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COURT OF APPEALS

STATE OF NEW YORK

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BENTORIA HOLDINGS, INC.,  
Respondent,

-against-

TRAVELERS INDEMNITY COMPANY,  
Appellant  
-----

No. 160

20 Eagle Street  
Albany, New York 12207  
September 6, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

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Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Bentoria Holdings?

2 MR. LAZARE: Yes.

3 CHIEF JUDGE LIPPMAN: Do you want any  
4 rebuttal time, counsel?

5 MR. LAZARE: Two minutes, please, Your  
6 Honor.

7 CHIEF JUDGE LIPPMAN: Okay. You're on.

8 MR. LAZARE: Good afternoon, Your Honors.  
9 Steve Lazare for Travelers Indemnity.

10 The issue here is whether a first-party  
11 property insurance policy's earth movement exclusion  
12 in its current form applies to excavation-related  
13 loss, or at least a loss that in part - - -

14 CHIEF JUDGE LIPPMAN: What does man-made or  
15 not mean?

16 MR. LAZARE: Well, the sentence at the end,  
17 Your Honor, of subparagraph 4, the one that you're  
18 referring to - - -

19 CHIEF JUDGE LIPPMAN: Whatever it says  
20 about man-made there.

21 MR. LAZARE: It says this exclusion applies  
22 to earth movement, it lists that, regardless of what  
23 causes it. And it says "be it artificial, man-made"  
24 - - -

25 CHIEF JUDGE LIPPMAN: Right.

1 MR. LAZARE: - - - whatever.

2 CHIEF JUDGE LIPPMAN: What's the  
3 significance of that in relation to an excavation  
4 kind of - - -

5 MR. LAZARE: Well, an excavation - - -

6 CHIEF JUDGE LIPPMAN: - - - situation.

7 MR. LAZARE: Earth movement due to  
8 excavation fairly describes as attributed to an  
9 artificial, man-made event as opposed to a natural  
10 event like an earthquake or a landslide.

11 JUDGE GRAFFEO: Why doesn't the policy just  
12 say "excavation" if that's what it's aimed at?

13 MR. LAZARE: Well, it's only one of the  
14 things it's aimed at, Your Honor. It's intended as a  
15 broad exclusion pertaining to all forms of earth  
16 movement. It lists various examples, but  
17 subparagraph 4 fairly described as a catchall.  
18 Subparagraph 1 refers to earthquakes; subparagraph 2  
19 refers to landslides; subparagraph 3 refers to mine  
20 subsidence; and subparagraph 4, then, refers to any  
21 shifting, rising, sinking - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but wasn't - -  
23 - this case comes up after Pioneer, right?

24 MR. LAZARE: Yes, Your Honor.

25 CHIEF JUDGE LIPPMAN: Why couldn't it have

1           been changed to say "excavation"?

2                   MR. LAZARE:   Well - - -

3                   CHIEF JUDGE LIPPMAN:   I mean, why - - - if  
4           that's the meaning, it would seem such an obvious  
5           thing to do.

6                   MR. LAZARE:   I guess, Your Honor, if you -  
7           - - I mean, where do you stop then?  If you list  
8           excavation and then we're here on - - -

9                   CHIEF JUDGE LIPPMAN:   No, but I'm saying  
10          there's a specific case that we had that - - -  
11          relating to that; if the meaning is to be  
12          unambiguous, why couldn't that have been put in - - -

13                   MR. LAZARE:   Well - - -

14                   CHIEF JUDGE LIPPMAN:   - - - by insurers?

15                   MR. LAZARE:   - - - I suppose that could  
16          happen going down the road.  This actually came out -  
17          - - this - - -

18                   JUDGE CIPARICK:   Policy, right?

19                   MR. LAZARE:   This dispute, this policy was  
20          before Pioneer.

21                   CHIEF JUDGE LIPPMAN:   The policy itself was  
22          written before Pioneer?

23                   MR. LAZARE:   Oh, yes, Your Honor, yes.  But  
24          - - -

25                   CHIEF JUDGE LIPPMAN:   And today, though, it

1 still hasn't been changed, though, right?

