THE FLORIDA SUPREME COURT

CARLOS FAYAD AND DORA FAYAD,

Petitioners,

v.

CASE NO.: 3D02-2447

S. Ct. Case No.: SC03-1808

CLARENDON NATIONAL INSURANCE COMPANY

Respondent.

_____/

ON PETITION FROM THE
THIRD DISTRICT COURT OF APPEAL

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF THE POSITION OF PETITIONERS

United Policyholders has sought leave of court to file this amicus curiae brief.

WILLIAM F. MERLIN, JR., ESQ.
Florida Bar No.: 364721
MARY E. KESTENBAUM, ESQ.
Florida Bar No.: 114596
777 So. Harbour Island Blvd., Suite 950
Tampa, FL 33602
Telephone: (813) 229-1000
Facsimile: (813) 229-3692
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

CASE LAW

PAGE

OTHER AUTHORITIES

INTRODUCTION

United Policyholders, a non-profit organization dedicated to educating the public on insurance issues and consumer rights, submits this Brief in support of the position of the Petitioners.

United Policyholders hopes that its efforts can be of assistance to both counsel and this Court, by focusing its analysis on the public policy considerations associated with first-party insurance coverage issues, and by bringing to this Court's attention the broader implications associated with the issues of insurance policy interpretation. As a public interest organization, United Policyholders' goal is to assist and to educate the public and courts across the United States on the question of policyholders' insurance rights, and to promote greater understanding of insurance-related issues.

SUMMARY OF ARGUMENT

The Third District Court of Appeal improperly analyzed the insurance policy exclusions at issue, and as a result, erroneously found that the policy's exclusion for earth movement precludes coverage as a matter of law.

Courts and legislators recognize that the business of insurance is different from other commercial enterprises, and that the consuming public is particularly vulnerable in dealings with insurers. Significantly, insurance policies are complicated and adhesionary commercial contracts. As a result, specific rules of

policy interpretation exist so as to allow for consistency in dealings with standardized insurance policies. In this case, the homeowners insurance policy issued to the Fayads was a standardized Insurance Services Office form policy.

The law favors coverage where any question exists as to the meaning of policy language. Thus, policy language that might not ordinarily be considered unclear can be found ambiguous in the context of an insurance policy.

With respect to the policy language at issue in this matter, the Third District applied Florida's rules of insurance policy interpretation in a way that actually broadened the policy exclusion, which is an improper application of these standards. Unless this court reverses the decision and rejects that improper reasoning, consistency in policy interpretation will not be the norm, and the built-in protections for policyholders will be eviscerated.

ARGUMENT

I. The Business of Insurance Serves the Public Trust. Courts and Legislatures Recognize the Unique Nature of the Insurance Business.

The field of insurance is different from any other business involving commercial contracts, based on its high degree of interaction with a potentially vulnerable portion of the consuming public. As explained in an insurance industry treatise, *The Legal Environment of Insurance* in its chapters on Insurance Contract Law:

Public Interest

> Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance is a *business affected with a public interest,* as reflected in legislative and judicial decisions.
>
> State laws restrict contractual rights for insurers in the public interest. For example, insurers cannot consider an applicant's race or religion in determining acceptability or rate classification. Many jurisdictions have adopted legislation limiting the insurers' rights to reject, cancel, or refuse to renew certain types of insurance….

James J. Lorimer, *The Legal Environment of Insurance,* 179 (4th ed. 1993).

The insurance industry is highly regulated, in part, because of the public importance of insurance in today's modern society. From one industry expert's perspective:

> Because the essence of the insurance contract is a promise to provide benefits in the future, perhaps years after the premiums are paid, the essence of insurance regulation is the enforcement of that promise in real, practical terms by making certain that insurers have adequate, liquid funds to pay claims, whether days or decades after the corresponding premiums have been paid In addition to solvency, insurance regulation is largely devoted to making certain that all legitimate needs for insurance are met, and to promoting fairness and equity on the part of insurers in their dealings with policyholders and claimants, with regard to the content of policies, premium classifications and rates, and marketing and claim practices.

