

1988

# Village Inn Apartments and Village Partners-Cedar City v. State Farm Fire and Casualty Company : Brief of Appellant

Utah Court of Appeals

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Darwin C. Hansen; Hansen, Crist and Spratley; Attorney for Respondent.

Thomas J. Erbin; Prince, Yeates, Geldzahler; Attorneys for Appellant.

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DOCKET NO.

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IN THE UTAH COURT OF APPEALS

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VILLAGE INN APARTMENTS and  
VILLAGE PARTNERS-CEDAR CITY,

Plaintiffs-Appellants,

vs

STATE FARM FIRE AND CASUALTY  
COMPANY,

Defendant-Respondent.

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Case No. 880632-CA

Priority No. 14.b.

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BRIEF OF APPELLANTS

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APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE RICHARD MOFFAT, DISTRICT JUDGE

---

Darwin C. Hansen, Esq.  
HANSEN, CRIST & SPRATLEY  
Attorney for Defendant/Respondent  
110 West Center  
Bountiful, Utah 84010  
Telephone: (801) 295-2391

Thomas J. Erbin, Esq.  
PRINCE, YEATES, GELDZAHLER  
Attorneys for Plaintiff/Appellant  
City Centre I, Suite 900  
175 East 400 South  
Salt Lake City, Utah 84111  
Telephone: (801) 524-1000

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VILLAGE INN APARTMENTS and  
VILLAGE PARTNERS-CEDAR CITY,

Plaintiffs-Appellants,

vs

STATE FARM FIRE AND CASUALTY  
COMPANY,

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Darwin C. Hansen, Esq.  
HANSEN, CRIST & SPRATLEY  
Attorney for Defendant/Respondent  
110 West Center  
Bountiful, Utah 84010  
Telephone: (801) 295-2391

Thomas J. Erbin, Esq.  
PRINCE, YEATES, GELDZAHLER  
Attorneys for Plaintiff/Appellant  
City Centre I, Suite 900  
175 East 400 South  
Salt Lake City, Utah 84111  
Telephone: (801) 524-1000

### List of Parties

Pursuant to Rule 24(a)(1) of the Rules of the Court of Appeals, plaintiff represents that the names of all parties to this appeal appear in the caption hereof. The plaintiffs are the owner and mortgagee, respectively, of the building in question. Since their interests are aligned, they will collectively be referred to as "plaintiff".

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Statement of Jurisdiction and Nature  
of the Proceedings Below

The Court Of Appeals has jurisdiction over this appeal pursuant to § 78-2a-3(2)(j), U.C.A. This appeal was "poured over" to the Court Of Appeals from the Utah Supreme Court by notice of November 3, 1988.

In the proceedings below, the parties cross-moved for summary judgment on the issue of whether an "earth movement" exclusion in the subject insurance policy excluded plaintiff's property loss. The Lower Court found that that the exclusion did apply, as a matter of law, thus granting defendant's motion and denying plaintiff's motion.

Statement of Issue Presented For Review

The issue presented for review is an issue of law. The parties agreed on the relevant facts. The issue is whether, as a matter of law, the "earth movement" exclusion in the defendant's insurance policy applies to the property loss sustained by plaintiff.

It is respectfully submitted that this is an issue of first impression in this jurisdiction.

Constitutional and Statutory Provisions

The issue of law presented herein is determined by case law, rather than statutory or constitutional law.

### Statement of the Case

Pursuant to Rule 24(a)(7) of the Rules of the Utah Court of Appeals, plaintiff states the case as follows:

(i) Nature of the Case - This is an insurance coverage case. This is a first-party action (i.e. insured against carrier) to determine whether there is coverage for plaintiff's loss. The loss at issue is a property loss, i.e. structural damage to plaintiff's building.

(ii) Course of Proceedings - This action seeking determination of insurance coverage was filed in February 1987. Defendant answered by claiming, inter alia, that its insurance policy had an "earth movement" clause which excluded coverage for plaintiffs loss. After discovery, the parties cross-moved for summary judgment on the issue of whether that "earth movement" exclusion applied to plaintiff's loss.

(iii) Disposition in the Court Below - The Lower Court granted the defendant's Motion For Summary Judgment, and denied plaintiff's Cross-Motion For Summary Judgment. In other words, the Lower Court found that the "earth movement" exclusion did exclude coverage for plaintiff's loss, as a matter of law. This appeal followed.

