



# ADJUSTING TODAY

Adjusters International Disaster Recovery Consulting

## EDITOR'S NOTE

*As this issue of Adjusting Today was being prepared, the earthquake and resulting tsunami of March 2011 struck Japan. That concurrence put an exclamation point on what already was the theme of this edition: earthquake coverage is an important, but too often lacking component of an adequate business or personal insurance program.*

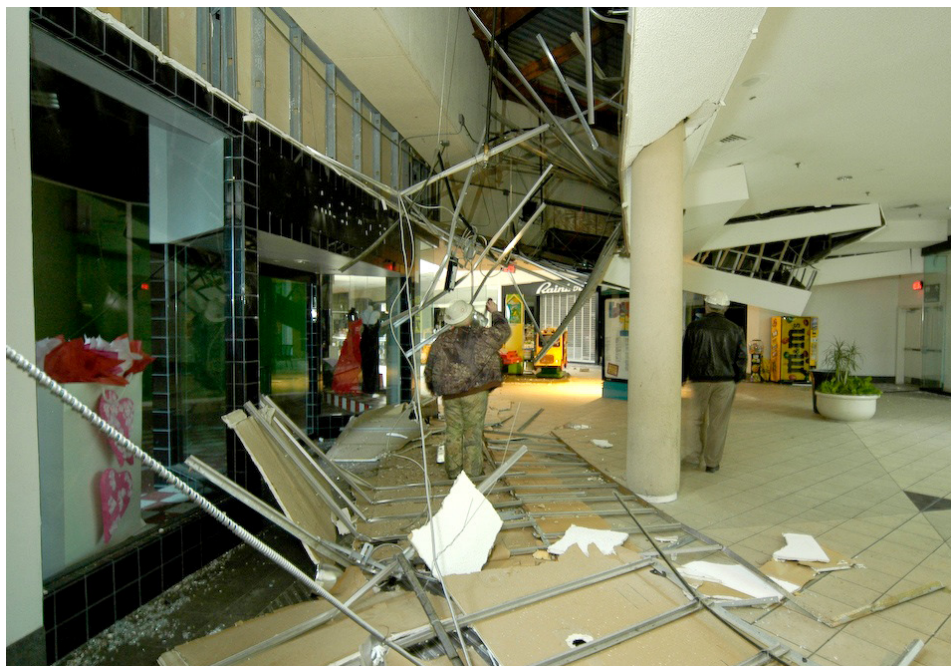
*Although excluded in standard commercial and homeowners policies, earthquake protection is available by endorsement. Insurance expert Robert PrahI details this availability in our lead article. Then, on a closely related subject, he takes an insightful look at how the courts have interpreted policy language in several earth-movement claims.*

*Rounding out this issue is a sidebar offering some interesting facts about earthquakes in the United States.*

*As evidenced by the Japan disaster, however, regardless of where they strike, earthquakes can have international ramifications. They can affect the operations — and therefore the insurance needs — of firms thousands of miles away. One such need, for contingent business interruption coverage, was demonstrated to many American companies by the Japan experience. Adjusters International quickly provided important information on this coverage in two electronic editions of Adjusting Today that continue to be available on our website, [www.AdjustingToday.com](http://www.AdjustingToday.com).*

*We invite you to read them as timely companions to this regular edition.*

Sheila E. Salvatore  
Editor



## Earthquake Insurance: What's **YOUR** Exposure?

By Robert J. PrahI, CPCU

Did you know that while the United States experiences only two percent of the world's earthquakes, some 90 percent of its population lives in seismically active areas? According to the U.S. Geological Survey, there is a 70 percent probability that an earthquake of magnitude 6.7 or larger will strike the San Francisco Bay area over the next 30 years. (For statistical information about earthquake exposures in other regions of the country, see sidebar, titled "More About Earthquakes.")

Earthquake insurance provides protection from the shaking and cracking that can destroy buildings and personal possessions. However, coverage for related damages that may result from earthquakes, such as fire and water damage, is provided by standard property insurance.



Unlike flood insurance, earthquake coverage is available from most private insurance companies rather than from the government — except in California, where homeowners can also obtain coverage from the California Earthquake Authority (CEA). Commercial structures are not eligible for coverage from the CEA.

### Coverage for the Earthquake Exposure: Commercial Property Coverage

Earthquake insurance is expensive and in locations with high or severe exposure to loss by this peril, availability may be somewhat limited. This is true particularly in California and in states near the New Madrid Fault, which include parts of Arkansas, Illinois, Indiana, Kentucky, Mississippi, Missouri, and Tennessee. In other areas of the country earthquake insurance is generally available but may not be considered necessary, which for some can be unfortunate. As pointed out in the accompanying sidebar, “More About Earthquakes,” in the past 100 years earthquakes have occurred in 39 states.