2 MR. LAZARE: Not that I know of. But the  
3 policies were changed, in response to cases like  
4 Pioneer, to include artificial, man-made - - -

5 CHIEF JUDGE LIPPMAN: Yeah, well, that's  
6 why I asked you to begin with.

7 MR. LAZARE: Right.

8 CHIEF JUDGE LIPPMAN: That conveys a  
9 certain thought - - -

10 MR. LAZARE: Yes, sir.

11 CHIEF JUDGE LIPPMAN: - - - man-made or  
12 not.

13 MR. LAZARE: Right.

14 CHIEF JUDGE LIPPMAN: And it doesn't - - -  
15 the policy, it doesn't talk about sudden or gradual?

16 MR. LAZARE: It doesn't specifically say  
17 sudden or gradual, but there are examples of both,  
18 illustrative examples of both in the exclusion. I  
19 mean, an earthquake is certainly not necessarily  
20 gradual.

21 CHIEF JUDGE LIPPMAN: You think it's  
22 unambiguous, though - - -

23 MR. LAZARE: I do, Your Honor.

24 CHIEF JUDGE LIPPMAN: - - - the provision.

25 MR. LAZARE: I think it is unambiguous. I

1 don't think - - - you know, the provision starts with  
2 an anti-concurrent lead-in, which means any one of  
3 the causes that follows, any one of them, if they had  
4 any effect, even if there were other nonexcluded  
5 causes to the loss, the exclusion is triggered - - -

6 JUDGE CIPARICK: And you think it's clear,  
7 it's clear and unambiguous to you - - - it's clear  
8 and unambiguous - - -

9 MR. LAZARE: Oh, yes, Your Honor.

10 JUDGE CIPARICK: - - - that it would  
11 exclude an excavation?

12 MR. LAZARE: Yes, Your Honor, because at  
13 the end, subparagraph 4 refers to any sinking,  
14 rising, shifting of earth, and then it says "whether  
15 natural, artificial or man-made".

16 One of the initial questions that was asked  
17 and one of the questions brought up in the briefing  
18 here is, why isn't excavation specifically listed and  
19 why isn't sandblasting specifically - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but doesn't  
21 excavation have a little different meaning than  
22 rising, falling, whatever the different terms are  
23 that would be those kind of gradual situations?

24 JUDGE CIPARICK: Sinking, right?

25 CHIEF JUDGE LIPPMAN: Why - - - you know

1           what I mean?  It's a little different concept than  
2           the shifting, rising one that happens on land, right?

3                       MR. LAZARE:  Well, Your Honor, I don't  
4           think so.  The policy refers - - - uses that phrase,  
5           "sinking, rising, and shifting" in several places.  
6           It uses it right next to earthquakes.  It uses it  
7           right next to landslides.  And then it uses it in the  
8           catchall provision at the end.  There's nothing in  
9           this exclusion to suggest that this is referring only  
10          to a gradual phenomenon.  In fact, probably more the  
11          opposite.

12                       And when you think about excavation, now,  
13          if you - - - plaintiff in this case, quoting from  
14          their own underlying papers, contends "that the  
15          damages to the building were caused in large part by  
16          excavation activities at an adjacent property."  So  
17          if you picture that, excavation happening at an  
18          adjacent property, that necessarily involves the  
19          movement of earth.

20                       Now, earth can move in one of three ways.  
21          It can rise, which means it goes up.  It can sink,  
22          which means it goes down.  Or it shifts, which means  
23          it goes side to side.  When you couple that language  
24          with the clarifying sentence at the end, "all,  
25          whether due to natural, man-made, or artificial

1 causes", I don't think it's reasonable to read this  
2 provision to exclude earth movement that at its  
3 beginning might have been caused, at some point along  
4 the chain, by sandblasting, soil compaction,  
5 excavation or any other sort of mechanical event that  
6 caused the earth to move. I think that's the plain  
7 intent of that provision.

8 And as to why it doesn't specifically list  
9 excavation, it's because what they're trying to do  
10 here is not limit themselves by listing too many  
11 examples. That catchall provision at the end - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but you know  
13 that exclusions are construed narrowly. I mean, so  
14 it's got to be clear.

15 MR. LAZARE: Yes, Your Honor, I think it's  
16 - - -

17 CHIEF JUDGE LIPPMAN: Is that the only  
18 possible interpretation you can make of that  
19 language?

20 MR. LAZARE: I think so, Your Honor. I  
21 think it is - - - I would state that just because an  
22 exclusion is broad doesn't mean that it's ambiguous.  
23 This is admittedly a broad exclusion, but it's  
24 unambiguous in its breadth.