If the Lower Court's Judgment were to be reversed, defendant has a remaining defense to coverage that would



necessitate trial. In this regard, plaintiff's Motion For Summary Judgment below properly should have been designated a Motion For Partial Summary Judgment.

(iv) Statement of Relevant Facts - The relevant facts were not contested, and were set forth in defendant's Memorandum In Support Of Summary Judgment (R. 68) and plaintiff's Memorandum In Support Of Cross-Motion For Summary Judgment (R. 145). A concise summary of the relevant facts follows:

Plaintiff owns and operates the Village Inn Apartments in Cedar City, Utah (R. 147). In 1986, plaintiff was insured with defendant State Farm under an Apartment Policy (hereafter "the policy," R. 81, relevant sections in Addendum hereto). The policy generally provided plaintiff with property and liability coverage (R. 69). The loss here was a property loss.

On or before February 24, 1986, an underground water pipe ruptured on the premises of plaintiff's Village Inn Apartments (R. 68). The escaping water saturated the soil beneath, causing the soil to lose its weight-bearing ability. The foundation settled almost 8 inches (R. 69). Estimated costs of repair: \$70,000 (R. 147).

After the loss, Plaintiff submitted a claim to its insurance carrier (defendant State Farm). Defendant

investigated the claim, and ultimately denied same on the ground, inter alia, of an "earth movement" exclusion in the policy. After the claim was denied, plaintiff brought this action seeking a determination of coverage.

#### Summary of Arguments

Plaintiff argues that the Lower Court made an error of law when it determined that the earth movement clause excluded coverage for plaintiff's loss as a matter of law. Plaintiff argues that the earth movement clause is inapplicable to this loss, as a matter of law. There are three grounds for plaintiff's argument.

First, the earth movement clause does not apply because no earth movement occurred here. In the policy, the undefined phrase "earth movement" is followed by a string of natural phenomenon and acts of God (e.g. earthquake, volcano, landslide). Under the doctrine of ejusdem generis, the phrase "earth movement" should be construed to mean natural forces such as those mentioned, not "man-made" losses such as a pipe break.

Second, the phrase "earth movement" can be construed as ambiguous, because it is undefined and reasonably susceptible of different meanings. That ambiguity is strictly construed against the carrier and in favor of coverage.

Third, to construe the earth movement exclusion as applicable to this foundation-settling loss renders the policy duplicative.

#### Argument

The defendant carrier has denied this claim on the basis of an earth movement exclusion in the policy. However, the policy does not define the phrase "earth movement". Therefore, the Court must construe that phrase. Plaintiff submits that the phrase could be construed in either of two ways: under the doctrine of ejusdem generis, or as ambiguous. Under either construction, the result is the same: the phrase "earth movement" is deemed to apply only to natural forces and natural phenomenon. The majority of jurisdictions to construe such exclusionary language have so ruled.

Before addressing the proper construction of the phrase "earth movement", the burden of proof in the Lower Court and the standard of review on this appeal will be set forth.

When an insurer denies a loss based upon an exclusion in its policy, the insurer has the burden of proving by the weight of the evidence that the loss falls within that cited exclusion. Whitlock v. Old American Insurance Company 442 P.2d 26, 21 Utah 2d 131 (Utah 1968). The Lower Court determined summarily that the defendant carried its burden of proving that

this loss fell within the earth movement exclusion. On appeal, this Court should not accord any particular deference to the Lower Court's decision on this legal issue. Since the Summary Judgment was granted as a matter of law rather than fact, this Court is free to reappraise the Trial Court's legal conclusions. Barber v. Farmers Insurance Exchange 751 P.2d 248 (Utah App. 1988).

I.

IF THE PHRASE "EARTH MOVEMENT" IS CONSTRUED  
UNDER THE DOCTRINE OF EJUSDEM GENERIS, THE  
EXCLUSION DOES NOT APPLY TO THIS LOSS AS A  
MATTER OF LAW.

The defendant carrier relied upon the "earth movement" exclusion in the policy to deny coverage. That earth movement clause appears as ¶ 3.b in the policy and excludes property loss . . .

"caused by, resulting from, contributed to, or aggravated by any of the following: (1) earth movement, whether combined with water, including but not limited to earthquake, volcanic eruption, landslide, subsidence, mudflow, sinkhole, erosion, or the sinking, arising, shifting, expanding or contracting of earth." (¶ 3.b. of Policy, see p. 1)

Because the phrase "earth movement" is undefined, the Court must construe the scope of that language. Other Courts faced with similar, undefined "earth movement" clauses have applied the doctrine of ejusdem generis to hold that the phrase only applies to natural or geologic phenomenon.