Earthquake damage is excluded in the standard homeowners and commercial property insurance policies of Insurance Services Office (ISO) and the American Association of Insurance Services (AAIS). The following excerpt from the earth movement exclusion (with the concurrent causation language



lead-in) is found in the ISO Basic, Broad, and Special Causes of Loss forms CP 10 10 06 07, CP 10 20 06 07, and CP 10 30 06 07 of the commercial property policy.<sup>1</sup>

#### B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
  - b. Earth Movement
    - (1) Earthquake, including any earth sinking, rising or shifting related to such event;
    - (2) Landslide, including any earth sinking, rising or shifting related to such event;
    - (3) Mine subsidence, meaning subsidence of a man-made mine, whether or not mining activity has ceased;
    - (4) Earth sinking (other than sinkhole collapse<sup>2</sup>), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

But if Earth Movement, as described in b. (1) through (4) above, results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.

- (5) Volcanic eruption, explosion or effusion. But if volcanic eruption, explosion or effusion results in fire, building glass breakage or Volcanic Action, we will pay for the loss or damage caused by that fire, building glass breakage or Volcanic Action.

The AAIS exclusion reads as follows:

- b. Earth Movement or Volcanic Eruption — We do not cover loss caused by any earth movement (other than sinkhole collapse) or caused by eruption, explosion, or effusion of a volcano.



Earth movement includes, but is not limited to, earthquake; landslide; mudflow; mudslide; mine subsidence; or sinking, rising, or shifting of earth.

We cover direct physical loss by fire, explosion, or volcanic action resulting from either earth movement or eruption, explosion, or effusion of a volcano.

All volcanic eruptions that occur within a 168-hour period shall be considered a single loss.<sup>3</sup>

### Adding Earthquake Coverage

Premiums for earthquake coverage differ widely by location, insurer, distance from fault lines, and the type of structure that is covered. Generally, older buildings cost more to insure than new ones. Wood frame structures generally benefit from lower rates than brick buildings because they tend to withstand quake stresses better.

ISO offers two endorsements to add earthquake and volcanic eruption coverage under commercial property insurance. Independently filed earthquake endorsements are also available from some insurers. The two ISO endorsements are:

- (1) Earthquake and Volcanic Eruption Endorsement — CP 1040
- (2) Earthquake and Volcanic Eruption Endorsement (Sub-Limit Form) — CP 1045

The first endorsement provides coverage for the full policy limit and contains a coinsurance clause. The second provides coverage subject to a sublimit that is lower than the base policy limit and it does not contain a coinsurance clause.

AAIS offers an endorsement similar to the ISO endorsements that provides earthquake and volcanic eruption coverage. Both the AAIS and ISO forms state that all earthquakes or volcanic eruptions that occur within a 168-hour period will be considered a single occurrence and that the 168-hour period is not limited by the policy expiration.

In addition, both forms include a potential limitation that in the AAIS form reads as follows:

Masonry Veneer — “We” do not cover loss to exterior masonry veneer (other than stucco) on wood frame walls caused by earthquake or volcanic eruption. The value of masonry veneer is not included in the value of covered property or the amount of loss when applying:

1. The deductible that is applicable to this Perils Part; or
2. The coinsurance applicable to the Commercial Property Coverage.

However, “we” cover masonry veneer when described as included on the “declarations” or when it is less than 10 percent of the exterior wall area.<sup>4</sup>

Although coverage for collapse is limited to specific perils in standard property insurance policies, the ISO Earthquake Endorsement includes coverage for collapse caused by earthquake or volcanic eruption. However, there is no coverage for damage caused directly or indirectly by tidal wave or tsunami, even if attributable to an earthquake or volcanic eruption. Businesses would need flood insurance to pay for the flood damage caused by a tsunami or tidal wave. In addition, coverage does not apply to loss caused by requirements for building code upgrades, unless ordinance or law coverage is added by endorsement.

### Business Interruption Coverage

The business interruption exposure from a loss caused by earthquake is significant. Commercial firms must carry business interruption coverage as part of their commercial property insurance if they want that coverage to apply in the event of an earthquake. Business interruption coverage is only triggered if there is a covered property loss, so insureds with exposure to earthquake loss need to carry both business interruption and earthquake coverage.



