRATIONS FROM THE BLAST. AT LEAST THAT THE IS WHAT THE COURT ASSUMED FOR THE PURPOSES OF SUMMARY JUDGMENT.

LET ME CLARIFY, JUST TO PUT EVERYTHING IN CONTEXT, AND CORRECT ME IF I AM WRONG. THIS IS AS A RESULT OF MINING ACTIVITIES THAT ARE TAKING PLACE IN NORTH DADE COUNTY, AM I CORRECT?

YES.

AND THE ROCK MINING ACTIVITIES TAKE PLACE FROM ONE-TO-FIVE MILES WITHIN THE AREA.

YES, 2.5 MILES, IN THIS CASE, YES.

AND THAT BLASTING ALLEGEDLY CAUSE SOME HOUSES TO DEVELOP CRACKS AND OTHER KINDS OF DAMAGE, CORRECT?

HOUSES OTHER THAN THIS ONE?

THERE HAVE BEEN MANY ALLEGATIONS IN NORTHWEST DADE COUNTY THAT THIS BLASTING HAS CAUSED DAMAGE TO HOMES, HASN'T THERE BEEN, IN THE NEWS?

I WILL TAKE YOUR WORD FOR IT. I HAVEN'T SEEN ANYTHING LIKE THAT.

OKAY. AND ISN'T THE VIBRATIONS THAT ARE CAUSED BY THE BLASTING, MEASURED IN LESS

THAN AN INCH IN SHIFTING?

YES. THEY ARE QUITE SLIGHT.

POINT ONE INCHES OR LESS. SOMETIMES LESS THAN .1 INCHES?

YES.

AND YOU WOULD CONSIDER THAT MOVEMENT WHERE PARTICLES SHIFT BY LESS THAN A TENTH-OF-AN-INCH?

ANY EARTH MOVING, RISING OR SHIFTING, IS EARTH MOVEMENT, ACCORDING TO THE POLICY.

LET'S TAKE A LOOK AT THIS. IF SOMEONE COMES IN NEXT DOOR TO YOUR INSURED AND BEGINS DRIVING PILES, AND THE VIBRATIONS OF THAT POUNDING, I MEAN, DOES TREMENDOUS DAMAGE RIGHT NEXT DOOR. WE ARE NOT TALKING ABOUT A MILE AWAY OR WHATEVER. THERE WOULD BE NO COVERAGE THEN, BECAUSE THEN YOU WOULD SAY EVEN THOUGH THERE IS NO INDICATED EARTH SINKING, THERE IS NO INDICATING OF RISING OR MOVEMENT, OTHER THAN THROUGH THE VIBRATIONS, THEN THERE IS NO COVERAGE UNDER THIS POLICY FOR THAT AS WELL.

I AM SORRY. IF THERE WAS A PILE DRIVER NEXT DOOR THAT CAUSED VIBRATIONS TO THE EARTH AND THOSE VIBRATIONS DAMAGED THE HOUSE?

THERE WOULD BE NO COVERAGE FOR THAT, EITHER.

CHIEF JUSTICE: I THINK YOU ARE IN YOUR PARTNER'S TIME.

THANK YOU.

> MAY IT PLEASE THE COURT. GUY BURNETT.

NOW, ARE YOU GOING TO HANDLE A DIFFERENT ASPECT OF THIS ARGUMENT, OR GOING TO CONTINUE ALONG THE SAME LINE?

I WILL IN SOME RESPECT, CONTINUE ALONG, BUT WHAT I WOULD LIKE TO DEVELOP AT THIS POINT IS A POINT THAT I THINK NEEDS TO BE BROUGHT TO THIS COURT'S ATTENTION. IN THE PETITIONER'S BRIEFS, AND THAT IS THE ISSUE OF THIS NATURAL VERSUS MAN-MADE EARTH MOVEMENT, AND THE SUGGESTION IS THAT THE MAJORITY OF DECISIONS THAT HAVE HELD AROUND THE COUNTRY ARE THAT THESE ARE ALL NECESSARILY NATURAL EFFECTS. WE TAKE ISSUE WITH THAT, AND WE NOTE THAT THE EXCEPTION OR THE EXCLUSION IN THIS CASE, ENCOMPASSES AN EVENT WHICH IS ALMOST BY DEFINITION, A MAN-MADE EVENT, AND THAT IS MINE SUBSIDENCE. MINES ARE NOT A NATURALLY-OCCURRING EVENT IN NATURE. THEY ARE MAN-MADE, AND ONE OF THE DEFINITIONS CITED BY THE PETITIONER IN THEIR BRIEF, THE PETERS TOWN CASE ISSUE, AND CORRECTLY HOLDING THAT IT WAS BROUGHT ABOUT BY NATURAL SPONTANEOUS EFFECTS BUT NOT BY THE EARTH MOVEMENT, BROUGHT ABOUT BY MAN-MADE OCCURRENCES, SUCH AS MINE SUBSIDENCE.