In the exclusion, the phrase "earth movement" is an undefined general phrase grouped together with more specific terms. Where general language is used together with specific words, the familiar rule of construction known as ejusdem generis ("of the same kind") requires that the general words be restricted to a sense analogous to the specific words. Fields v. Mtn. States Tel. and Tel., 754 P.2d 677 (Utah App. 1988), Matter of Disconnection of Certain Territory 668 P.2d 544 (Utah 1983).

This rule of construction, ejusdem generis, mandates that the general term "earth movement" be restricted to the specific surrounding terms (such as earthquake, volcano, landslide, mudflow, rising and shifting of earth) which contemplate natural or geologic forces. Each of the recent cases cited hereafter is a first-party action for property coverage in which the Court, as a matter of law, construed the phrase "earth movement" to apply only to natural forces or natural phenomenon.

In United Nuclear Corp. v. Allendale Mut. Ins. Co. 709 P.2d 649 (N.M. 1985) an earthen dam failed. The carrier denied coverage on the grounds, inter alia, of the earth movement exclusion. The trial court construed the exclusion to apply to "other naturally occurring phenomenon" in addition to the

"flood, earthquake, landslide [and] subsidence" cited in the exclusion. That construction was affirmed by the New Mexico Supreme Court:

"In construing the term 'earth movement' to cover only naturally occurring phenomenon, the trial court applied the doctrine of ejusdem generis. Numerous other cases have applied the doctrine to the term 'earth movement' [citations omitted] . . . Therefore, we determine that the trial court did not err in applying the doctrine of ejusdem generis to the term 'earth movement' and thereby finding that the exclusion in the Allendale insurance policy did not apply to the tailings dam spill . . ." Id. at 652-3.

In Holy Angels Academy v. Hartford Ins. Co., 487 NYS.2d 1005 (N.Y. 1985), a foundation settled due to nearby construction work. The carrier denied coverage on the basis of the earth movement exclusion. The parties cross-moved for summary judgment on the issue of coverage. The court granted summary judgment for the insured, applying the doctrine of ejusdem generis to construe the "earth movement" phrase as restricted to natural phenomenon:

" . . .these words must be read in context with those that surround them (ejusdem generis) and, therefore, are limited in application to natural phenomena . . ." Id. at 1007.

In Henning Nelson Const. Co. v. Firemen's Fund, 383 N.W.2d 645 (Minn. 1986) a foundation wall collapsed. The

carrier denied coverage on the grounds, inter alia, of the earth movement exclusion. The lower court held the exclusion inapplicable, construing the exclusion as relating only to earth movement caused by widespread natural disaster. The Minnesota Supreme Court affirmed:

"The phrase 'any other earth movement' must be construed within the context of the exclusion as a whole and cannot be artificially separated from the other language [citation omitted]. Taken in this manner, the earth movement exclusion must be construed to apply to earth movements caused by widespread natural disasters and not to those caused by human forces." Id. at 653.

In Peters TP. School Dist. v. Hartford Indemnity Co. 833 F.2d 32 (Third Cir. 1987), a school sank after a mine subsided. The carrier denied coverage under the earth movement exclusion. The District Court construed the earth movement clause to exclude property damage from natural causes such as earthquake, landslides, and mudflows. In upholding this construction, the Third Circuit Court traced the historical basis for construing earth movement exclusions to apply only to natural phenomenon:

"We begin our review by noting that earth movement exclusions in an insurance policy generally refer to and have historically related to catastrophic and extraordinary calamity such as earthquakes and landslides . . . We conclude, as did the District Court . . . that the earth movement exclusion in the policy was meant to deny coverage for

spontaneous, natural, catastrophic earth movement, and not movements brought about by other causes." Id. at 35-6.

The Third Circuit Court in Peters found, as a matter of law, that the carrier had failed to carry its burden of proving that the loss fell within the earth movement exclusion. Partial summary judgment was granted the insured on the earth movement exclusion.

Thus, numerous jurisdictions have recently construed the language "earth movement" under the doctrine of ejusdem generis to apply only to losses by natural forces and natural phenomenon. Ejusdem generis is a familiar rule of construction in Utah as well, and "requires that the general words be restricted to a sense analogous to the specific words". Matter of Disconnection, supra, at 548. Therefore, the earth movement exclusion should be construed to apply only to natural forces, not "man-made" events such as a broken pipe.