## Deductible Issues

The earthquake deductible generally is in the form of a percentage rather than a dollar amount. Deductibles can range anywhere from 2 percent to 20 percent of the value of the property (e.g., replacement value or actual cash value, whichever is applicable) of the structure. Insurers in Washington, Nevada and Utah, with higher than average risk of earthquakes, often set minimum deductibles at around 10 percent. In most cases consumers can get higher deductibles to save money on earthquake premiums.

The deductible provisions of ISO's earthquake endorsement apply to each earthquake or volcanic eruption. It is important to note that separate deductibles are calculated for and apply to each building, to personal property at each building, and to personal property in the open.

Deductibles are calculated separately and applied even if two or more buildings sustain damage, personal property at two or more buildings sustains damage, or a building and the personal property in it sustain damage.

If, in addition to earthquake damage, there is also damage from another cause (such as fire) that is covered through an exception to the earth movement exclusion in the base policy, then the earthquake

deductible is the only deductible taken. It will be significantly higher than the base policy deductible.

The ISO earthquake endorsement contains an example of the application of the deductible as follows:<sup>5</sup> (Assume values shown are from the most recent Statement of Values on file with the insurer.)

Building #1	\$500,000	Value of Property
Building #2	\$500,000	
Bus. Per. Prop. at Bldg. #1	\$250,000	
Bus. Per. Prop. at Bldg. #2	\$250,000	

Assume that the following amounts of loss do not exceed the applicable limits of insurance (for specific insurance). Also assume that the total amount of loss does not exceed the applicable blanket limit of insurance (for blanket insurance).

Building #1 and business personal property at #1 have been damaged: the amounts of loss are \$95,000 (Bldg.) and \$5,000 (Per. Prop.). The deductible is 10 percent.

The *percentage* deductible provision is significant. Though the deductible is 10 percent, it is not 10 percent of the loss, but rather 10 percent of the value of the property (RC or ACV).

Loss is adjusted as follows:

### Bldg.

Step (1):

\$500,000 (amt. of ins.) x 10% = \$50,000 deductible amt.

Step (2):

\$95,000 (loss) minus \$50,000 = \$45,000

### Bus. Per. Prop.

Step (1):

\$250,000 (amt. of ins.) x 10% = \$25,000 deductible amt.

The loss of \$5,000 does not exceed the deductible.

The most that will be paid is \$45,000. The remainder of the building loss, \$50,000, is not covered due to





application of the deductible. There is no loss payment for the business personal property because the damage is under the deductible.

### Conclusion

In an effort to spread risk, insurers and government agencies are using reinsurance, state and private pools, Fair Access to Insurance Requirements (FAIR) plans, and trading options on a catastrophe index that the Chicago Board of Trade maintains. However, more is needed, according to ISO. Consequently, many insurers advocate a proposal put forth by the Natural Disaster Coalition. This proposal provides for:

- Mandatory coverage of hurricanes, earthquakes, volcanoes, and tsunamis, at actuarially sound rates
- A federal reinsurance program
- Incentives for state governments to develop loss mitigation programs

The exposure to loss by earthquake may be more significant than people realize. Organizations need to check periodically with their insurance advisors to ensure that their insurance coverage realistically meets their exposures.

Earthquake insurance is also available with a Difference in Conditions (DIC) policy, the topic planned for a future issue of *Adjusting Today*.

<sup>1</sup>Copyright, Insurance Services Office, Inc. 2007, with permission.

<sup>2</sup>Sinkhole collapse (collapse of land into underground spaces created by the action of water on limestone or similar rock formations), which is common in Florida and Pennsylvania, is covered by the commercial property policies of AAIS and ISO. The peril is covered in AAIS homeowner forms, but is not covered in ISO homeowner forms, but may be added by endorsement. In some states the coverage is required by law.

<sup>3</sup>Copyright, American Association of Insurance Services, Inc., 2000, with permission.

<sup>4</sup>Copyright, American Association of Insurance Services, Inc., 2007, with permission.

<sup>5</sup>Copyright, Insurance Services Office, Inc., 1998, with permission.

## Courts Have Made a Distinction

# Earth Movement: Man-Made vs. Natural Causes

Since this issue of *Adjusting Today* focuses on earthquake insurance, it seems fitting to include a related subject that can likely be encountered in earth movement claims. That subject has to do with causation, and particularly whether an earth movement claim involves loss or damage caused by natural events, which are often widespread and catastrophic, or loss or damage caused by man-made activity, which usually is more confined.

