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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VILLAGE INN APARTMENTS and
VILLAGE PARTNERS-CEDAR CITY,

Plaintiffs-Appellants,

vs

STATE FARM FIRE AND CASUALTY
COMPANY,

Defendant-Respondent.

Case No. 880632-CA

Priority No. 14.b.

REPLY BRIEF OF APPELLANTS

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

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REPLY ARGUMENT

THE LEAD-IN POLICY LANGUAGE RELIED ON BY STATE FARM DOES NOT DETERMINE THE MEANING OF THE "EARTH MOVEMENT" EXCLUSION HERE.

Defendant State Farm is correct in admitting that courts have traditionally rejected earth movement exclusions under an "efficient predominant cause" analysis or an "ejusdem generis" analysis. Defendant is correct in arguing that its new lead-in language defeats the efficient predominant cause analysis. Defendant is incorrect in arguing that its new language defeats the rule of ejusdem generis. The phrase "earth movement" remains undefined, and must be construed in the context of its surrounding terms (i.e. ejusdem generis) and according to its ordinary usage and meaning.

A fair reading of the insurance journal articles in defendant's Addendum shows that the new lead-in language was added to defeat only the "efficient predominant cause" analysis. That analysis resulted in coverage when an uncovered peril was set in motion by a covered peril. Plainly, the change was tailored to overcome that argument. But that is not the argument plaintiff makes here.

Plaintiff's argument is that in light of both the immediately surrounding policy language and common usage, a layman could reasonably understand the phrase "earth movement" to mean only natural disasters and natural forces. Is that a

reasonable interpretation of the phrase? That is the question. Because the answer is yes, coverage follows.

Defendant begs the question. Defendant argues that its new lead-in language excludes the listed events regardless of cause. But the question is the meaning and definition of the excluded "events" themselves. If the phrase "earth movement" is construed to mean only natural and geologic forces, no amount of boiler plate lead-in language can change that. Defendant's argument that the excluded event should be construed by the lead-in language rather than the language of the exclusion itself is tantamount to "the tail wagging the dog". In its 1983 policy revisions, defendant had the opportunity to define the "earth movement" exclusion as applying to events other than natural events, but defendant did not do so.

The California cases in defendant's Addendum do not help any more than the insurance journal articles. First, in none of those cases did the insured argue that the "earth movement" clause is reasonably construed as meaning only natural and geologic forces. As best can be determined from these "opinions", the insureds were generally arguing efficient predominant cause or other issues unrelated to the case at hand. Second, with the exception of State Farm Fire & Cas. Co. v. Martin, 668 F.Supp. 1379 (D. Cal. 1987), aff'd., No. 87-6109

(9th Cir. April 10, 1989), these decisions appear to be unpublished state trial court orders, of limited value as precedent.

Plaintiff submits two additional points in reply:

1. More and more, this Court and the Utah Supreme Court have been resorting to Webster's Dictionary to ascertain ordinary meaning. In Bear River Mutual Insurance Co. v. Wright, 104 Utah Adv. Rep. 41 (Utah App. March 14, 1989), this Court reversed a summary judgment granted to the carrier in an insurance coverage case. The critical question was whether an exclusion for unlisted "automobiles" excluded coverage for motorcycles. This Court held that:

> In the absence of a clear and unambiguous definition in the policy, the term "automobile" should be given its common sense, plain meaning.

Id. at 42. The Court then used Webster's Dictionary to determine plain meaning and held that the exclusion did not apply there. As mentioned in plaintiff's opening brief, the plain meaning of "earth movement" is defined by Webster as a geologic term. According`", th's exclusion does not apply here.

2. Defendant unfairly accuses plaintiff of failing to "quote" the lead-in language. The first page of plaintiff's Addendum is the earth movement exclusion, complete with the lead-in language. More important, that language does not help define the meaning of the "earth movement" exclusion here.

CONCLUSION

Defendant's construction of the undefined phrase "earth movement" varies from ordinary meaning and the immediately surrounding policy language. This is contrary to Utah law, which requires that, in the absence of definition, a phrase in an insurance policy will be given its ordinary meaning and construed in light of the surrounding policy language.

The question is whether a layman could reasonably understand the phrase "earth movement" to mean only natural, geologic forces. This Court should follow the majority of jurisdictions that have faced this question, and answer in the affirmative.

Plaintiff urges that the summary judgment in favor of defendants be reversed with directions that the District Court grant plaintiff's motion for summary judgment.

DATED this 18th day of May, 1989.

PRINCE, YEATES & GELDZAHLER

By [signature]
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MAILING CERTIFICATE

I hereby certify that, on the 18th day of May, 1989, I caused to be mailed, postage prepaid, four true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS to the following:

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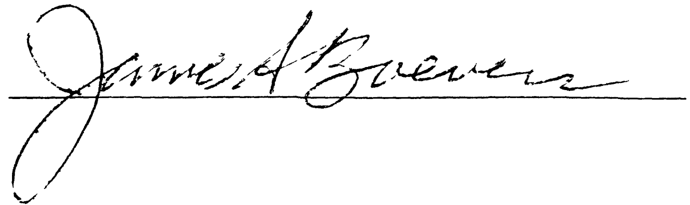

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