



# NEW AND NOTEWORTHY FOR Insurance Coverage

## PIONEER DISTINGUISHED: “EARTH MOVEMENT” EXCLUSION APPLIES TO EXCAVATION WORK

On October 25, the Court of Appeals issued its decision in Bentoria Holdings, Inc. v. Travelers Indemnity Co., 2012 N.Y. Slip Op. 7141 (2012), holding that an “earth movement” exclusion in a first-party property policy applies to damage caused by excavation work on property adjacent to the insured premises. This decision distinguishes the Court’s earlier decision in Pioneer Tower Owners Assoc. v. State Farm Fire & Cas. Co., 12 N.Y.3d 302 (2009), which found that an earth movement exclusion in a similar policy did not unambiguously apply to damage caused by excavation because the exclusion’s examples of earth movement (e.g., earthquake, landslide, erosion, subsidence) were arguably different in kind than damage caused by the intentional removal of earth.

In contrast, the “earth movement” exclusion at issue in Bentoria expressly refers to man-made causes. The exclusion states, in relevant part:

We will not pay for loss or damage caused directly or indirectly by any of the following . . .

b. Earth Movement

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- (4) Earth sinking (other than sinkhole collapse), 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;

*All whether naturally occurring or due to man made or other artificial causes.*

(emphasis added).

The Court of Appeals in Bentoria distinguished Pioneer based on this additional language, stating:

The plaintiff in *Pioneer* argued that the policy did not clearly exclude “an excavation – the intentional removal of earth by humans”. We found that argument to be “reasonable”, and therefore held that the earth movement exclusion “did not unambiguously remove” excavation damage from the coverage of the policy. But the same argument is not available to plaintiff here. By expressly excluding earth movement “due to man made or artificial causes” the policy contradicts the idea that “the intentional removal of earth by humans” is not an excluded event. This policy cannot reasonably be read to cover the damage on which plaintiff’s claim is based.

The Court of Appeals decisions in Bentoria and Pioneer frame the distinction between earth movement exclusions that apply to man-made or artificially caused damage and those that do not. As such, Bentoria does not overrule Pioneer, which remains in effect for exclusions that do not sufficiently refer to man-made damage such as that caused by excavation work. However, Bentoria confirms that the Court of Appeals’ decision in Pioneer was based on the language of the exclusion in that case, and reflects that exclusions written to apply to construction-related earth movement will be enforced.