Although property insurance policies contain earth movement

exclusions, the courts have sometimes held for coverage when the cause of the earth movement can be attributed to man-made activities, while excluding loss from natural events, i.e., earthquake, related earth sinking or shifting, or mudslide. For example, building damages caused by nearby blasting activities or excavation on an adjacent lot that resulted in settling, sinking, and cracks and separations in the foundations were considered to be man-made activities and held to be covered, despite the earth movement exclusion.

Whether coverage applies typically depends on how the exclusion is worded, and particularly on the existence and/or strength of the *anti-concurrent causation* lead-in language to the exclusions. For many years, the Insurance Services Office (ISO) and the American Association of Insurance Services (AAIS) have included anti-concurrent causation language in their commercial property, businessowners, and homeowners policies. Essentially, the doctrine of concurrent causation holds that when a loss can be attributed to



two causes, one that is covered and one that is excluded, the loss will be covered. It applies primarily to “all risks” or “open perils” policies. Insurers then countered the concurrent causation doctrine, which in many instances resulted in their paying claims that were never contemplated in their premium structure to be covered, by adding an anti-concurrent causation provision to the exclusions section. That provision clarified that there was no coverage for loss caused by an excluded peril (flood, earthquake, etc.), regardless of any other cause that contributed concurrently or in any sequence to the loss.

While current standard property forms of ISO and AAIS contain this provision, non-standard or independently filed policies may not, or may contain their own versions of this provision. Reviewing court decisions that involve the issue of man-made vs. natural earth movement losses can be instructive by providing insights on how courts analyze the issue and the insurance language that is applicable to the loss.

#### Court Decisions

The first case is *Fayad v. Clarendon National Ins. Co.*, 899 So.2d 1082, 2005 WL 729172, (Fla. 2005).<sup>1</sup> The plaintiffs had an all risks property policy that contained an earth movement exclusion. The claim involved

nearby blasting activity that caused structural damage to their home. Clarendon denied the claim on the basis that blasting was earth movement and, therefore, excluded. The pertinent provision in the Clarendon policy read as follows:

We do 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.

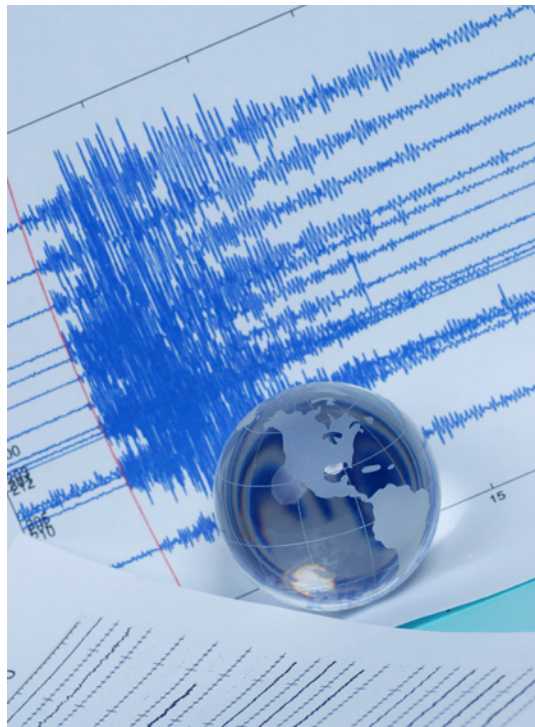
The earth movement exclusion read:

Earth Movement, meaning earthquake, including land shock waves or tremors before, during or after a volcanic eruption; landslide; mine subsidence; mudflow; earth sinking, rising or shifting; unless

direct loss by: fire or explosion ensues and then we will pay only for the ensuing loss.

The trial court decided in favor of Clarendon based on the ruling in another case, *State Farm Fire & Casualty Co. v. Castillo*, 829 So.2d 242 (Fla. 3d DCA 2002). In that case, the court held that the lead-in language of the exclusions clearly ruled out coverage. State Farm’s lead-in provision read:

We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following events. We do not insure for such loss regardless of: (a) the cause of the excluded events or (b) other causes of the loss or (c) whether other causes acted concurrently or in any sequence with the excluded



**“Whether coverage applies typically depends on how the exclusion is worded, and particularly on the existence and/or strength of the anti-concurrent causation lead-in language to the exclusions.”**



event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these.

Note that the (d) part of this provision refers to both natural as well as external forces.

