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 REPLY BRIEF ON THE MERITS**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS . . . . . . . . . . . . . . . . . . . . . . . ii

TABLE OF AUTHORITIES . . . . . . . . . . . . . . . . . . . . . iii

OTHER AUTHORITIES . . . . . . . . . . . . . . . . . . . . . . iii

ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . 3

"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 . . . 3

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . 9

CERTIFICATE OF SERVICE . . . . . . . . . . . . . . . . . . . 9

CERTIFICATE OF TYPE SIZE AND STYLE . . . . . . . . . . . . . 10

## TABLE OF AUTHORITIES

Chase v. State Farm Fire and Cas. Co., 780 A. 2d 1123 (D.C. Cir. 2001) . . . . . . . . . . . . . . 7

Dyer v. Nationwide Mut. Fire Ins. Co., 276 So. 2d 6 (Fla. 1973) . . . . . . . . . . . . . . . . . . 8

Paulucci v. Liberty Mutual Fed. Ins. Co., 190 F. Supp. 2d 1312 (M.D. Fla. 2002) . . . . . . . . . . . 1

Peters Tp. School Dist. v. Hartford Acc. and Indem. Co., 833 F.2d 32 (3d Cir. 1987) . . . . . . . . . . . . . . . . . 5

Phoenix Ins. Co. v. Branch, 234 So. 2d 396 (Fla. 4th DCA 1970) . . . . . . . . . . . . 1, 2

Prudential Property & Cas. Inc. Co. v. Swindal, 622 So. 2d 467 (Fla. 1993) . . . . . . . . . . . . . . . . . 8

Reaves v. State, 485 So. 2d 829 (Fla. 1986) . . . . . . . . . . . . . . . . . 1

Stewart v. Preferred Fire Ins. Co., 206 Ken. 247, 477 P.2d 966 (Kan. 1970) . . . . . . . . . . 8

Winters v. Charter Oak Fire Ins. Co., 4 F. Supp. 2d 1288 (D.N. Mex. 1998) . . . . . . . . . . . 7

Wyatt v. Northwestern Mut. Ins. Co. of Seattle, 304 F. Supp. 781 (D. Minn. 1969) . . . . . . . . . . . . . . 5

## OTHER AUTHORITIES

2 Law & Practice of Insurance Coverage Litigation §45:13 (2002) . . . . . . . . . . . . . . . . . . . . . 8

American Heritage Dictionary of the English Language (1975 ed.) . . . . . . . . . . . . . . . . . . . . . . . . 2

Florida Constitution, art. V, §3(b)(3) . . . . . . . . . . . 3

## JURISDICTION[1]

This Court's conflict jurisdiction is dependent on the facts contained within the four corners of the decision. Reaves v. State, 485 So. 2d 829 (Fla. 1986). The Fayad petitioners spent a great deal of time in their initial brief demonstrating that the underlying Third District decision is irreconcilable with the Fourth District's decision in Phoenix Ins. Co. v. Branch, 234 So. 2d 396 (Fla. 4th DCA 1970) ("Phoenix"). (I.B. pp. 4-6). Clarendon Insurance Company ("Clarendon") responds that (1) Phoenix "rests on the efficient proximate cause doctrine;" (A.B. p. 7) and (2) its policy differs from Phoenix' because of a "lead-in provision." (A. B. p. 10). Neither claim is correct.

Clarendon's discussion of "efficient proximate cause" and "concurrent cause" is a red herring, since Phoenix **does not discuss**, let alone, "rest" on either doctrine. (A.B. pp. 3, 7-9) . The basis to defeat jurisdiction is made up of whole cloth. The facts cited do not appear in the Phoenix decision, and Clarendon quotes a different federal case to explain an inapplicable doctrine that Phoenix doesn't mention. (A.B. p.8, citing Paulucci v. Liberty Mutual Fed. Ins. Co., 190 F. Supp. 2d 1312, 1317 (M.D. Fla. 2002)).

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[1] All references are to the Fayads' Initial Brief on the Merits (I.B. p. ), and to Respondent's Answer Brief on the Merits. (A.B. p. ).