Peter M. Lencsis, *Insurance Regulation in the United States, an Overview for Business and Government,* p. viii (Quorum Books 1997).

Courts throughout the country and state departments of insurance recognize this public importance of insurance contracts, as well as the vulnerability of

consumers in dealing with insurance companies and the policies those companies sell. The regulatory scheme surrounding insurance has a long history and its effect and importance are widely accepted.

> …[R]egulation of the insurance industry is necessary. As the United States Supreme Court has long recognized, insurance is a business coupled with a public interest. Consumers invest substantial sums in insurance coverage in advance, but the value of the insurance lies in the future performance of the various contingent obligations. Because the interests protected are so important – including an individual's future ability to provide for dependents in case of death or injury, to retire, to obtain necessary medical treatment, to replace damaged or destroyed property – regulation of the industry furthers public welfare. Related reasons for insurance regulation center on the complexity of insurance and consumers' inability to obtain and understand information about insurance. Consumers are ill-equipped to assess a company's future solvency, to compare the coverage of various policies, or to evaluate a company's claim service. Theoretically, government regulation of insurance eliminates these problems. Regulation can ensure solvency and the insurer's ability to pay claims in the future, standardize policy coverage, require minimum coverage, and require fair claims processing.

Susan Randall, *Article: Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners.* 26 Fla. St. U.L. Rev. 625, 627 (1999)(footnotes omitted).

The federal government recognizes that states must regulate the insurance industry. According to the McCarran-Ferguson Act, the business of insurance will be subject to state law:

> …Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be

> construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011.

Because of this unique nature of insurance, courts and legislators have promulgated a specialized field of common law and numerous safeguards, rules, statutes, and regulations to provide protection to consumers. Most law schools teach "insurance law" as a specialized study.

II. Insurance Contracts are Complicated and Adhesionary. The Public Needs the Protection of Specific Rules of Insurance Policy Interpretation.

The complex nature of insurance was explained in *The Legal Environment of Insurance* as follows:

> "**Flood of Darkness"**
>
> In reviewing the language of a fire insurance policy in 1873, a court stated as follows:
>
> > Whether [people] ought to be what they are, or not, the fact is, that in the present condition of society, men in general cannot read and understand these insurance documents…Forms of applications and policies, of a most complicated and elaborate structure, were prepared, and filled with covenants, exceptions, stipulations, provisos, rules, regulations, and conditions, rendering the policy void in a great number of contingencies…The compound, if read by [an insured], would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion…It was printed in such small type, and in lines so long and so crowded, that the perusal of it was made physically difficult, painful, and injurious. Seldom has the art of typography been so

> successfully diverted from the diffusion of knowledge to the suppression of it. There was ground for the premium payer to argue that the print alone was evidence, competent to be submitted to a jury, of a fraudulent plot…[1]

In another court case, in 1975, the court decided that the holders of an insurance policy were not bound by its provisions because its printing was of "a size type that would drive an eagle to a microscope." The court added the following:

> It cannot be reasonably assumed that the insured having average sight of a human being would be award of the content of the questioned clause, at least in the absence of special optical equipment…It should not be necessary for the insured to provide himself with a microscope in order to inspect the small print contained within his insurance policy. Neither should it be necessary for an insured to provide himself with an insurance policy to protect himself against the provision to be found within such small print of his insurance policy.[2]

A state insurance department study of the readability of insurance policies measured the standard automobile policy by the Flesch Readability Scale. This scale assesses the readability of written documents by assigning point values for length and complexity of sentence structure. The higher the total score, the more readable the document. For the passage selected for this particular study, the Bible received a readability score of 66.97, and Einstein's Theory of Relativity scored 17.72. Both scored higher as to readability then the standard automobile policy at 10.31.

Current trends in insurance policy construction are toward more simplified language. Any new language in insurance contracts, however, requires interpretation by the courts. Therefore, the success of efforts at clearer expression remains to be seen.

---

[1] *Delancy v. Insurance Company,* 52 N.H. 581 (1873)

[2] *Drake v. Globe American Casualty Company,* Ohio 10th Circuit Court of Appeals, unreported case No. 74AP-472, March 11, 1975.