The court in the Castillo case concluded that based on this language, the policy clearly and unambiguously excluded the earth movement loss, regardless of the cause. The trial court in *Fayad* followed this reasoning, despite the fact that the lead-in language to the exclusions in each policy read differently.

The plaintiff appealed to the District Court on the basis that the exclusionary language in the Clarendon policy was materially different from the exclusion in the State Farm policy. While agreeing that the Clarendon exclusion was much narrower, the District Court nevertheless upheld the ruling of the trial court. The plaintiff then appealed to the Florida Supreme Court.

Without including all the details of the Supreme Court's analysis, the main points of the Court's ruling were as follows: (1) There is a distinction between losses caused by man-made events and natural causes; (2) Where an earth movement exclusion does not contain language excluding earth movement regardless of its cause,

the majority of courts conclude that the exclusion only applies to earth movement caused by natural causes; (3) The principle of *ejusdem generis*, meaning that where a policy lists several events (such as mudslide, earthquake, volcano) and then lists a broader event (earth sinking, rising or shifting), the court will interpret the broader events as applying to the same kind or class as those that are specifically mentioned.

The Florida Supreme Court concluded that there was no specific language in the Clarendon policy that excluded earth movement regardless of cause (despite the lead-in language of the Clarendon policy), and that the policy listed several natural events in its definition of "earth movement." As a result, the Court overturned the District Court and ruled that the policy covered damage caused by blasting. The Court further stated that if Clarendon intended to exclude damage from earth movement caused by man-made events, it should have done so clearly and unambiguously.

It is also noteworthy that the Court commented that even though Clarendon would be paying for the plaintiff's damage, it could seek recovery against the blasting company through subrogation.

In *Pioneer Tower Owners Assn. v. State Farm Fire & Casualty Co.* 2009 NY Slip Op 03409 (Court of Appeals)<sup>2</sup>, the plaintiff made claim for damage to its condominium building that was caused by

excavation on an adjacent lot. State Farm denied the claim citing the earth movement exclusion. When cracks appeared in the building, an engineer was called in and concluded that the cracks and separations in the building were caused by the excavation work on the adjacent lot. The engineer attributed damage to the building to flawed underpinning that was built by the excavating company to protect the plaintiff's foundation, and that as a result, earth slid away from beneath the building causing the damage.

State Farm's anti-concurrent cause provision was the same as that shown in the *Castillo* case, *except for part (d)*. (Emphasis added.) The earth movement exclusion in the State Farm policy read as follows:

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 also relied on the settling or cracking exclusion which read:

We do not insure for loss either consisting of, or directly and immediately caused by, one or more of the following:  
f. settling, cracking, shrinking, bulging or expansion.

In deciding this case, the Court noted that the law governing



interpretation of insurance policy exclusionary clauses is highly favorable to insureds, and cited *Seaboard Sur. Co. v. Gillette Co.* 64 NY2d 304 1984 which said essentially that:

Whenever an insurer wishes to exclude certain coverage from its policy, it must do so in clear and unmistakable language and any exclusions must be accorded a strict and narrow construction and must not be subject to another reasonable interpretation.

State Farm argued that the earth movement exclusion applied because the loss was caused by the movement of earth, and specifically by its sinking and shifting beneath the plaintiff's building. It also contended that the settling or cracking exclusion applied because the loss consisted of cracking that was directly and immediately caused by the settling of the building (which was in turn caused by the excavation).

The plaintiff, on the other hand, contended that a literal reading of the words does not give the meaning that an ordinary person would assign to these exclusionary clauses. As to the earth movement exclusion, plaintiff pointed to the examples of earth movement given in the policy of earthquake, landslide, erosion and subsidence. The plaintiff's position was that an excavation — the intentional removal of earth by humans — is a different kind of event from an earthquake and the other examples

given, and suggested that when specific examples are mentioned, those not mentioned should be understood to be things of the same kind (*ejusdem generis*).

The plaintiff contended that if the drafter of the policy language in question intended to bring excavation within the exclusion, it should have been listed as an example of the perils not covered. Similarly, the plaintiff argued that the settling or cracking exclusion would not be thought by an ordinary person to apply to settling or cracking that is the immediate and obvious result of some other event, such as the intentional removal of earth in the vicinity of the building.

After considering both arguments, the Appeals Court concluded that both the plaintiff's and defendant's positions were reasonable. However, the Court added that the precedents require the policy interpretation to narrow the exclusions, and result in coverage. It also cited two Appellate Division cases and one Federal District Court decision that have held that the earth movement exclusions, using identical language, are not applicable to losses caused by excavation. (*Lee v. State Farm Fire & Cas. Co.*, 32 AD3d 902 [2d Dept. 2006]; *Burack v. Tower Ins. Co. of N.Y.*, 12 AD3d 167 [1st Dept. 2004]; *Wyatt v. Northwestern Mut. Ins. Co. of Seattle*, 304 F. Supp. 781 [D Minn. 1969].)

