THE FLORIDA SUPREME COURT

S. Ct. Case No.: SC03-1808

CASE NO.: 3D02-2477

CARLOS FAYAD AND DORA FAYAD,

Petitioners,

vs.

CLARENDON NATIONAL INSURANCE COMPANY

Respondent.
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**PETITIONER'S CORRECTED INITIAL BRIEF ON THE MERITS**

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Respectfully submitted,

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## PREFACE

Carlos and Dora Fayad ("the Fayads") seek review of the Third District's decision in Fayad v. Clarendon Nat. Ins. Co., 857 So. 2d 293 (Fla. 3d DCA 2003) based on express, direct conflict with the Fourth District's decision in Phoenix Ins. Co. v. Branch, 234 So. 2d 396 (Fla. 4th DCA 1970). For the reasons which follow, it is respectfully submitted that the Third District's decision should be quashed, in favor of the Fourth District's decision, and the case remanded for further proceedings.

## STATEMENT OF THE CASE AND FACTS[1]

Clarendon Insurance Company ("Clarendon") insured the Fayads' home through an "all risk" policy. (S.R. 184-211). During the policy period, the Fayads reported to Clarendon that nearby blasting activities had caused damage to their home and personal property. (R. 1-8). In a letter, Clarendon denied coverage for the home's structural damage, indicating that its investigation revealed that damages to the home were the result of "settlement, shrinkage and thermal effects," which its policy excluded. Clarendon's letter did not address the Fayads' personal property claim. (R. 14-21).

[1] All references are to the record (R. ), as supplemented in the Third District. (S.R. ).

The Fayads demanded an "appraisal," and thereafter Clarendon instituted this declaratory judgment action, seeking a determination that there was no coverage. (R. 2-8). Clarendon relied primarily on an "earth movement" exclusion. (R. 208).[2]

Clarendon's policy provided dwelling coverage for perils including "risk of direct loss to property described in Coverages A & B only if that loss is a physical loss to property." (S.R. 199, App. A).[3] Clarendon's earth movement exclusion further specified:

> **SECTION I--EXCLUSIONS**
>
> 1. 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.
>
> * * *
>
> b. 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:
>
> (1) Fire; [or]
> (2) Explosion ...
>
> (3) * * *
>
> ensues and then we will pay only

[2] Other provisions excluded "wear and tear," "settling" or "defective design." (R. 2-8).

[3]Coverage A is for dwelling and Coverage B is for "other structures." (S.R. 195).

> for the ensuing loss. (S.R. 188, App. B, emphasis added).

Clarendon's personal property coverage provision added:

> **COVERAGE C--PERSONAL PROPERTY**
>
> We insure for direct physical loss to the property described in Coverage C caused by a peril listed below **unless the loss is excluded in SECTION I--EXCLUSIONS.**
>
> * * *
>
> 3. Explosion (S.R. 200, App. C, emphasis added).

The Fayads answered the complaint, asserting *inter alia* that the term "earth movement," as defined in this policy exclusion was limited to certain naturally occurring phenomena rather than man-made events and could not be broadened beyond those listed. The Fayads counterclaimed for an appraisal to determine the amount of their loss. (R. 9-13).

Clarendon moved to dismiss the counterclaim, asserting that the coverage determination should precede any appraisal. The trial court denied the motion to dismiss, but stayed the counterclaim, pending its determination of coverage. (S.R. 1, 9-10).

Clarendon moved for summary judgment, based on the policy exclusions, and the affidavit and report of an engineering expert. (S.R. 25-26). The Fayads presented other evidence reflecting that their property was damaged by "blasting/explosion." (R. 25-26; 38). Evidence was undisputed

that the Fayads' personal property loss was due to blasting. (R. 25-26, ¶9).