> The insurance contract has the same basic requisites as other contracts. There is a need for an agreement, competent parties, consideration, and a legal purpose. However, the insurance contract also has other distinctive features. Insurance contracts cover fortuitous events, are contracts of adhesion and indemnity, must have the public interest in mind, require the utmost good faith, are executory and conditional, and must honor reasonable expectations.

The Legal Environment of Insurance at 176-77.

A particularly scholarly discussion explaining why insurance is treated differently by courts is found in an article written by Professor Henderson of the University of Arizona College of Law, which includes the following discourse:

> In a free enterprise system, economic development steadily increases the number of situations in which individuals can suffer "loss." At the same time, economic development enhances the ability to avoid the prospect of "loss." In other words, in a relatively affluent society, there is much more to lose in the way of property and other economic interests as the human condition improves. In such a society, however, individuals are more likely to have the requisite discretionary income to transfer and to spread the attendant risks of loss. Disruptive losses to society, as well as to the individual, are obviated or minimized by private agreements among similarly situated people. In this way, the insurance industry plays a very important institutional role by providing the level of predictability requisite for the planning and execution that leads to further development. Without effective planning and execution, a society cannot progress.
>
> ….
>
> This perceived social significance has set apart insurance contracts from most other contracts in the eyes of the law. Insurance is purchased routinely and has become pervasive in our society. It protects against losses that otherwise would disrupt our lives, individually and collectively. The public interest, as well as the individual interests of millions of insureds, is at stake. This is the

foundation for the general judicial conclusion that the business of insurance is cloaked with a public purpose or interest. This perception also explains the extensive regulation of the insurance industry in the United States, not just through legislative and administrative processes, but also through the judicial process.

…

The insureds' disadvantage persisted as insurance took on more and more importance in this country. In order to purchase a home or a car, or commercial property, most people had to borrow money, and loans were not obtainable unless the property was insured. In addition, the lender often required that the life of the borrower be insured. On another front, the cost of medical care was rising beyond the reach of many people and insurance programs were developed to spread that risk. The purchase of insurance was no longer a matter of prudence; it was a necessity. Then losses occurred and the inevitable disputes arose. These disputes, however, were not about an even exchange in value. Rather, they were about something quite different.

Insureds bought insurance to avoid the possibility of unaffordable losses, but all too often they found themselves embroiled in an argument over that very possibility. Disputes over the allocation of the underlying loss worsened the insureds' predicament. In most instances, insureds were seriously disadvantaged because of the uncompensated loss; after all, the insured would not have insured against this peril unless it presented a serious risk of disruption in the first place. The prospect of paying attorneys' fees and other litigation expenses, in addition to the burden of collecting from the insurer, with no assurance of recovery, only aggravated the situation.

These additional expenses could prove to be a formidable deterrent to the average insured. For most insureds, unlike insurers, such expenses were not an anticipated cost of doing business. Insureds did not plan for litigation as an institutional litigant would. Insurers, on the other hand, built the anticipated costs of litigation into the premium rate structure. In effect, insureds, by paying premiums, financed the insurers' ability to resist claims. Insureds, as a group, were therefore peculiarly vulnerable to insurers who, as a group, were

> inclined to pay nothing if they could get away with it, and, in any event, to pay as little as possible. Insurance had become big business.

Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transaction: Refining the Standard of Culpability and Reformulating the Remedies By Statute,* 26 U. Mich. J.L. Ref. 1, 10-14 (1992).

These aforementioned points and how jurists should view the parties to an insurance relationship has been summed up as follows:

> [A]n insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared, and seldom understood by the assured… The parties are not similarly situated. The company and its representatives are experts in the field; the applicant is not. A court should not be unaware of this reality and subordinate its significance to strict legal doctrine.

Prudential Insurance Co. v. Lamme, 425 P. 2d 346, 347 (Nev. 1967).

III. As a Result of the Complexities of Insurance and the Need for Protection of the Consumer, Courts have Created Special Rules for Dealing with Interpretation of Insurance Contracts When Insurance Coverage Issues Arise.

Because of the complex nature of the business of insurance, and in order to protect policyholders and create consistency, courts utilize recognized rules of policy construction in their dealings with insurance policy litigation.