## II.

IF THE PHRASE "EARTH MOVEMENT" IS CONSTRUED  
AS AMBIGUOUS, THE EXCLUSION DOES NOT APPLY  
TO THIS LOSS AS A MATTER OF LAW.

In construing the undefined "earth movement" language, there is an alternative to the doctrine of ejusdem generis. This Court could also construe the undefined phrase as ambiguous.



In Utah, exclusionary language in an insurance policy is ambiguous if the language can be reasonably understood by the insured in a different manner than the carrier. In Fuller v. Director of Finance, 694 P.2d 1045 (Utah 1985) the issue was whether a policy insuring an employer against "damages" covered liability for out-of-state worker's compensation. In finding coverage, the Court observed that:

"At best, the meaning of the term as used in the employer's [insurance policy] is ambiguous. Plaintiff could have reasonably understood these provisions to cover his out-of-state worker's compensation liability . . . Therefore, facially, these provision afford coverage . . ." Id. at 1048.

Thus, under Fuller the critical question is whether an insured could have reasonably understood the policy language in a certain way. If so, coverage exists, because "An insured is entitled to the broadest protection he could have reasonably understood to be provided by the policy." Fuller, supra, at 1047.

The rule of Fuller was recently applied by this Court in Metropolitan Property and Liability Ins. Co. v. Finlayson 751 P.2d 254 (Utah App. 1988). Metropolitan Property was a declaratory judgment action to determine whether an insurance policy exclusion applied to the insured's loss. Specifically,

the carrier relied on a clause excluding coverage for "non-owned automobiles" available for "regular use". The lower court granted summary judgment to the carrier, finding that the clause excluded coverage for plaintiff's loss as a matter of law. On appeal, the insured argued that the undefined phrase "regular use" was ambiguous. This Court agreed:

"As previously stated, if the words used to express the meaning and intention of the parties may be understood to reach two or more plausible meanings, the language is ambiguous. We find either construction presented by the parties plausible. Each interpretation has some support in the case law and in ordinary usage". Metropolitan Property, supra, at 258.

Accordingly, the Metropolitan Property Court held that the ambiguous phrase must be construed in favor of coverage, and reversed the summary judgment of the lower court.

Defendant herein construes the phrase "earth movement" to mean any physical displacement of soil. Plaintiff herein construes the phrase "earth movement" to mean movement caused by natural forces or acts of God. The issue is whether plaintiff's construction is plausible. That issue is to be decided by reference to "ordinary usage" and case law. Metropolitan Property, supra, at 258.

With regard to "ordinary usage", a reasonable layman reading the language of this earth movement exclusion could

plausibly understand the clause to exclude coverage for natural forces and acts of God. The phrase "earth movement" itself is immediately followed by phrases denoting natural forces and natural disasters. Furthermore, to determine ordinary usage this Court can look to Webster's Dictionary, as it did in Metropolitan Property, supra. According to Webster, the ordinary meaning of "earth movement" is a geologic or natural force:

"Earth Movement - Geol. differential movement of the earth's crust; elevation or subsidence of the land, diastrophism; faulting; folding . . ." Webster's New Int'l Dictionary, 2nd Ed. p. 809.

In addition to ordinary usage, this Court can look to case law of sister jurisdictions in determining whether insurance policy language is ambiguous. See Metropolitan Property, supra, at 257-8; Fire Ins. Exchange v. Alsop 709 P.2d 389 (Utah 1985). Sister jurisdictions have found the phrase "earth movement" ambiguous because laymen could plausibly conclude that it referred to natural forces and natural disasters.

This precise issue was decided in 1985 by the Court in Holy Angels Academy, supra:

"Upon review, this Court finds that it is not unreasonable for an ordinary individual reading the policy language:  
'Earth movement, including but not limited to earthquake, landslide,

mudflow, earth sinking, earth rising or shifting'  
to conclude that this exclusion was designed and intended to remove from coverage, property damage occurring from such natural causes as earthquakes, landslides and mudflows . . . the policy holder is merely limiting the exclusionary clauses to those same general kind and class of perils as enumerated in companion language. In so holding we note, therefore, that [the carrier] has not established that its interpretation is the only one that can be fairly applied to the policy language, and, accordingly, we must resolve the ambiguity in favor of the insured." Id. at 1007

In so holding, the Holy Angels Court noted that similar exclusionary language had been the subject of judicial interpretation in several jurisdictions, with only one Court finding the language unambiguous.