The trial court granted Clarendon's motion, and entered summary final judgment relieving Clarendon of liability to pay the Fayads "for any loss to the subject or any amount whatsoever." (R. 49, 50-51). The Fayads appealed the judgment to the District Court of Appeal, Third District. Fayad v. Clarendon Nat. Ins. Co., 857 So.2d 293 (Fla. 3d DCA 2003). The District Court assumed, without deciding the issue, that all damages were due to blasting. It agreed with the Fayads that Clarendon's policy language and its "earth movement exclusion" were significantly different, and more limited in scope, than a State Farm policy which the court had interpreted previously. See State Farm Fire & Cas. Co. v. Castillo, 829 So. 2d 242 (Fla. 3d DCA 2002); Fayad v. Clarendon Nat. Ins. Co., 857 So. 2d 293 (Fla. 3d DCA 2003). It also agreed with the Fayads that the policy exclusion "enumerated **natural** disasters or perils." Id. at 296 (emphasis added). However, the Court applied the maxim "*expressio unius est exclusio alterius*" to the exclusionary language, and found there was no coverage. Id. at 296. The District Court cited no authority for this proposition, which the Fayads submit significantly broadened the exclusionary language of Clarendon's policy.

With regard to the Fayads' personal property claim, the Third District acknowledged that "explosion" was a listed peril. It nonetheless applied the earth movement exclusion to bar the Fayads' personalty claim, to prevent "interpreting two policy provisions in an inconsistent manner." Id. at 296. The Fayads petition this Court for further review.

## JURISDICTION

This Court has jurisdiction to review the Third District's decision which expressly, directly conflicts with the Fourth District's decision in Phoenix Insurance Company v. Branch, 234 So. 2d 396 (Fla. 4th DCA 1970); Fla. Const. art v, §3(b)(3).

In Phoenix, a company engaged in dredging operations at the Lake Worth inlet exploded large quantities of explosives, producing concussions and vibrations of the earth and air. Id. at 397. The insureds sought recovery against their insurer under an all risk policy, "on the basis of damage done to their home by reason of [the] blasting activities, which resulted in the cracking of the walls, roof and ceilings." Phoenix Ins. Co. v. Branch, 234 So. 2d at 399. As here, Phoenix' policy ostensibly insured the homeowners' home against "all risks" of "physical loss." However, the insurer defended *inter alia* on the basis of an earth movement exclusion, which provided:

This policy does not insure against loss:

* * *

> (b) **caused by, resulting from, contributed to or aggravated by any earth movement, (including but not limited to)** earthquake, landslide, mudflow, earth sinking, risking or shifting; unless loss by fire, explosion or breakage of glass constituting a party of the building(s) covered hereunder, including glass in storm doors and storm windows, ensues, and this Company shall then be liable only for such ensuing loss. (emphasis added).

The Fourth District gave the coverage provision insuring "all risks" a "broad and comprehensive" reading. Id. at 235. It gave the earth movement exclusion a restrictive reading, and concluded that the owners' blasting loss "d[id] not fall within the exclusionary provisions of the insurance policy." Id. at 236. In contrast, faced with a more restrictive exclusion here, the Third District interpreted the coverage language narrowly, and the exclusion broadly, and determined that there was no coverage for the exact same risk.

There is no need for a District Court to identify conflicting decisions in its opinion in order to create an express, direct conflict under Fla. Const. Art. v, §3(b)(3). Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981). For purposes of this Court's jurisdiction, intradistrict conflict contemplates either (1) the announcement of a rule of law which conflicts with a rule announced by another district court; or

(2) the application of a rule of law to produce a different result in a case which involves substantially the same material facts as a prior case disposed of by another district court. See Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960) (conflict between district court and this court); Eskind v. City of Vero Beach, 159 So. 2d 209, 211 (Fla. 1963) (when two district courts have arrived at different conclusions in two situations not materially distinguishable, the decisions present a "real, embarrassing conflict in the law which the Constitution contemplates must be resolved by this Court"). Where, as here, the Third District arrived at a different conclusion from the Fourth District under substantially similar facts and policy language, this case is ripe for further review.

## STANDARD OF REVIEW

The extent of coverage under an insurance policy is an issue of law, reviewable *de novo*. See Coleman v. Florida Ins. Guar. Ass'n, Inc., 517 So. 2d 686 (Fla. 1988). This case likewise arises on summary judgment, implicating the same standard of review. See Clay Elec. Co-op, Inc. v. Johnson, 2003 WL 22966277, 28 Fla. L. Wkly. S866 (Fla. 2003).

## SUMMARY OF THE ARGUMENT

An "all risk" policy is an open perils policy which provides coverage for all direct losses not otherwise excluded. In contrast, a "specific perils" policy provides coverage which

excludes all risks not specifically included in the contract, in accordance with the legal maxim "expressio unius est exclusio alterius." Applying this maxim here converted an "all risk" policy into its antithesis – a specific perils policy – and broadened the exclusion, not the coverage. This is contrary to settled Florida law addressing the proper construction of insurance policies.