In Phoenix, as here, Plaintiffs alleged that that damage to their home was "by reason of blasting activities which resulted in the cracking of the walls, roofs or ceilings." Phoenix, 234 So. 2d at 399. The insurer tacitly agreed, filing a third party action for indemnification against a dredging company, claiming that its explosives (i.e., blasting) produced concussions and vibrations which damaged the insureds' home. Id. at 397. The insurer ultimately dropped its third party claim, and defended on the **sole** basis of earth movement and wear and tear exclusions. The insurer lost at trial, and argued its exclusions on appeal. The Fourth District was "not impress[ed]," and squarely held that plaintiffs' blasting loss "does not fall within the exclusionary provisions of the insurance policy." Id. at 399.

Nor does Clarendon's "lead in" language make these two cases distinguishable. (A.B. p. 9). The Phoenix policy did not insure against loss "caused by, resulting from, **contributing to** or aggravated **by any earth movement**...." Id. at 398. The dictionary definition of "contribute" is "to give or supply in common with others" or "shared responsibility." See American Heritage Dictionary of the English Language (1975 ed.). This language is substantially similar to Clarendon's "lead in provision," which excludes loss from earth movement which

"contributes" concurrently with other causes. (A.B. p.9). Only the linguistic **location** is different; the import of these policy provisions is the same.

In sum, the Third and Fourth District decisions cannot be squared. This creates legal uncertainty affecting insureds and insurers alike. It is **precisely** the type of "conflict" which requires reconciliation by this Court. Fla. Const. art. V, §3(b)(3).

## 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**

As the Court will recall, with regard to dwelling coverage, Clarendon's earth movement exclusion provided:

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

Clarendon asserts that this earth movement exclusion merely "lists several illustrative examples." (A.B. p. 3, 4, 11, 15, 19). The term "meaning" is a term of definition, not example. It conveys a specific intention. In contrast, an "illustrative example" is merely representative. Clarendon's policy **defines** "earth movement" to have a specific "meaning." This definition contains **no** language of enlargement, but is limited to specific itemized and listed natural events.

Clarendon also urges that "[b]oth the Third District and the Fayads miss the mark" by resort to principles of construction, because its policy is "unambiguous." (A.B. p. 17). The majority of authorities in this country, disagree. (See I.B. p. 12-14, and cases collected). They continue to find this type of exclusion ambiguous and limited in application to naturally occurring catastrophes. (I.B. pp. 12-14).[2]

Resorting to geological textbooks, (A.B. pp. 15-16), Clarendon argues that **all** of these cases rest on "baseless" and

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[2] The Third District itself observed that Clarendon's exclusion "enumerated **natural** disasters or perils." Fayad v. Clarendon National Ins. Co., 857 So. 2d 293, 296 (Fla. 3d DCA 2003).

"false assumptions." (A.B. pp. 4, 16). This analysis misses the mark. The present case does **not** turn on whether earthquakes and landslides are natural or "anthropogenic" from a **geological** perspective, (A.B. pp. 15-16), but on how insurance companies generally treat these in their policies, and how Clarendon treated them specifically here. The majority rule treats each of the phenomena listed in Clarendon's exclusion as natural disasters. (I.B. p. pp. 12-14). The reason, explained in the seminal case of Wyatt v. Northwestern Mut. Ins. Co. of Seattle, 304 F. Supp. 781, 782-83 (D. Minn. 1969) is:

> [T]o relieve the insurer from occasional major disasters which are almost impossible to predict and thus to insure against. There are earthquakes or floods which cause a major catastrophe and wreak damage to everyone in a large area rather than on individual policyholder. When such happens, the very basis upon which insurance companies operate is said to be destroyed....

Seeking to avoid this result, Clarendon argues that "mine subsidence" is "exclusively anthropogenic." It cites Peters Tp. School Dist. v. Hartford Acc. and Indem. Co., 833 F.2d 32, 38 (3d Cir. 1987), but ignores the facts and actual holding of the case. (A.B. pp. 4, 14-17).

In Peters, the School District built two schools directly over coal mines. When cracks began to appear in the schools,

the School District sued Hartford. Hartford's earth movement exclusion, defined "earth movement" as "including but not limited to earthquake, landslide, mudflow, earth sinking, earth rising or shifting." Peters, 833 F.2d at 33. It did not include "mine subsidence," within this definition. Hartford **defended** on the basis that the schools were damaged due to "mine subsidence," which it claimed was a "natural phenomena," i.e., the antithesis of the insurer's position here. The District Court agreed, granted Hartford's summary judgment motion, and ruled that "mine subsidence" was a natural disaster **as a matter of law** because any coal mining had been abandoned years ago. Thus, these mines had returned to their "natural state."