Accordingly, coverage was afforded the plaintiff in this case.

In the case of *Castillo v. State Farm Fire & Casualty Company*, 32 FLW D2474a (Fla. 3<sup>rd</sup> DCA October 17, 2007)<sup>3</sup>, nearby blasting created shockwaves and vibrations that damaged the plaintiff's dwelling without actual displacement or permanent displacement of the earth. (This case has no relation to *State Farm Fire & Casualty Co. v. Castillo* discussed previously which held that coverage did not apply.)

The case involves the identical, strong State Farm anti-concurrent cause language that was quoted in the *State Farm v. Castillo* case beginning on page 6 and the earth movement exclusion that was contained in the *Pioneer Tower Owners Assn. v. State Farm* decision discussed previously. In *Castillo v. State Farm*, the allegations in the complaint were that vibrations and shockwaves caused by blasting without displacement of the earth resulted in the damage to the plaintiff's dwelling. The Court then noted that the policy does not specifically address whether or not damages caused by blasting, shockwaves, or vibrations fall under "earth movement" and would, therefore, be excluded from coverage. The Court went on to say that when the terms of the contract are ambiguous and susceptible to different interpretations, parol evidence<sup>4</sup> is admissible to explain, clarify or elucidate the ambiguous term.

The Court then sought further information to determine whether the exclusion applied in this case by





looking at State Farm's internal operating guidelines. In reviewing those guidelines, the Court found a reference to the effect that damage from blasting, crane or demolition equipment, etc., cannot occur unless the earth moves. Therefore, the Court reasoned that coverage will be provided for blasting that causes shockwaves/vibrations transmitted through the earth to the plaintiff's dwelling which causes damage without displacement of the earth. In conclusion, the Court determined that the plaintiff could proceed to a jury because the question of whether or not the shockwaves and vibrations alleged by the Castillos damaged their dwelling without displacement of the earth was an issue of material fact. The Court also noted that once the plaintiff establishes a loss apparently within the terms of an all risks policy, the burden shifts to the insurance company to prove that the loss arose from a cause which is excluded.

In *Totty v. Chubb Corp.*, 455 F. Supp. 2d 376 (W.D. Pa. 2006)<sup>5</sup>, the Court, applying Pennsylvania law, held that the earth movement exclusion in the homeowner's insurance policy did not clearly exclude damage caused by man-made forces and, therefore, denied the insurer's motion for summary judgment.

The plaintiff alleged that her property was damaged because of the densification of sand



layers in the underlying soil that resulted from the use of a vibratory compactor to repave the adjacent street in July 2002. Damage included cracked walls, damaged door frames, plumbing leaks, and the sinking of one side of her home. Although the case is identified as *Totty v. Chubb Corp.*, the claim was initially denied by Great Northern Insurance Co., a member of the Chubb Group, whose policy insured Totty. Totty subsequently filed suit against both Chubb Corp., the parent company, and Great Northern. Hence, the references to Great Northern throughout the discussion. Great Northern contested the plaintiff's theory of causation, but argued that even under that theory, the loss was not covered because it fell within the policy's earth movement and structural movement exclusions. The earth movement exclusion in Great Northern's policy was similar to the exclusionary language previously cited in the aforementioned cases.

The Court reasoned that on one hand, the exclusion bars coverage for natural events, i.e., earthquakes and volcanic eruptions. On the other hand, it bars coverage for events which can be natural, man-made or both, i.e., landslide, mudflow, earth sinking, rising or shifting. Although it is arguable that the exclusion is applicable to earth movement due to natural and man-made events, a reasonable person could conclude that the exclusion is applicable to earth movement due to natural events only. Since the earth movement exclusion is reasonably susceptible to different constructions, it is impossible to determine the intent of the parties as manifested by the written language of the contract of insurance.

Relying on this ambiguity and the principle of *ejusdem generis*, the Court held that the plaintiff's policy excluded coverage only for natural earth movements. The Court further held that Great Northern could have



easily excluded earth movement caused by man-made events.