The Fayads were covered under their all risk policy for direct physical damage unless man-made blasting damage was excluded. It was not. Clarendon's policy contained an exclusion for "earth movement," but defined that term by reference to certain specific and extraordinary natural events – earthquakes, volcanic eruption, landslide, mine subsidence and mudflow. Two different rules of construction are applicable to the phrase "earth moving, sinking or shifting" which follows the listed events. Both *ejusdem generis* and *noscitur a sociis* require this phrase to be construed similarly to the terms which precede it. Applied here, the term "earth sinking, rising or shifting" should be read in conjunction with the other examples of earth movement and restricted to exclude only natural phenomena. It does not and should not exclude damage due to man-made forces.

This interpretation is supported by the clear majority of courts in the country, both federal and state, including the

Fourth District in Phoenix Ins. Co. v. Branch, 234 So. 2d 396 (Fla. 4th DCA 1970). It is also consistent with the historical purpose of the exclusion – to relieve the insurer from payment from natural disasters – which are unpredictable, and thus almost impossible to insure against. The Third District correctly observed that Clarendon's exclusion "enumerated **natural** disasters or perils," Fayad v. Clarendon National Ins. Co., 857 So. 2d at 296 (emphasis added), but incorrectly broadened its language to also exclude perils which were purely man-made.

In the name of consistency, the Third District further voided coverage for a named peril covering personal property. Neither ruling can be sustained. The "earth movement" exclusion did not apply at all, and conflicts between coverage provisions and exclusions, must be resolved in favor of coverage. Construing the policy correctly leads to coverage for **all** of the Fayads' property damage.

## ARGUMENT

### "BLASTING" DAMAGE IS A COVERED RISK, AND DOES NOT FALL WITHIN CLARENDON'S "EARTH MOVEMENT" EXCLUSION WHICH IS LIMITED BY ITS TERMS TO CERTAIN ITEMIZED NATURAL PHENOMENA

In recent years, "all risk" insurance policies have been used with increasing frequency. "All risk" insurance is a special type of insurance extending to risks not usually contemplated, and generally allows recovery for all fortuitous or accidental losses unless the policy contains a specific exclusion expressly excluding the loss from coverage. See Sun Ins. Office, Limited. v. Clay, 133 So. 2d 735, 739 (Fla. 1961); Phoenix Ins. Co. v. Branch, 234 So. 2d 396 (Fla. 4th DCA 1970); Annot., 20 A.L.R. 5th 170 (1995-2004).

The term "all risk" is given a broad and comprehensive meaning, with coverage provisions construed liberally. See Wallach v. Rosenberg, 527 So. 2d 1386, 1388 (Fla. 3d DCA), rev. den., 536 So. 2d 246 (Fla. 1988); Phoenix Ins. Co. v. Branch, 234 So. 2d at 398; Hudson v. Prudential Property & Cas. Co., 450 So. 2d 565 (Fla. 2d DCA 1984); see generally Farrer v. U.S. Fidelity & Guar. Co., 809 So. 2d 85, 91 (Fla. 4th DCA 2002) (insuring or coverage clauses are construed in the broadest possible manner to effect the greatest extent of coverage).

The insureds' burden of proof under such a policy is a light one: to make out a *prima facie* case for recovery, they must show

only that a loss has occurred which appears to be within the scope of coverage. See Egan v. Washington General Ins. Corp., 240 So. 2d 875, 876 (Fla. 4th DCA 1970); Phoenix Ins. Co. v. Branch, 234 So. 2d at 398. Once the insureds make this showing, the burden shifts to the insurer to prove that the loss was caused by an excluded risk. See B & S Associates, Inc. v. Indemnity Cas. & Property, Ltd., 641 So. 2d 436, 437 (Fla. 4th DCA 1994); Wallach v. Rosenberg, 527 So. 2d at 1388; Hudson, 450 So. 2d at 568; Egan, 240 So. 2d at 876; Phoenix Ins. Co., 234 So. 2d at 398. The insureds are not required to disprove any excepted causes. See Hudson, 450 So. 2d at 568; Stonewall Ins. Co. v. Emerald Fisheries, Inc., 388 So. 2d 1089 (Fla. 3d DCA 1980).