In Florida, courts view insurance policies as contracts, and a policy's terms and conditions are generally viewed in accordance with their "plain meaning." *See Old Dominion Ins. Co. v. Elysee, Inc.,* 601 So. 2d 1243 (Fla. 1st DCA 1992), *citing*

Silva v. Southwest Florida Blood Bank, Inc., 601 So. 2d 1184 (Fla. 1992). Florida courts follow the rule that, once an insured establishes that a loss occurred while an "all-risk" policy was in effect, like the standard ISO form in this case, the burden shifts to the insurer to prove that the loss arose from an excluded cause. *See Hudson v. Prudential Property and Cas. Ins. Co.*, 450 So. 2d 565 (Fla. 2d DCA 1984). In other words, although the insured bears the initial burden of proving that the alleged acts trigger coverage, once an insured demonstrates that a loss is covered by the policy's general insuring provisions, the insurer then bears the burden of establishing the applicability of any exclusion. *State Farm Mut. Automobile Ins. Co. v. Pridgen,* 498 So. 2d 1245 (Fla. 1986). Generally speaking, the construction of an insurance policy is a question of law for a court to decide, although the issue of whether a certain set of facts exists to bring a loss within the terms of a policy is an issue to be determined by the trier of fact. *See Jones v. Utica Mutual Insurance Co.,* 463 So. 2d 1153 (Fla. 1985).

A court will generally rely on definitions contained within an insurance policy when interpreting the meaning of policy language. *Grant v. State Farm Fire & Cas. Co.,* 638 So. 2d 936 (Fla. 1994). Here, there is no definition of "earth movement" nor "explosion". However, where language is ambiguous, in that it is capable of being reasonably interpreted in at least two ways, a court in Florida must accept the interpretation that would favor the insured, and construe the

ambiguity strictly against the carrier. *See, e.g., Auto-Owners Ins. Co. v. Anderson,* 756 So. 2d 29 (Fla. 2000)(citations omitted); *Flores v. Allstate Ins. Co*., 819 So. 2d 740 (Fla. 2002); *Westmoreland v. Lumbermens Mut. Cas. Co.,* 704 So. 2d 176 (Fla. 4th DCA 1997).

These principles further provide that: "When dealing with grants of coverage, the courts should interpret the policy language broadly in favor of the existence of insurance, while limitations or exclusions should be interpreted narrowly against the insurer." *Progressive Ins. Co. v. Estate of Wesley,* 702 So. 2d 513, 515 (Fla. 2d DCA 1997)(citation omitted). One reason courts construe insurance policies in favor of the insured is the fact that the insurer was the party drafting the policy, and if a different meaning had been intended, the insurer could have inserted such language into the policy. *See Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.,* 711 So. 2d 1135 (Fla. 1998).

If an insurer fails to define a policy term, and if the relevant language is susceptible to different interpretations, one affording coverage and one excluding coverage, the policy must be construed in favor of the interpretation affording coverage in favor of the insured. *See Anderson,* 756 So. 2d at 34; *State Farm Fire & Cas. Co. v. CTC Development Corp*., 720 So. 2d 1072, 1076 (Fla. 1998); *Wesley,* 702 So. 2d 513. "When an insurer fails to define a term in a policy ... the insurer cannot take the position that there should be a 'narrow, restrictive

interpretation of the coverage provided.'" *CTC Development Corp.* at 1076 (citation omitted).

For example, in *Anderson,* a limitation of liability clause in an automobile policy was found ambiguous, and the interpretation sought by the insured was deemed controlling. *See Anderson, supra.* In addition, the undefined term "accident" in a general liability policy was found ambiguous in *CTC Development Corp.,* and the undefined term "relative" in an automobile liability policy was found ambiguous in *Wesley*. *See CTC Development Corp.,* and *Wesley, supra. See also State Comprehensive Health Ass'n v. Carmichael,* 706 So. 2d 319, 320 (Fla. 4th DCA 1997)(failure to define the term "policy of health care insurance" made the policy ambiguous, so that the term would be liberally construed); *Budget Rent-A-Car Systems, Inc. v. Government Employees Ins. Co.,* 698 So. 2d 608, 609 (Fla. 4th DCA 1997); *State Farm Mut. Auto. Ins. Co. v. Pridgen,* 498 So. 2d 1245, 1247 n.3 (Fla. 1986)(the term "theft" is to be construed in favor of coverage where undefined in the policy); *National Merchandise Coin. v. United Serv. Auto. Ass'n.,* 400 So. 2d 526, 530 (Fla. 1st DCA 1981)(the failure to define "auto accident" left the policy ambiguous).