The cases reviewed previously, except for *State Farm Fire & Casualty Co. v. Castillo*, held for coverage. However, in *Cali v. Merrimack Mut. Fire Ins. Co.*, 2007 NY Slip Op 06415 (Appellate Division, Second Dept.)<sup>6</sup>, the Court ruled that the earth movement exclusion applied to rule out coverage. A portion of the plaintiff's home collapsed when the concrete slab foundation settled, sank, and cracked. Merrimack denied the claim based on the policy language that excluded losses due to earth movement, earth sinking, rising or shifting and settling, shrinking, bulging, or expansion, including resultant cracking of pavements, patios, foundations, etc.

The plaintiff's engineer concluded that the slab foundation partially collapsed as a result of decayed wood in the earth beneath the foundation, which caused a void in the soil and the eventual collapse.

The Court held that Merrimack met its initial burden of establishing that the exclusion clearly and unambiguously applied to the loss. The Court also made reference to language which stated that losses due to earth movement are excluded *regardless of any other cause or event contributing concurrently or in any sequence to the loss*. Here, the loss was attributable to the resultant earth movement and sinking, even though the movement was precipitated, at least in part, by decayed wood in the earth beneath

the foundation slab. In this case, there was no evident man-made external force involved such as that of excavating or blasting that occurred in the previous cases discussed. The Court concluded that the policy language specifically excluded coverage for damages resulting from earth movement, even though the cause of the earth movement may be a covered peril or not specifically excluded.

### Conclusion

It is apparent from these court decisions that causation as well as policy language, particularly anti-concurrent cause and exclusion provisions, will influence how courts interpret insurance policy provisions and rule in a dispute. Admittedly, some of the decisions discussed could be described as close calls, in that the decision could have gone either way.

On the one hand, it seems unlikely that an insured would prevail in an earth movement claim when the insurance policy involved contains both a strong anti-concurrent cause provision and a detailed earth movement exclusion. Yet it is evident from these cases that the possibility exists when an external force such as man-made activity causes or contributes to the loss, and pertinent policy provisions are vague, subject to ambiguity, or lack detail. It is also true that some insurers, usually non-standard or specialty companies that write larger commercial risks, will provide earth movement coverage, including that caused by man-

made activity. In such cases, the insurer deletes the anti-concurrent cause provision.

In closing, it is noteworthy that in the 2000 edition of the ISO homeowners special or "open perils" policy and the latest editions of the AAIS homeowners special policy, earth movement is excluded whether it results from or is caused by *human or animal forces or an act of nature*.

Seemingly, that language would settle the matter once and for all, but it was not present in the court cases discussed previously<sup>7</sup> nor is it present in standard commercial property or business owners forms, at least not yet.

<sup>1</sup> Clausen Miller, Attorneys at Law, "An Earth Movement Exclusion is Limited to Damage Caused by Natural Causes (Absent Specific Policy Language to the Contrary)," April 2005.

<sup>2</sup> Lawrence N. Rogak, *Rogak Report*, April 30, 2009, "Earth Movement Exclusion Does Not Apply to Man-Made Movement of Soil; Loss is Covered," The Council of Insurance Brokers of Greater New York.

<sup>3</sup> Third District Court of Appeal, State of Florida, July Term A.D. 2007, *Castillo v. State Farm Florida Insurance Co. and State Farm Fire & Casualty Co.*, October 17, 2007.

<sup>4</sup> The parol evidence rule states that a written contract cannot be modified by an oral agreement. However, there are exceptions to the parol evidence rule, one of which is that oral testimony is admissible to explain the meaning of ambiguous words or phrases in a contract (or insurance policy). Thus, the Court looked for other evidence beyond the policy as to State Farm's intent in its internal operating guidelines.

<sup>5</sup> Michael L. Blauvelt, "Did the Earth Move?" *riskVue*, Copyright 1999-2008 by Warren, McVeigh & Griffin, Inc.

<sup>6</sup> Hiscock & Barclay, Attorneys at Law, New York, *Legal Alert*, October 2007, "Earth Movement Exclusion Upheld on Appeal."

<sup>7</sup> Although two of the State Farm cases discussed here contained an anti-concurrent cause provision that referred to damage that arises from natural or external forces, which is excluded.