Insurance contracts are ordinarily construed in accordance with the plain language of the policies as bargained for by the parties. Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 33 (Fla. 2000); Prudential Property & Cas. Ins. Co. v. Swindal, 622 So. 2d 467, 470 (Fla. 1993). If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage, the insurance policy is considered ambiguous. Ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy. Auto-Owners Ins. Co. v. Anderson, 756 So. 2d at 33; Prudential Property & Cas.

Ins. Co. v. Swindal, 622 So. 2d at 470. Under settled Florida law, exclusions are **always** construed strictly. Demshar v. AAACon Auto Transport, Inc., 337 So. 2d 963 (Fla. 1976). Ambiguous policy exclusions are construed against the drafter and in favor of the insureds. Auto-Owners Inc. Co. v. Anderson, 756 So. 2d at 33.

In the instant case, the Fayads adduced evidence that their home and personal property sustained "physical loss" as a direct result of nearby blasting activity. This sustained their "light burden" of proof. Clarendon invoked an "earth movement" exclusion to defeat coverage. Application of the proper rules governing insurance policies in general, and this exclusion in particular, should have defeated Clarendon's defense.

Earth movement exclusions historically related to catastrophic and extraordinary calamities such as earthquakes and landslides. The reason for inserting this type of exclusion in an all risk policy was to relieve the insurer from an occasional major disaster which was almost impossible to predict, and thus to insure against.[4] See Peters Tp. School Dist.

[4] An insurance company also has the right to subrogate and recoup any payments to its insured from a third party or parties who are responsible for such man-made events. As to the nature and doctrine of subrogation see generally Dantzler Lumber & Export Co. v. Columbia Cas. Co., 156 So. 116 (Fla. 1934), Florida Farm Bureau Ins. Co. v. Austin Carpet Service, Inc., 382 So. 2d 305 (Fla. 1st DCA 1979); Almeroth v. Government Employees Ins. Co., 587 So. 2d 550 (Fla. 4th DCA 1991); McKibben v. Zamora,

v. The Hartford Acc. and Indem. Co., 833 F. 2d 32, 35-36 (3d Cir. 1987); Wyatt v. Northwestern Mut. Ins. Co. of Seattle, 304 F. Supp. 781, 782-83 (D. Minn. 1969). They were never intended to encompass damage caused by the conduct of third persons in the immediate vicinity of the property. See Wyatt v. Northwestern Mutual Ins. Co. of Seattle, 304 F. Supp. at 783:

> It seems hard to contend that the insurance policy meant to exclude all earth movements, for it is difficult to distinguish between a situation where a piece of heavy equipment breaks loose and hits a house causing serious damage and a situation where that equipment instead hits only an embankment next to a house but causes the earth to move and thereby damages the house. Certainly not all earth movements, or at least those where some human action causes such are included in the exclusion. If this interpretation creates an ambiguity in the language then it is necessary to decide what earth movements were intended to be covered. The class cited in the exclusionary clause is therefore held, if not limited to natural phenomena, at least not to exclude coverage in the case at bar.

Clarendon's policy excludes losses "caused directly or indirectly by any of the following," i.e., "earth movement." "Earth movement" is an expressly defined term, limited to certain specific and extraordinary events. It means "earthquake, including land shock waves or tremors, before, during or after a volcanic eruption; landslide, mine subsidence;

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358 So. 2d 866 (Fla. 3rd DCA 1978). There can necessarily be no subrogation for losses due to acts of nature.

mudflow; [and] earth sinking, rising or shifting..., unless direct loss by fire or explosion ensues."