25 JUDGE CIPARICK: So both courts below are



1 wrong - - -

2 MR. LAZARE: I'm sorry, Your Honor?

3 JUDGE CIPARICK: - - - in finding that  
4 there was an ambiguity here?

5 MR. LAZARE: The Appellate Division, the  
6 Second Department - - -

7 JUDGE CIPARICK: Right.

8 MR. LAZARE: - - - found that it was not  
9 clear, right, Your Honor, and we disagree with that  
10 holding.

11 JUDGE GRAFFEO: Well, are you saying the  
12 excavation falls under the man-made or the other  
13 artificial causes?

14 MR. LAZARE: It could be either, Your  
15 Honor. It could be either. I think that - - - you  
16 know, it's just not a natural cause.

17 JUDGE SMITH: Out of curiosity, how can you  
18 be artificial and not man-made? Is there something  
19 other than a man who can make an artificial cause?

20 MR. LAZARE: I'm not sure, but I think the  
21 intent of that sentence is to - - - you know, it's a  
22 response to cases not just out of New York, but cases  
23 elsewhere that have suggested that it wasn't clear  
24 whether or not this exclusion applied to unnatural  
25 man-made phenomenon. It can - - -

1 JUDGE CIPARICK: So if it's not clear to  
2 you, how could it be clear to the policyholder? I  
3 mean - - -

4 MR. LAZARE: No, it's clear now.

5 JUDGE CIPARICK: - - - a policyholder's  
6 expectations - - -

7 MR. LAZARE: It's clear. Your Honor, this  
8 exclusion, the one before the Court now, was  
9 clarified in response to those cases to show that it  
10 does apply to - - -

11 JUDGE CIPARICK: But it was not clarified  
12 further in response to Pioneer?

13 MR. LAZARE: No, it - - - again, this  
14 policy was issued - - - it's clarified - - -

15 JUDGE CIPARICK: You said 4?

16 MR. LAZARE: - - - in response to cases  
17 that have expressed a similar rationale to Pioneer.

18 CHIEF JUDGE LIPPMAN: Would you charge - -  
19 -

20 MR. LAZARE: Just the time - - -

21 CHIEF JUDGE LIPPMAN: Would you charge them  
22 more if they want to have excavation included?

23 MR. LAZARE: That's exactly right, Your  
24 Honor.

25 CHIEF JUDGE LIPPMAN: Do you do that?

1 MR. LAZARE: That - - -

2 CHIEF JUDGE LIPPMAN: Do your policy - - -

3 MR. LAZARE: Yes, Your Honor, they would  
4 typically buy an endorsement that takes the exclusion  
5 out. And they didn't do that.

6 CHIEF JUDGE LIPPMAN: Oh, I see, on that -

7 - -

8 MR. LAZARE: Yes.

9 CHIEF JUDGE LIPPMAN: - - - particular  
10 thing, yeah.

11 MR. LAZARE: Right, you take - - -

12 CHIEF JUDGE LIPPMAN: But you don't have a  
13 policy that just, in its normal course, says - - -

14 MR. LAZARE: I suppose I'm not sure if that  
15 product exists, but the way I've typically seen it is  
16 - - -

17 CHIEF JUDGE LIPPMAN: That they do a - - -

18 MR. LAZARE: Yeah, they slap an endorsement  
19 on it and that removes the earth movement exclusion.  
20 And they didn't opt for that here.

21 CHIEF JUDGE LIPPMAN: Okay. Anything else,  
22 counsel?

23 MR. LAZARE: No, not unless the Court has  
24 any questions.

25 CHIEF JUDGE LIPPMAN: Okay. You'll have

1 your rebuttal.

2 MR. LAZARE: Thank you.

3 CHIEF JUDGE LIPPMAN: We'll come back to  
4 you.

5 Counsel?

6 MR. DECOLATOR: Good afternoon, Your  
7 Honors. I'm John Decolator. I represent Bentoria  
8 Holdings. And with me is John Lerner from Lerner,  
9 Arnold & Winston.

10 CHIEF JUDGE LIPPMAN: What does man-made  
11 mean?

12 MR. DECOLATOR: Man-made could easily refer  
13 to some human act, if it's set in motion, the gradual  
14 rising, sinking and shifting - - -

15 CHIEF JUDGE LIPPMAN: So you would link it  
16 to the gradual kind of situation - - -

17 MR. DECOLATOR: Yes.

18 CHIEF JUDGE LIPPMAN: - - - because it  
19 doesn't say "gradual or sudden"?

20 MR. DECOLATOR: Anyone who speaks English  
21 as a first language, reading this clause - - - most  
22 people think of earth rising, sinking or shifting - -  
23 -