## More About Earthquakes . . .

### U.S. Experience

In the early 1800s, a series of earthquakes occurring over a three-month period made the Mississippi River flow backwards — temporarily — and rang church bells 1,000 miles away in Boston!<sup>1</sup>

The New Madrid Fault, which is approximately 150 miles south of St. Louis, has experienced a series of tremors that registered larger than a magnitude 8 on the Richter Scale. According to the Missouri State Emergency Management Agency (SEMA), the New Madrid Fault poses the highest earthquake risk in the United States, outside of the West Coast. The U.S. Geological Survey estimates there is a 25 percent to 40 percent chance that the fault could generate an earthquake of a magnitude 6 or greater within any 50-year period. SEMA projects that a quake of that size could inflict severe damage on older and poorly built structures, cause masonry buildings to shift or even collapse, cause widespread power outages — and even damage buildings, bridges and other structures specifically designed to withstand earthquakes.

About 5,000 earthquakes are felt in the United States each year. Since 1900 earthquakes have occurred in 39 states and caused damage in all 50.<sup>2</sup> Like floods, earthquakes can cause catastrophic damage and may also set off landslides,

avalanches, flash floods and tsunamis.

One of the worst catastrophes in U.S. history was the San Francisco earthquake of 1906. It was caused by the movement of the San Andreas fault, which extends 600 miles along the California coast. According to the National Geophysical Center, the quake caused direct quake losses of about \$24 million and fire losses of about \$500 million. Those figures would translate into total damages of \$96 billion today.<sup>3</sup>

More recently, the Northridge earthquake, which struck Southern California in January 1994, was the most costly quake in U.S. history, causing an estimated \$20 billion in total property damage. Not only has California experienced the most damaging earthquakes, it continues to have the greatest exposure to damage from quakes. Alaska, however, has had the most major earthquakes of any state — and the most violent quakes have occurred in the central United States.

While the risk is not nearly as high as in the West, the East Coast and Northeast are seismically active and also vulnerable to earthquakes. A quake estimated to have been 7.5 in magnitude struck Charleston, South Carolina in 1886, killing more than 60 people. A 6.0 quake hit Boston in 1755 and a 5.8 earthquake



struck northern New York State in 1944. Experts believe that a quake of between 6.5 and 7.5 remains possible in the Northeast.<sup>4</sup>

### Insurance Considerations

Earthquakes can have a devastating impact on property owners because losses from them are not covered under standard homeowners or commercial insurance policies. Coverage is usually available for earthquake damage in the form of an endorsement to a home or commercial policy (see adjoining main article “Earthquake Insurance — What’s Your Exposure?” in this issue of *Adjusting Today*). Interestingly, automobiles are covered for earthquake damage under the “Comprehensive (Other than Collision)” part of the auto policy. Ostensibly this is because the exposure is small compared to the catastrophic exposure to damage that could occur to buildings and contents, and might be sustained in a business interruption loss.



The potential cost of earthquakes continues to grow due to urban development in seismically active areas, as well as the increasing vulnerability of older buildings in these areas — many of which were not built or have not been upgraded to current building codes. Yet insurance coverage in place to protect against these costs is often lacking. After a major quake strikes there is typically an increase in coverage purchased, but as memory of the disaster fades, the coverage is often not renewed.

According to the Insurance Information Institute, in 2004 only about 57 percent of Missouri homeowners who live in areas near the New Madrid Fault and about 40 percent statewide bought earthquake coverage. Of the \$20 billion in property damage done by the Northridge quake in 1994, only \$12.5 billion was covered by insurance. Across California, 30 percent of homeowners purchased earthquake insurance in 1996; one decade later, that number had fallen to 12 percent, even though the risk remained the same.<sup>5</sup>

### Measuring Earthquakes

The Richter scale, developed by Charles Richter in the 1930s, was long viewed as the standard for measuring the intensity of earthquakes, particularly in comparing one quake to another. In recent years, however, the Richter scale has been superseded by the Moment Magnitude scale. Both scales measure the magnitude of a quake by the seismic energy released and the readings generated by the two can be very similar, but the Moment Magnitude scale uses newer technologies to produce a more accurate measurement of a specific earthquake event. Today, news reports about earthquakes often omit references to either scale and indicate the magnitude number only. The truth remains: the higher the number, the more severe the quake.

<sup>1</sup>Christopher Tritto, "Are We Prepared for Our Own Disaster?" *St. Louis Business Journal*, Sept. 9, 2005.

<sup>2</sup>[www.iii.org/insurance\\_topics/](http://www.iii.org/insurance_topics/), Natural Disasters, Earthquakes; Risk and Insurance Issues.

<sup>3</sup>Ibid, from Insurance Information Institute (III) article, citing a 2009 study by AIR Worldwide.

<sup>4</sup>Ibid, from Insurance Information Institute (III) article.

<sup>5</sup>Gregory Boop, "Insure Your Business Against Earthquake Damage," *About.com Guide*.



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