IN THIS CASE, DOES THAT REALLY MATTER IF, IN FACT, THE POLICY IS CONSTRUED IN SUCH A MANNER, AS TO, WHEN YOU TALK ABOUT EARTH MOVEMENT, THEY HAVE SPECIFIC, NOT EXAMPLES, BUT THEY HAVE A SPECIFIC DEFINITION. IF WE CONCLUDE THAT THIS IS A SPECIFIC DEFINITION FOR EARTH MOVEMENT IN REGARDS TO THIS POLICY, THEN, DOES IT REALLY MATTER WHETHER MINES, THE MOVEMENT OF THE MINE IS REALLY MAN-MADE OR NATURAL? BECAUSE WE KNOW THAT THAT IS NOT WHAT OCCURRED HERE. SO DO WE LOOK, SHOULDN'T WE LOOK AT THIS POLICY, TO SEE WHETHER WHAT OCCURRED HERE FITS INTO ANY OF THESE CATEGORIES, AND WE KNOW THAT THE MOVEMENT OF THE MINE IS NOT THAT CATEGORY.

RIGHT. THIS IS NOT A MINE SUBSIDENCE OR A VOLCANO CASE OR AN EARTHQUAKE.

SO, DOES THIS FIT, WHERE DOES THIS FIT, INTO ANY OF THESE SPECIFIC THINGS THAT ARE DEFINED AS CERTAIN MOVEMENT?

YES. THE ANSWER TO THE QUESTION, JUSTICE QUINCE, IS THAT IT FITS INTO THE CATCH-ALL PROVISION, WHICH FOLLOWS AT THE END OF THAT EXCLUSION. THE LANGUAGE STATES EARTH --

DO YOU CONSIDER IT A CATCHALL?

EARTH RISING, FALLING OR SHIFTING. NOW, THAT IS NOT LIMITED. IT IS NOT IN ANY WAY SET OFF, BUT IT IS SIMPLY A STATEMENT THAT EARTH MOVEMENT, CONSISTING OF ANY TYPE OF RISING, SINKING OR SHIFTING.

WHICH BRINGS ME BACK TO THE QUESTION THAT WAS ASKED EARLIER, WHICH IS WE DON'T REALLY HAVE A RECORD HERE THAT SAYS THAT THIS OCCURRED BECAUSE THE EARTH SANK OR ROSE OR WHATEVER, SHIFTED, BECAUSE ACTUALLY THE BLASTING COULD HAVE BEEN A VIBRATION OF THE AIR, COULDN'T IT?

AS WELL, IT COULD HAVE BEEN, JUSTICE QUINCE, BUT IN THIS CASE, WE KNOW THAT THIS WAS PRESENTED TO THE TRIAL COURT. AND INDEED, IT WAS EVEN PRESENTED TO THE THIRD DCA.

BUT NOT FACTUALLY. I MEAN, THIS WAS ON A MOTION FOR SUMMARY JUDGMENT, CORRECT?

YES.

SO THE FACTS WERE NEVER DEVELOPED.

BUT THE FACTS AS ARGUED AND AS PRESENTED TO THE COURT, WERE THAT THERE WAS AN EARTH MOVEMENT, WHICH WAS DISTINGUISHED OR DIFFERENTIATED BY THE PETITIONERS.

I THOUGHT THERE ARGUMENT WAS THAT THIS DIDN'T FIT INTO EARTH MOVEMENT AT ALL.

THEY HAVE CLAIMED THAT IT IS A LOSS BY AN EXPLOSION, AND BECAUSE THEY TAKE ISSUE WITH THE CHARACTERIZATION OF EARTH MOVEMENT BEING ANYTHING HAVING TO DO WITH A MAN-MADE EVENT, IT LOGICALLY FOLLOWS THEY WOULD NOT CHARACTERIZE THIS ASSERT MOVEMENT.