24 CHIEF JUDGE LIPPMAN: Do you think all the  
25 things relate to that kind of situation?

1 MR. DECOLATOR: I'm sorry, Judge?

2 CHIEF JUDGE LIPPMAN: You think everything  
3 else in the policy in that section refers to the  
4 rising, shifting, whatever - - -

5 JUDGE CIPARICK: Sinking.

6 CHIEF JUDGE LIPPMAN: - - - sinking - - -

7 MR. DECOLATOR: That paragraph 4 refers to  
8 earth rising, sinking and shifting.

9 CHIEF JUDGE LIPPMAN: Right.

10 MR. DECOLATOR: I think any - - -

11 JUDGE SMITH: Well, what is man-made  
12 shifting of earth if it's not excavation?

13 MR. DECOLATOR: No, it says "due to man-  
14 made causes or artificial" - - -

15 CHIEF JUDGE LIPPMAN: What is that?

16 MR. DECOLATOR: A man-made cause could be  
17 something that humans did: a broken water pipe,  
18 removing trees that caused erosion, anything that set  
19 in motion the sinking, rising and shifting of the  
20 earth.

21 JUDGE SMITH: Well, you said removing trees  
22 would be excluded? Earth movement resulting from the  
23 removal of trees would be excluded?

24 MR. DECOLATOR: Right, right.

25 JUDGE SMITH: Not from the removal of

1 earth?

2 MR. DECOLATOR: No. Judge, I don't think  
3 anyone reading - - - thinking that - - - reading that  
4 sentence, "earth rising, sinking and shifting" thinks  
5 of excavation as a part of that. If I drive by a big  
6 construction site and I see a huge pit in the ground  
7 that they've just excavated to put a foundation in,  
8 no one is going to say, oh, look at the way the earth  
9 rose, shifted or sank.

10 JUDGE SMITH: Even - - - but if the  
11 sentence said "earth moving, rising, and shifting,  
12 including from man-made causes", wouldn't you think,  
13 oh, gee, there's some earth being moved by man-made  
14 causes?

15 MR. DECOLATOR: I'm saying it's a gra - - -  
16 the implication here is a gradual process. So the  
17 man-made cause could be something man-made that set  
18 that process in motion.

19 Second of all, I think Pioneer governs  
20 here.

21 CHIEF JUDGE LIPPMAN: What if it said - - -  
22 used the term "external forces" and included both  
23 sudden or gradual? Then it would be excluded?

24 MR. DECOLATOR: Well, then, for example,  
25 you have a situation that - - -

1 CHIEF JUDGE LIPPMAN: Or it wouldn't be  
2 excluded.

3 MR. DECOLATOR: - - - you had in Brice,  
4 which is a federal case.

5 CHIEF JUDGE LIPPMAN: That's what I'm  
6 asking. Is the language in Brice a different  
7 situation or - - -

8 MR. DECOLATOR: I think it's more arguable  
9 because then you're talking about external forces  
10 that clearly say "sudden" as opposed to "gradual".  
11 You could certainly make a stronger case for that.

12 But as one of the judges pointed out, why  
13 not just say excavation? You have no problem saying  
14 earthquake, volcano, landslide, mine subsidence.  
15 When they want to talk about sudden events, they're  
16 very capable of doing it.

17 JUDGE GRAFFEO: How - - -

18 MR. DECOLATOR: Those are all - - -

19 JUDGE GRAFFEO: How sudden was this damage  
20 - - -

21 MR. DECOLATOR: This is - - -

22 JUDGE GRAFFEO: - - - in a time sequence  
23 from when the excavation occurred?

24 MR. DECOLATOR: I'm glad you brought that  
25 up. The earth here didn't rise, sink or shift. It

1 was removed and the cracks formed immediately. If  
2 you look at their own expert's report, page 189, he  
3 tells you, "Soil was dug out. It's displaced during  
4 the underpinning. It's removed from the south wall,  
5 removing all lateral support for the south wall."  
6 And as a result then the - - - as a result, the walls  
7 had no support anymore. The absence of soil is not a  
8 soil condition, it's not a rising, sinking or  
9 shifting; there's no more soil. That's certainly not  
10 contemplated by the earth movement exclusion.

11 I think including excavation in the phrase  
12 "earth sinking, rising and shifting", just strains  
13 the language to the breaking point. And certainly  
14 the absence of soil is not a soil condition.

15 Like I said, when they want to exclude  
16 sudden things, like earthquakes and landslides, they  
17 do it very clearly. So I think Pioneer still governs  
18 here because that conclusion of that phrase "man-  
19 made" doesn't change anything.