Thus, ordinary usage and case law from sister jurisdictions demonstrate that a layman could plausibly understand the language "earth movement" to refer to natural and geologic forces. The defendant insurance company has a different understanding of the language. This renders the term ambiguous, and that ambiguity is resolved against the carrier and in favor of coverage. Metropolitan Property, supra, at 258; Fuller, supra, at 1046.

### III.

DEFENDANT'S CONSTRUCTION OF  
THE PHRASE "EARTH MOVEMENT"  
RENDERS THE POLICY DUPLICATIVE.

Defendant urges that the phrase "earth movement" should be construed to apply to a foundation-settling loss such as occurred here. However, defendant's policy has an entirely separate exclusion for foundation-settling. See Exclusion 1.e. of the policy (Addendum, p. 2). If State Farm believed the earth movement exclusion applied to foundation-settling losses, it was superfluous to provide a separate exclusion for foundation-settling.

A similar situation arose in Jones v. Saint Paul Ins. Co., 725 S.W.2d 291 (Texas App. 1987). In Jones, a foundation settled as earth dried, causing a wall to collapse. The carrier denied coverage on the basis of the earth movement exclusion and a foundation-settling exclusion. The Jones Court held the earth movement exclusion inapplicable as a matter of law, for two reasons. First, earth movement "contemplated abnormally large movements such as the examples listed." Second, it would be incongruous to construe the earth movement exclusion to cover foundation-settling when the policy had a separate exclusion for foundation-settling:

"A contract must be construed to give effect to all its provisions, if possible, and a construction will not be placed on one provision if it causes another to be meaningless [citations omitted]. Another exclusion pled by [the carrier] was settling, cracking, or other defect of foundations. This 'settling' exclusion

would be rendered meaningless by adopting the construction of 'earth movement' urged by [the carrier]." Id. at 297

Conclusion

Plaintiff asks this Court to reverse the Lower Court and hold that the policy's earth movement exclusion does not apply to plaintiff's loss, as a matter of law. The result is the same whether the undefined phrase "earth movement" is construed under the doctrine of ejusdem generis, or as ambiguous.

DATED this 15<sup>th</sup> day of March, 1989.

PRINCE, YEATES & GELDZAHLER

By 

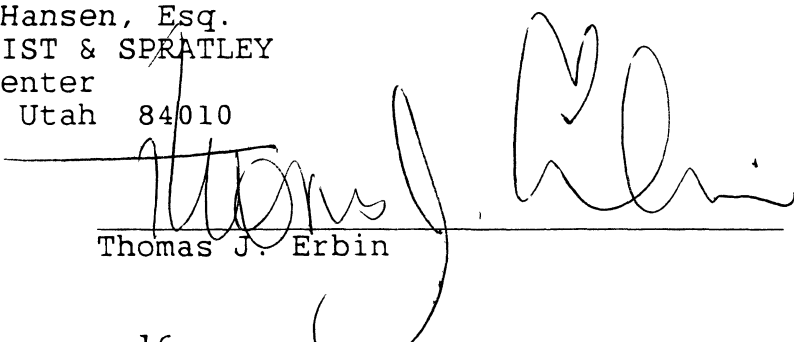
Thomas J. Erbin

Attorneys for Plaintiff/Appellant

MAILING CERTIFICATE

I hereby certify that, on the 15<sup>th</sup> day of March, 1989, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLANTS to the following:

Darwin C. Hansen, Esq.  
HANSEN, CRIST & SPRATLEY  
110 West Center  
Bountiful, Utah 84010