CAN I ASK A FEW QUESTIONS ON THIS. ARE THERE ANY, THE EARTH, TO ME, IF SOMEBODY WANTED TO EXCLUDE EARTH MOVEMENT, YOU WOULD SAY EARTH MOVEMENT FROM ANY CAUSE, AND THAT WOULD SORT OF END THE DISCUSSION. WOULD YOU AGREE THAT THAT WOULD BE A PRETTY STRAIGHTFORWARD WAY TO DO THIS?

CERTAINLY BUT THAT COULD ALSO LEAD TO SOME OTHER ARGUMENTS, BUT I RECOGNIZE YOUR STATEMENT.

NOW, WOULD YOU ALSO AGREE THAT THIS STANDARD POLICY THAT, AROUND THE COUNTRY, THAT THE MAJORITY RULE HAS INTERPRETED THIS EXCLUSION, WHICH IS TO BE NARROWLY CONSTRUED AGAINST THE INSUROR, WHO HAS DRAFTED THE POLICY, HAS ACTUALLY GONE WITH WHAT THE APPELLANT IS SAYING TODAY, WHICH IS THAT IT ONLY IS LIMITED TO NATURAL DISASTERS. WOULD YOU AGREE THAT IS THE MAJORITY RULE?

I WOULD AGREE THAT THE MAJORITY OF DECISIONS HAVE RULED THAT WAY, YOUR HONOR.

AND THE OTHER QUESTION I HAVE, DO YOU ALSO AGREE THAT, ACTUALLY THE THIRD DISTRICT,

EVEN THOUGH THEY HAVE ENDED UPSIDING WITH YOU, ACTUALLY SAID THAT THE EARTH MOVEMENT EXCLUSION COVERED ONLY ENUMERATED NATURAL DISASTERS OR PERILS, SO THEY WENT OFF ON THIS ISSUE OF, WELL, IT IS NOT IN THE EXCEPTION TO THE EXCLUSION, BUT THAT, BUT THEY SAID THE EXCLUSION ONLY COVERED NATURAL DISASTERS OR PERILS.

YES. I NOTE THAT THE COURT SAID THAT.

AND YOU WOULD AGREE THAT IS JUST AN ERROR IN REASONING.

UNFORTUNATELY IT IS.

HOW ABOUT HELPING ME WITH THIS PROPOSITION, THAT HERE WE HAVE AN ALL-RISK POLICY, AND YOU HAVE THE FACT THAT THIS STARTS FROM BLASTING, AND THEN YOU HAVE A, AND I WOULD ACCEPT YOUR PROPOSITION THAT, BECAUSE OF THIS SEMICOLON, THAT SAID THAT EARTH RISING, SHIFTING OR SINKING COULD BE BY MAN-MADE OR NATURAL RESULTS, BUT THEN I HAVE GOT TO, I HAVE GOT TO SAY THAT, EVEN IF I CONCLUDE THAT THE EARTH MOVED BECAUSE OF THE BLASTING, THERE FOR I AM GOING TO THIS EXCLUSION. I GET, THEN, TO THE UNLEFT DIRECT LOSS OF EXPLOSION, AND I HAVE GOT TO SAY THAT WHAT THAT WOULD MEAN TO WOULD BE EARTH RISING, SINKING OR SHIFTING, UNLESS THE EARTH RISING, SINKING OR SHIFTING, THE DIRECT LOSS FROM THAT IS OF THE EARTH MOVING, IS BY AN EXPLOSION!

AND THEN I WOULD RESPECTFULLY DISAGREE WITH THAT READING, JUSTICE WELLS. I UNDERSTAND YOUR COMMENT. BUT I BELIEVE THAT THAT LANGUAGE FOLLOWS THE ENTIRE EXCLUSIONARY SECTION. WHAT I WOULD LIKE TO --

BUT HELP ME AS TO WHY, WHAT I JUST, WHAT I JUST READ WOULD BE AN UNREASONABLE WAY TO READ THAT POLICY. THAT WHAT YOU ARE TALKING ABOUT, IS THAT YOU ARE SAYING THAT, IF THE EARTH MOVES, AND IT MOVES BY SOME FORCE LIKE A TREE COMING DOWN, OR SOMEBODY CHOPPING A TREE DOWN, AND LIKE WE HAVE HAD A LOT OF POST-HURRICANE SITUATIONS, CAUSED CRACKING.