Clarendon's exclusion expressly defined the term "earth movement" with regard to specific, itemized and listed events. A clear majority of courts continue to find this type of exclusion ambiguous and limited in its application only to naturally occurring catastrophic events, not those which are man-made. See Murray v. State Farm Fire and Cas. Co., 203 W. Va. 477, 509 S.E. 2d 1, 9 n.6 (W. Va. 1988) (and cases collected); see e.g. Peters Tp. School Dist. v. Hartford Acc. and Indemn. Co., 833 F. 2d at 35 ("mine subsidence"); Peach State Uniform Service, Inc. v. American Ins. Co., 507 F. 2d 996 (5th Cir. 1975); Gullett v. St. Paul Fire & Marine Ins. Co., 446 F. 2d 1100 (7th Cir. 1971); Wyatt v. Northwestern Mut. Ins. Co., 304 F. Supp. at 782 (excavating contiguous property); Winters v. Charter Oak Fire Ins. Co., 4 F. Supp. 2d 1288, 1290 (N.D. Mex. 1998); Sentinel Associates v. American Mfrs. Mut. Ins. Co., 804 F. Supp. 815 (E.D. Va. 1992) (leaking water pipe, a "manmade problem"), aff'd, 30 F. 3d 130 (4th Cir. 1994); Bly v. Auto Owners Ins. Co., 437 So. 2d 495, 497 (Ala. 1983) (vibrations caused by passing vehicles); West v. Umialik Ins. Co., 8 P.3d 1135, 1140-41 (Alaska 2000) (broken water pipe); Opsal v. United Services Auto. Ass'n, 2 Cal. App. 4th 1197, 10 Cal. Rptr. 2d 352, 355 (Cal. Ct. App. 1991) (defective construction); Anderson v.

Indiana Lumbermen Mut. Ins. Co. of Indianapolis, Ind., 127 So. 2d 304, 308-09 (La. Ct. App. 1961); Government Employees Ins. Co. v. DeJames, 256 Md. 717, 261 A. 2d 747 (Md. 1970); Henning Nelson Const. Co. v. Fireman's Fund American Life Ins. Co., 361 N.W.2d 446, 449 (Minn. Ct. App. 1985), aff'd as modified, 383 N.W.2d 645 (Minn. 1986); Ariston Airline & Catering Supply Co., Inc. v. Forbes, 211 N.J. Super. 472, 511 A.2d 1278, 1284 (N.J. Sup. Ct. 1986); United Nuclear Corp. v. Allendale Mut. Ins. Co., 103 N.M. 480, 709 P.2d 649, 652 (N. Mex. 1985); Holy Angels Academy v. Hartford Ins. Group., 127 Misc. 2d 1024, 487 N.Y.S.2d 1005 (N.Y.S. Ct. 1985) (blasting under property for subway system); Steele v. Statesman Ins. Co., 530 Pa. 190, 607 A. 2d 742 (Pa. 1992) (collapse of hillside due to construction on adjoining property); Rankin v. Generali-U.S. Branch, 986 S.W. 2d 237 (Tenn Ct. App. 1998) (movement of wall by heavy machinery); Jones v. St. Paul Ins. Co., 725 S.W. 2d 291 (Tex. Ct. App. 1986) (adjacent construction); Wisconsin Builders, Inc. v. General Ins. Co. of America, 65 Wis. 2d 91, 101, 221 N.W.2d 832, 837 (Wis. 1974); American Motorists Ins. Co. v. R & S Meats, Inc., 190 Wis. 2d 196, 526 N.W.2d 791, 796 (Wis. Ct. App. 1994); see also Couch on Insurance (3d) §153:77 (2003); Dahlquist, "Perspectives on Subsidence Exclusions and the Role of Concurrent Causation in Earth Movement Cases, 37 Tort & Ins. L.J. 949, 960 (Spring 2002) (hereinafter "Dahlquist"),

The Third District correctly observed that Clarendon's exclusionary language "enumerated **natural** disasters or perils." Fayad v. Clarendon Nat. Ins. Co., 857 So. 2d at 296 (emphasis added). It erred when it thereafter determined there was no coverage for physical damages sustained from blasting. The court did so by resort to the maxim "expressio unius est exclusio alterius" or the enumeration of particular acts should be construed to exclude all those not expressly mentioned. This was the wrong doctrine applied in the wrong context.[5]

An "all risk" policy is an open perils policy which provides coverage for all direct losses not otherwise excluded. A "specific perils" policy, in contrast, provides coverage in accordance with the legal maxim "expressio unius est exclusio alterius" and excludes all risks not specifically included in the contract. It is the **antithesis** of an "all risk" policy. See Poulton v. State Farm Fire and Cas. Companies, 267 Neb. 569, 675 N.W. 2d 665, 669 (Neb. 2004). By reliance on the maxim here, the Third District converted Clarendon's "all risk" policy into one for "specific perils," or its converse.