20 In Pioneer you also had a leading clause,  
21 like you do here, which said regardless of the cause  
22 these excluded events are excluded. That leading  
23 clause could certainly include man-made events. You  
24 had that in Pioneer, and yet this Court found an  
25 ambiguity and denied summary judgment.



1 CHIEF JUDGE LIPPMAN: Assuming we agreed  
2 with you, why can't they get a severance?

3 MR. DECOLATOR: There's no substantial  
4 prejudice here, Judge. How is a jury - - - just  
5 because you've got noninsurance defendants, the  
6 contractors in the case, why is a jury any more  
7 likely to find coverage than they would if the case  
8 was only tried against Travelers?

9 JUDGE PIGOTT: Don't you get to ask - - -

10 MR. DECOLATOR: It's not just - - -

11 JUDGE PIGOTT: Don't you get to ask the  
12 insurance question? You know, when you're picking a  
13 jury, you know, and all these, do you or anyone in  
14 your immediate family own, have stock in a company  
15 that writes liability insurance, giving everybody on  
16 the jury the impression that there's no harm if we  
17 find for the plaintiff because the insurance  
18 company's going to pay. In this one you've got a  
19 flag sticking up in the middle of the defense table  
20 saying Travelers Insur - - - or an umbrella, I should  
21 say.

22 JUDGE CIPARICK: Right.

23 MR. DECOLATOR: But Judge, the case against  
24 Travelers is against an insurance company. How could  
25 the jury not know this is a - - -

1 JUDGE PIGOTT: Well, you can sever it and  
2 then you don't have to worry about that.

3 MR. DECOLATOR: But you still have a case  
4 against - - - the jury's still going to know there's  
5 insurance involved, whether you have those corporate  
6 def - - - the contractors or not. There's no getting  
7 around the fact that there's insurance involved in  
8 this case. So I can't imagine how a jury's more  
9 likely to find coverage. If anything, they're  
10 probably less likely because now they've got other  
11 defendants to put liability on, as opposed to trying  
12 the case just against Travelers. So I don't think  
13 the Court abused its discretion at all in denying  
14 that severance motion which is the standard.

15 Unless there are any other questions - - -

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. DECOLATOR: Thank - - -

18 CHIEF JUDGE LIPPMAN: Thank you, counsel.

19 MR. DECOLATOR: Thank you, Judge.

20 CHIEF JUDGE LIPPMAN: Rebuttal, counsel?

21 MR. LAZARE: I'll be very brief.

22 JUDGE CIPARICK: Do you want to address the  
23 severance issue? Can you address the severance  
24 issue?

25 MR. LAZARE: Sure, I'll be - - -



1 things. In terms of the gradualness of this, I think  
2 it's very apparent, very clear, very unambiguous from  
3 the exclusion itself that sinking, rising and  
4 shifting is not limited to something gradual.

5 Subparagraph 1 refers to earthquakes,  
6 including sinking, rising and shifting resulting  
7 therefrom; landslides, including sinking, rising and  
8 shifting arising therefrom. Neither of those are  
9 gradual events.

10 Paragraph 4 again refers to earth sinking,  
11 rising and shifting. There's no reason why it would  
12 take on a different meaning in one subparagraph than  
13 it would in the other subparagraphs. It could be  
14 sudden. It could be gradual. There's nothing here  
15 limiting that.

16 And in fact, one of the events that is  
17 excluded - - - that is excepted from subparagraph 4  
18 is sinkhole collapse, which is a sudden event. If  
19 this did not apply to sudden events, why would you  
20 except that one sudden event.

21 CHIEF JUDGE LIPPMAN: It's different from  
22 Brice, this case, the language is?

23 MR. LAZARE: It's different, but I don't  
24 think materially different. I think it's actually  
25 stronger than Brice because Brice refers to external

1 events. This refers to man-made artificial events.  
2 I think this is arguably more - - -

3 CHIEF JUDGE LIPPMAN: Well, Brice also  
4 refers to sudden or gradual, right?

5 MR. LAZARE: Brice specifically says  
6 "whether sudden or gradual". I think this provision,  
7 fairly read, includes sudden or gradual. I think it  
8 does, because how else can you describe the use of  
9 sinking, rising and shifting in the context of  
10 earthquakes.

11 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
12 counsel.

13 MR. LAZARE: Thank you.

14 CHIEF JUDGE LIPPMAN: Thank you both.

15 (Court is adjourned)

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I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Bentoria Holdings, Inc. v. Travelers Indemnity Company, No. 160 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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