YES, SIR.

THAT THAT IS NOT COVERED. HOWEVER, IF IT IS A DIRECT LOSS BECAUSE SOMEBODY EXPLODE ADD BOMB, IF THAT CAUSED THE EARTH TO MOVE, THEN YOU ARE COVERED.

YES, SIR.

WHY IS THAT AN UNREASONABLE {REEINGD} OF THAT PROVISION?

WELL, I THINK THE PROPER READING IS THAT THE EXCLUSION THAT IS AT ISSUE HERE, IS ONE THAT THE INSURANCE INDUSTRY HAS LONG RECOGNIZED POSES A VERY REASONABLE THREAT TO THEM, BECAUSE WE ARE DEALING WITH EXTERNAL FORCES AWAY FROM THE INSURED PREMISES, AND I THINK THE ALASKA SUPREME COURT ADDRESSED THIS, IN CHARACTERIZING WOULD IT CONSIDER TO BE A DISTINCTION BETWEEN NOT THE NATURAL AND MAN-MADE CAUSES OF EARTH MOVEMENT, BUT WHAT IT TERMED THE NATURAL AND EXTERNAL CAUSE OF EARTH MOVEMENT, AND I THINK IN THAT LIGHT, I THINK WE BEGIN TO SEE HOW THE PROPER ANALYSIS IS TO LOOK AT WHAT IT IS THIS EXCLUSION IS INTENDED TO RESTRICT OR TO PREVENT THE EXPOSURE OF THE INSURANCE COMPANY FROM COVERING, AND I THINK THAT, IN THIS CASE WHAT WE ARE TALKING ABOUT IS THOSE EXTERNAL EFFECTS AT ALASKA SUPREME COURT HAS CHARACTERIZED.

NOW, IN THAT CASE AN EXTERNAL EVENT, IS AN EARTHQUAKE A MASSIVE EVENT, OR WAS IT A MAN-MADE OCCURRENCE LIKE AN EXPLOSION?

IT DOESN'T EVEN LIMIT IT IN THAT CASE, AND I REFER TO THE RULIACK CASE.

WHAT WAS THE FACTS THAT THEY WERE DEALING WITH?

A LEAKING PIPE ON THE PROPERTY, SO THE ISSUE OF WHETHER THEY WERE TALKING ABOUT THAT DISTINCTION BETWEEN EXTERNAL AND --

WHAT CAUSE THE LEAKING, THE EARTHQUAKE?

NO. IT WAS NOT CAUSED BY. THAT IT WAS CAUSED BY A SERIES OF ISSUES THAT WERE A DETERIORATED PIPE. THE PIPE LEAKED, AND THAT CAUSED THE --

LET'S SAY THEY HAVE HURRICANE EXCLUSIONS OR WHATEVER, IS THAT DISTINGUISHED FROM THE VOLCANIC ERUPTION OR THOSE TYPES OF EFFECTS OR A MINE SUBSIDING IN A MAJOR AREA OF WEST VIRGINIA OR PENNSYLVANIA, CAUSING HUGE, UNEXPECTED DAMAGE. IS THAT WHAT IT IS INTENDED --

THAT IS THE WAY THE ALASKA SUPREME COURT CHARACTERIZED IT, WHICH I THINK IS THE PROPER POINT HERE, BECAUSE THEY SAID THAT SOMETHING --

ISN'T THAT THE CHALLENGE, AND, REALLY, THE RESPONSIBILITY OF THE UNDERWRITERS, OR THE INSURANCE INDUSTRY OR CARRIER, AND THAT IS AS OPPOSED TO WAITING FOR AN ALASKA SUPREME COURT DECISION TO EXPLAIN WHAT THE INSURANCE COMPANY MEANT BY THIS EXCLUSION, FOR THE INSURANCE UNDERWRITERS, THEMSELVES, TO ARTICULATE VERY CLEARLY, WHAT THEY MEANT TO EXCLUDE, ISN'T THAT WHAT GIVES RISE TO ALL OF THIS LITIGATION AND EVERYTHING? BLASTING IS, I DON'T KNOW HOW MANY LETTERS IN THE WORD, BLASTING HAS BEEN GOING ON FOR A LONG TIME.