Courts have traditionally applied two different rules of

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[5] This particular maxim is ordinarily used to broaden coverage, not broaden exclusions. See e.g. Aetna Ins. Co. v. Webb, 251 So. 2d 321 (Fla. 1st DCA 1971); Dorrell v. State Farm Fire & Cas. Co., 221 So. 2d 5 (Fla. 3d DCA 1969). *Cf.* Mason v. Florida Sheriff's Self-Insurance Fund, 699 So. 2d 268 (Fla. 5th DCA 1997).

construction to **limit** earth movement exclusions: *ejusdem generis* and *noscitur a sociis*. Under the doctrine of *ejusdem generis*, where general words are used in a contract after more specific terms, the general words will be limited in their meaning or restricted to things of like, kind and nature with those specified. The phrase "*noscitur a sociis*" means "it is known from its associates." This doctrine holds that the meaning of a general term is or may be known from the meaning of accompanying specific words. These doctrines are similar in nature; their application holds that "in an ambiguous phrase mixing general words with specific words the general words are not construed broadly but are restricted to a sense analogous to the specific words." Murray v. State Farm Fire and Cas. Co., 203 W.Va. 477, 509 S.E. 2d 1, 9 (W. Va. 1998). Applied here, the term "earth sinking, rising or shifting" should be read in conjunction with the other examples of "earth movement," and restricted to exclude only natural phenomena, rather than damage due to man-made forces. See Wyatt v. Northwestern Mutual Ins. Co., 304 F. Supp. 781, 784 (D. Minn. 1969); Winters v. Charter Oak Fire Ins. Co., 4 F. Supp. 2d 1288, 1292 (D. N. Mex. 1998); Sentinel Associates v. American Mfrs. Mut. Ins. Co., 804 F. Supp. 815, 818 (E.D. Va), aff'd, 30 F. 3d 130 (4th Cir. 1994).

In the instant case, Clarendon could not and did not show

that the Fayads' damages were due to:

- Earthquake
- Land shock wave or tremors, before during or after a volcanic eruption;
- Landslide;
- Mine subsidence; or
- Mudflow.

The general phrase "earth sinking, moving or shifting" is properly read restrictively with reference to all of these more specific natural phenomena that come before. There was no reason for the Third District to go further and examine the exception to the exclusion – which applies when fire or explosion "ensues" from natural phenomena. The Fayads' damage resulted from blasting. This was a man-made damage, covered under the "all risk of physical loss" provision – not subject to the earth movement exclusion at all.

The Fourth District's decision in Phoenix was the right one. As here, Plaintiffs sustained damage to their home in the form of cracks and fractures on their premises. This was a risk of "physical loss" which the policy insured against. The burden was on the insurer to prove that blasting was excluded under a policy exclusion which defined earth movement as "**including but not limited to**":

- Earthquake
- Landslide
- Mudflow; or
- Earth sinking, rising or shifting...

This exclusion is actually broader than Clarendon's, since the bolded phrase is one of enlargement which extends to everything in the same class, not specifically enumerated. See e.g. Alligator Enterprises, Inc. v. General Agents, Ins. Co., 773 So. 2d 94, 96 (Fla. 5th DCA 2000), rev. den., 790 So. 2d 1101 (Fla. 2001) (term "including" typically indicates a partial list); see also Berniger v. Meadow Green-Wildcat Corp., 945 F. 2d 4, 6 (1st Cir. 1991) (phrase "including but not limited to" preceding specification in a statute, is a term of enlargement which extends statutory provisions to everything else embraced in its class); State v. Thompson, 92 Ohio St. 3d 584, 752 N.E. 2d 276 (Ohio 2001) (statutory phrase "including, but not limited to" "indicates that what follows is a non-exhaustive list of examples").

In Phoenix, the Fourth District deemed the exclusion "inapplicable" and squarely held that blasting damage was covered. This was the proper result here.

State Farm Fire and Cas. Co. v. Castillo, 829 So. 2d 242 (Fla. 3d DCA 2002) does not help Clarendon, since State Farm's exclusion is both different from and broader in scope than

Clarendon's. State Farm's insurance contract contains a "lead in" provision which states that:

> 2. 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 excluded events. We do 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; 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.**
>
> b. 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, mudflow, sinkhole, subsidence and erosion. (emphasis added).