On appeal, the Third Circuit reversed. First, it **agreed** with the district court that this earth movement exclusion was "meant to deny coverage for spontaneous, natural, catastrophic earth movement, and not movements brought about by other causes." Id. at 36. Here, however, Hartford's policy did **not** exclude "mine subsidence," and the exclusion had to be read strictly. The District Court's error was in ruling as a **matter of law** that the damage was natural. Peters Township thus does **not** stand for the proposition that "mine subsidence" is "exclusively anthropogenic." Rather, it was an issue of fact for the jury, with respect to one school where causation was

disputed. Causation by “mine subsidence” was admitted by Hartford as to the second school. Since this was **not** an excluded risk, this school received a reversal with directions to enter summary judgment in its favor.

The insurance industry has since cured the problem of “mine subsidence” by endorsement. Where “mine subsidence” is a covered risk, it is used as a term of art with a “natural” meaning. For example, ISO form HO 23 83 03 01, covers “mine subsidence” meaning “the collapse of **inactive** underground coal mines” resulting in damage to a structure. The earth movement exclusion is then made expressly inapplicable to this risk. (App. A, emphasis added).

The instant case arose on summary judgment. In affirming, the district court assumed that “blasting” was the cause of Plaintiffs’ loss, and that Clarendon’s earth movement exclusion applied only to natural disasters. Its error was in reading coverage narrowly, and the exclusion broadly, by resort to an inapplicable rule of construction.

Relying heavily on Chase v. State Farm Fire and Cas. Co., 780 A. 2d 1123 (D.C. Cir. 2001), Clarendon argues that the State Farm lead-in provision controls. (A.B. p. 21). State Farm’s “lead-in” provision indicated that it did not insure for certain losses regardless of (a) the cause of the excluded event; (b)

other causes of loss; (c) whether other causes acted concurrently or in any sequence with the excluded event; or (d) whether the event arises from natural or external forces, or ... as a result of any combination of these. Chase 780 A. 2d at 1125. One of these excluded losses was "earth movement," meaning "the sinking rising, shifting, expanding or contracting of earth, all whether combined with water or not." A water pipe burst following a freeze, a drainage pipe failed to drain, and this caused significant damage to Chase' home. Chase claimed that State Farm's "lead-in" provision was itself ambiguous. The appellate court disagreed, aligning itself with the "large majority" of courts which deemed State Farm's "unique" language valid. Id..

More on point to the instant case is Winters v. Charter Oak Fire Ins. Co., 4 F. Supp. 2d 1288 (D.N. Mex. 1998), which is based on the same lead-in clause found in Clarendon's policy and a similar earth movement exclusion. The District court agreed with the insureds that the "lead-in" provision could not broaden the exclusion, unless the event at issue first came within the definition of "earth movement."

Here, there was nothing to prevent Clarendon from drafting an exclusion similar to State Farm's. Having failed to do so, it cannot imply this language into its policy now.

Clarendon also relies heavily on Stewart v. Preferred Fire

Ins. Co., 206 Ken. 247, 477 P.2d 966 (Kan. 1970). While not identified as such in Clarendon's brief, Stewart reflects the minority view. See 2 Law & Prac. of Ins. Coverage Litigation §45:13 (2002) (majority of courts limit earth movement exclusion to natural earth movement, and not manmade events, while Kansas and Washington provide the minority view). It engendered a vigorous dissent. See Stewart, 477 P. 2d at 969 (Fatzer, J. dissenting).

Finally, the parties are in agreement that the personal property coverage is "named peril," not all risk. (A.B. pp. 22-23). Where a coverage provision conflicts with a policy exclusion, settled law requires the coverage provision to prevail. See Dyer v. Nationwide Mut. Fire Ins. Co., 276 So. 2d 6 (Fla. 1973); Prudential Property & Cas. Inc. Co. v. Swindal, 622 So. 2d 467 (Fla. 1993). Here, "explosion" is an expressly covered peril. Try though it might, Clarendon cannot explain how its earth movement exclusion defeats coverage for an expressly listed named peril. The District Court's decision was clearly wrong.

**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.

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