  
Thomas J. Erbin

ADDENDUM

Two Relevant Sections Of  
State Farm Policy

**SECTION I**  
**LOSSES INSURED AND**  
**LOSSES NOT INSURED (cont.)**

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- ance of property, or shortage of property disclosed on taking inventory;
- i. due to any delay or loss of market;
  - j. caused by repeated leakage or seepage of water or steam whether continuous or intermittent from any:
    - (1) heating, air conditioning or refrigerating system;
    - (2) domestic appliance; or
    - (3) plumbing system, including from or around any shower stall or other shower bath installation, bath tub or other plumbing fixture.
2. The Company does not insure for loss either consisting of, or directly and immediately caused by power, heating or cooling failure, or due to change in temperature or humidity, unless the failure or change results from physical damage to the building or to equipment contained therein caused by a Loss Insured. Also, the Company shall not be liable under this exclusion for any loss resulting from riot, riot attending a strike, civil commotion, or vandalism or malicious mischief.
3. The Company does not insure for loss which would not have occurred in the absence of one or more of the following excluded events. The Company does not insure for such loss regardless of: a) the cause of the excluded event; or b) other causes of the loss; or c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss:
- a. occasioned directly or indirectly by enforcement of any ordinance or law regulating the construction, repair or demolition of buildings or structures;
  - b. caused by, resulting from, contributed to, or aggravated by any of the following:
    - (1) earth movement, whether combined with water or not, including but not limited to earthquake, volcanic eruption, landslide, subsidence, mudflow, sinkhole, erosion, or the sinking, rising, shifting, expanding, or contracting of
  - (2) flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;
  - (3) water which backs up through sewers or drains;
  - (4) water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors, or through doors, windows or any other opening in such sidewalks, driveways, foundations, walls or floors;
- unless fire or explosion as insured against ensues, and then the Company shall be liable only for loss caused by the ensuing fire or explosion. This exclusion shall not apply to loss arising from theft;
- c. hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack:
    - (1) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces;
    - (2) by military, naval or air forces; or
    - (3) by an agent of any such government, power, authority or forces;
- it being understood that any discharge, explosion or use of any weapon of war employing nuclear fission or fusion shall be conclusively presumed to be such a hostile or warlike action by such a government, power, authority or forces;
- d. insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or custom's regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation



# SECTION I LOSSES INSURED AND LOSSES NOT INSURED

## LOSSES INSURED

This policy insures for accidental direct physical loss except as provided in SECTION I - LOSSES NOT INSURED.

## LOSSES NOT INSURED

1. The Company does not insure for loss either consisting of, or directly and immediately caused by, one or more of the following:

- a. caused by leakage or overflow from plumbing, heating, air conditioning or other equipment or appliances (except fire protective systems) caused by freezing while the described building is vacant or unoccupied, unless the insured shall have exercised due diligence with respect to maintaining heat in the buildings or unless such equipment and appliances have been drained and the water supply shut off during such vacancy or unoccupancy;
- b. caused by any electrical injury or disturbance of electrical appliances, devices, fixtures, or wiring caused by electrical currents artificially generated unless fire as insured against ensues. The Company shall be liable only for loss caused by the ensuing fire,
- c. caused by pilferage, appropriation or concealment of any property covered or any fraudulent, dishonest or criminal act done by or at the instigation of any insured, partner or joint venturer, including any officer, director, trustee, employee or agent thereof, or any person to whom the property covered may be entrusted;
- d. caused by:
  - (1) wear and tear, marring or scratching;
  - (2) deterioration, inherent vice, latent defect;
  - (3) mechanical breakdown of machines, including rupture or bursting caused by centrifugal force;

- (4) rust, mold, wet or dry rot, contamination;
- (5) dampness or dryness of atmosphere, changes in or extremes of temperature;
- (6) smog, smoke from agricultural smudging or industrial operations;
- (7) birds, vermin, rodents, insects or animals;

unless loss by fire, smoke (other than smoke from agricultural smudging or industrial operations) explosion, collapse of a building, glass breakage or water not otherwise excluded ensues. This policy shall cover only such ensuing loss.

If loss by water not otherwise excluded ensues, this policy shall also cover the cost of tearing out and replacing of any part of the building covered required to effect repairs to the plumbing, heating or air conditioning system or domestic appliance but excluding loss to the system or appliance from which the water escapes,

- e. due to any and all settling shrinking, cracking, bulging or expansion of driveways, sidewalks swimming pools, pavements, foundations, walls, floors, roofs or ceilings,
- f. caused by explosion of steam boilers, steam pipes, steam turbines or steam engines (except direct loss resulting from the explosion of accumulated gases or unconsumed fuel within the firebox, or combustion chamber of any fired vessel or within the flues or passages which conduct the gases of combustion therefrom) if owned by, leased by or operated under the control of the insured, or for any ensuing loss except by fire or explosion not otherwise excluded. The Company shall be liable only for such ensuing loss;
- g. due to voluntary parting with title or possession of any property by the insured or others if induced to do so by any fraudulent scheme or false pretense,
- h. due to unexplained or mysterious disappear-