YES, SIR.

AND THERE ARE INSURANCE POLICIES THAT HAVE BLASTING EXCLUSIONS.

YES, SIR.

OKAY.

AS WELL AS BLASTING INSURANCE.

INSURANCE COMPANIES KNOW HOW TO SAY WE DO NOT COVER DAMAGE FROM ADJACENT OR DISTANT BLASTING OR WHATEVER. AND AREN'T WE HERE IN THIS PICKLE, BECAUSE, AS OPPOSED TO THE ALASKA COURT EXPLAINING WHAT THE PURPOSE OF THESE THINGS ARE, THAT THE INSURANCE COMPANY DIDN'T DO IT CLEARLY. ISN'T THAT, REALLY, YOU KNOW, WHY WE ARE HERE IN COURT TODAY --

IN CERTAIN RESPECTS, JUSTICE ANSTEAD, BUT I WOULD TELL YOU THAT IT IS AN EVER-PRESENT ISSUE. IN THE BRIEFS AND AS THE ARGUMENTS HAVE GONE BEFORE THIS COURT, THE STATE FARM UNIQUE LANGUAGE WHICH HAS BEEN RECOGNIZED SO WIDELY ACROSS THE COUNTRY, WAS AS NEAR AS GEORGIA, FOUND TO BE AMBIGUOUS, AND FOUND TO CLEARLY DELINEATE THE LIMITATIONS OF THAT EXCLUSION, SO THERE IS ALWAYS AN ARGUMENT TO BE MADE ON THAT POINT. THERE IS ALWAYS A --

ISN'T THE MESSAGE OUT THERE TO THE INSURANCE UNDERWRITERS, REALLY, THAT YOU BETTER READ THE CASES.

CERTAINLY.

WHEN IN DOUBT, USE A VERY SPECIFIC WORD, BECAUSE THE PREVAILING LAW OUT OF THE COURTS GENERALLY, IS IF YOU ARE GOING TO EXCLUDE SOMETHING, YOU BETTER SAY IT VERY EXPRESSLY AND CLEARLY. ISN'T THAT, I MEAN, THAT --

THAT IS ALWAYS THE MESSAGE, I AGREE, BUT I BELIEVE HERE THEY HAVE DONE SO. I BELIEVE THEY HAVE ADEQUATELY EXCLUDED WHAT THEY INTENDED TO EXCLUDE, AND I BELIEVE THE CASES DO RECOGNIZE. THAT

CHIEF JUSTICE: AND WITH OUR QUESTIONS, YOU HAVE USED UP YOUR TIME.

THANK VERY MUCH FOR YOUR TIME.

CHIEF JUSTICE: THANK YOU VERY MUCH. MS.^ROSS.

TWO CASES, VERY BRIEFLY, WEST VERSUS UMILIAK, THE ALASKA SUPREME COURT EXPRESSLY HELD THAT THE EARTH MOVEMENT EXCLUSION, DID NOT PRECLUDE COVERAGE. IT HELD EXACTLY THE OPPOSITE. IT SAID EXTERNAL VERSUS NATURAL, AND IT CAME DOWN ON THE LINE OF NATURAL AND HELD THAT THE DAMAGE FROM A BROKEN WATER PIPE WAS CLEARLY NOT INCLUDED IN THE EARTH MOVEMENT EXCLUSION, SQUARELY, AND THE OTHER POINT, I WANTED TO POINT JUSTICE CANTERO TO THE ALABAMA CASE, AUTO OWNERS INSURANCE COMPANY, 437 SO.2D 495, BECAUSE THAT INCLUDES BLASTS FROM VIBRATION DAMAGE AND IT USED THE LANGUAGE INCLUDING BUT NOT LIMITED TO AND STILL HELD THAT IT WAS NOT RESTRICTIVE AND WAS NOT EXCLUDED BY THE EARTH MOVEMENT EXCLUSION. THANK YOU.

CHIEF JUSTICE: THANK YOU BOTH, VERY MUCH, OR ALL THREE OF YOU, FOR A VERY INFORMATIVE ORAL ARGUMENT ON A VERY INTERESTING SUBJECT. THE COURT WILL TAKE ITS MORNING RECESS OF 15 MINUTES.

MARSHAL: PLEASE RISE.