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This opinion is uncorrected and subject to revision before  
publication in the New York Reports.  
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No. 160  
Bentoria Holdings, Inc.,  
Respondent,  
v.  
Travelers Indemnity Company,  
Appellant,  
et al.,  
Defendants.

Stephen M. Lazare, for appellant.  
John V. Decolator, for respondent.  
American Insurance Association et al., amici curiae.

SMITH, J.:

In Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co. (12 NY3d 302 [2009]), we held that an "earth movement" exclusion in an insurance policy did not unambiguously apply to excavation. We now confront a policy in which a similar exclusion is expressly made applicable to "man made" movement of

earth. We hold that this added language eliminates the ambiguity, and that loss caused by excavation is excluded from the policy.

Travelers Indemnity Company issued to plaintiff an insurance policy covering "direct physical loss of or damage to" a building in Brooklyn. Under the heading "EXCLUSIONS," the policy said:

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

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"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."

The building suffered cracks as a result of an excavation being conducted on the lot next door to it. Plaintiff submitted a claim, which Travelers rejected, relying on the earth movement exclusion. Plaintiff sued for breach of the policy. Supreme Court denied Travelers' motion for summary judgment; the Appellate Division affirmed (Bentoria Holdings, Inc. v Travelers Indem. Co., 84 AD3d 1135 [2d Dept 2011]), but granted leave to

appeal to this Court. We now reverse.

Pioneer was in most respects virtually identical to this case. The defendant there insured a building against "accidental direct physical loss" (12 NY3d at 305); the building suffered cracks and other damage as a result of an excavation on an adjoining lot. The defendant refused to pay, relying on an earth movement exclusion very similar to the one quoted above, with the distinction that the last words of the earth movement exclusion here -- "All whether naturally occurring or due to man made or other artificial causes" -- were absent in Pioneer.

The plaintiff in Pioneer argued that the policy did not clearly exclude "an excavation -- the intentional removal of earth by humans" (id. at 308). We found that argument to be "reasonable" (id.), and therefore held that the earth movement exclusion "did not unambiguously remove" excavation damage from the coverage of the policy (id. at 305). 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.

Accordingly, the order of the Appellate Division should be reversed, with costs, the motion of Travelers Indemnity Company for summary judgment dismissing the complaint as against it granted, and the certified question answered in the negative.

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Order reversed, with costs, the motion of Travelers Indemnity Company for summary judgment dismissing the complaint as against it granted, and certified question answered in the negative. Opinion by Judge Smith. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Decided October 25, 2012