In Castillo, the trial court found this provision ambiguous and entered summary judgment in Plaintiff's favor. The Third District reversed for entry of judgment in favor of State Farm. Noting the general rule that ambiguity arises when more than one interpretation may be fairly given to a policy provision, the court concluded that the State Farm exclusion was susceptible to only one interpretation, "particularly when it is read in conjunction with the lead in provision of the policy, as it must be." Id. at 245. State Farm's policy excluded loss from **any** earth movement, "**regardless of the cause of the earth movement."**

Id. (emphasis in original). In so holding, the district court twice referred to the "precise language" of State Farm's policy – which had been "previously construed by other courts." Id. at 245.

This exclusion has been upheld,[6] but is generally recognized to be "unique." See Winters v. Charter Oak Fire Ins. Co., 4 F. Supp. 3d at 1291; Chase v. State Farm Fire and Cas. Co., 780 A.2d 1123, 1128 (D.C. Ct. App. 2001); Murray v. State Farm Fire and Cas. Co., 203 W.Va. 477, 509 S.E.2d 1, 13 (W.Va. 1998); see generally Dahlquist, 37 Tort & Ins. L.J. at 956-57 (State Farm's "regardless of cause" form "is the broadest type of earth movement exclusion and is generally understood to exclude coverage for all earth movement"). By its terms, it excludes all earth movement, whether arising from natural or external forces.

In the instant case, Clarendon's policy lacks the "lead in"

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[6] See Rhoden v. State Farm Fire and Cas. Co., 32 F. Supp. 2d 907 (S.D. Miss. 1998), aff'd, 200 F. 3d 815 (5th Cir. 1999); State Farm Fire and Cas. Co. v. Slade, 747 So. 2d 293 (Ala. 1999); State Farm Fire and Cas. Co. v. Bongen, 925 P.2d 1042 (Alaska 1996); Kula v. State Farm Fire and Cas. Co., 212 A.D. 2d 16, 628 N.Y.S.2d 988 (N.Y. 1995); Alf v. State Farm Fire and Cas. Co., 850 P.2d 1272 (Utah 1993); Millar v. State Farm Fire and Cas. Co., 167 Ariz. 93, 804 P.2d 822 (Ariz. Ct. App. 1990); Rodin v. State Farm Fire and Cas. Co., 844 S.W. 2d 537 (Mo. Ct. App. 1992); Schroeder v. State Farm Fire and Cas. Co., 770 F. Supp. 558 (D.Nev. 1991); but see Cox v. State Farm Fire and Cas. Co., 217 Ga. App. 796, 459 S.E. 2d 446 (Ga. 1995); Murray v. State Farm Fire and Cas. Co., 203 W.Va. 477, 509 S.E.2d 1 (W.Va. 1998).

clause in State Farm's policy, which excluded earth movement caused by **both** natural **and external** forces. Clarendon's exclusion is limited to specific listed events, with "earth sinking, moving or shifting," properly limited to the specific type of event which proceeds it – all of which involve catastrophic natural phenomena. Where, as here, there are two reasonable interpretations of the exclusion, the policy is ambiguous, and must be read in favor of coverage for the Fayads' property damage. See Auto Owners Ins. Co. v. Anderson, 756 So. 2d at 33; Prudential Property & Casualty Co. v. Swindal, 622 So. 2d at 470.

Finally, explosion is specifically listed in the policy as a named peril and the Third District, by excluding coverage for personal property damaged by explosion, has simply voided coverage that was specifically listed in that part of the policy.[7] Apparently, the Third District's rationale was to avoid the possibility of interpreting two policy provisions in an inconsistent manner. Although the Court correctly determined that provisions in a contract that appear to be in conflict should be reconciled and harmonized if possible to do so, the Court misapplied Florida law by resolving the apparent

[7] Although the Building/Structure portion of the policy is "all risks", the personal property coverage is "named peril". (App. C).

inconsistency in favor of the insurer, instead of the insureds. Ultimately, reconciling the structure and personal property provisions in favor of the insurer contradicts Florida law. Conflict between clauses in an insurance policy should be resolved in favor of the policyholder. See Dyer v. Nationwide Mut. Fire Ins. Co., 276 So. 2d 6 (Fla. 1973).

In sum, construing this policy correctly leads to coverage for **all** of the Fayads' property damage.

## CONCLUSION

For all of the foregoing reasons, the Third District's decision should be quashed, in favor of the Fourth District's decision, and the case remanded for further proceedings.

Respectfully submitted,

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Undersigned counsel certifies that the size and style of type used in this brief is 12 pt. Courier New.

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