



Overcoming That Sinking Feeling

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The recent rainstorms in California rightly have been hailed as the end of a lengthy drought. The inches of rain which fell in the span of a week have filled reservoirs and raised the water table in the parched ground. Such a large volume of water, however, increases the danger of landslides in California's notoriously unconsolidated hillsides and bluffs, and with it, the possibility of disputes over whether particular ground movement claims are covered by their liability policies.

Let's look at a hypothetical example. XYZ Construction is laying pipes under an existing street at the top of a bluff. In the course of digging trenches to hold the pipes, one of XYZ's diggers accidentally breaks the water main line. Water spurts out of the main line, quickly fills the trench, and spills across the ground toward the top of the bluff. Several hours later, the saturated bluff, already weakened by rain, collapses onto a building below, causing severe damage to the structure. The owner of the damaged structure files a lawsuit against XYZ. XYZ, like virtually all construction contractors, has purchased commercial general liability (CGL) insurance. CGL policies insure the policyholder's liability for bodily injury or property damage, and provide it with a defense against claims asserting such liability. XYZ's insurer refuses to defend it against the third-party claim, noting that the policy has an earth movement exclusion. Under that exclusion, there is no coverage for liability arising out of "the subsidence of land or earth movement, including landslide,

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earthquake, mudflow, earth sinking, earth rising or earth shifting.” The insurance company notes that, because the claim against XYZ clearly arises out of earth movement, there is no possibility of coverage. Is the insurance company correct?

Many CGL policies have earth movement exclusions. The placement of such exclusions in CGL policies is a frequent source of friction between insurance companies and policyholders, because if applicable they can defeat coverage of a substantial source of bet-the-company-size liability. Not surprisingly, the scope of earth movement exclusions has been heavily litigated. Earth movement exclusions can vary widely between insurance companies. As it turns out, these differences can make or break the insurance company’s coverage defense.

Where an earth movement exclusion contains express language making it applicable without regard to cause, courts have applied them broadly to defeat coverage. However, where the exclusion does not have such language, courts have been less willing to apply them to earth movement attributable to human causes, as CGL policies by their nature insure against accidents. This is especially the case where the exclusion lists examples of earth movement that are best characterized as natural, such as landslides, mudflows, earthquakes, and so on. In such circumstances, many – though not all – courts read the exclusion to be ambiguous, and under the rules of insurance policy construction, resolve interpretation of the exclusion in favor of coverage.