Importantly, those cases involved the meaning of terms that one may not necessarily consider ambiguous when used in everyday speech. However, in the context of an insurance policy, those courts found the words to have multiple

reasonable interpretations. Since the insurers had failed to provide clear definitions for the terms, the courts applied the interpretation that afforded coverage to the policyholder.

As pointed out by the Petitioners in their Initial Brief, a reasonable construction of the term "earth movement" in a homeowners insurance policy is a spontaneous, natural, catastrophic earth movement, and not movement brought about by other man-made causes. *See* Initial Brief of Petitioners at pp. 17-18. A majority of other jurisdictions agree. *See, e.g., Peters Township School District v. Hartford Accident and Indemnity* Co., 833 F. 2d 32 (3d Cir. 1987); *Wyatt v. Northwestern Mutual Ins. Co*., 304 F. Supp 781, 782–83 (D. Minn. 1969); *Murray v. State Farm Fire and Cas. Co.,* 203 W.Va. 477, 509 S.E. 2d 1, 9 (W. Va. 1998)(explaining the proper application of the legal doctrines of *noscitur a sociis* and *ejusdem generis* in finding the policy language ambiguous).

IV. The Insurance Contract At Issue is a Nationally Recognized ISO Form Contract and Consistent Application is Essential.

Significantly, courts deal consistently with insurance policies that contain the same or substantially similar language. On that issue, it is important to note that most insurers use standardized forms in order to achieve this consistency of coverage and accuracy in establishing their rates. As a result, over 1400 insurers subscribe and belong to Insurance Services Office (ISO), a national rating bureau and service organization which creates standardized policy forms that comply with

state requirements, and which then files the forms with the respective state departments of insurance. *See, generally,* Thomas M. Reiter, *Article: The Pollution Exclusion Under Ohio Law: Staying the Course,* 59 U. Cin. L. Rev. 1165, 1189 n.98 (Spring 1991); David G. Stebing, *Article: Insurance Regulation in Alaska: Healthy Exercise of a State Prerogative,* 10 Alaska L. Rev. 279, 291 (Dec. 1993).

In this instance, it is important to note that the *Fayad* policy form at issue is an ISO standardized and copyrighted HO 00 03 04 91 policy form, similar to policies utilized by insurers throughout the country. *See* Supplemental Record 194-211. Moreover, the Respondent, Clarendon National Insurance Company, is a member of ISO. *See 2001 Property and Cas. Target Market Conduct Examination of Clarendon Nat'l Ins. Co. by the Florida Dept. of Ins.,* May 30, 2002 at 5. Indeed, the insurance industry recognizes that "the most important of the ISO forms are the personal auto, homeowners, commercial auto, commercial property, and commercial general liability coverage forms." *Insurance Regulation in the United States* at 64.

Ultimately, it is essential for the policy exclusion at issue to be consistently applied, utilizing these rules of construction in a way that provides the most coverage to a policyholder. A construction that does not follow the above-cited rules with respect to a standardized policy form will, as noted by the Petitioners,

create confusion, inconsistencies and turn the rules of policy construction on their head. The significant problems caused by inconsistent treatment is not new to insurance controversies:

> When merchants, shipowners, and underwriters continue to employ, in transactions amounting to hundreds of millions of pounds every year, an "absurd and incoherent instrument," suggesting the humor of a lunatic, it may reasonably be supposed that they have some grounds for their persistence. The merits of Lloyd's policy are, in fact, quite independent of its drafting. Indeed, it never was drafted as a complete instrument. A great deal of it goes back, at least, to the sixteenth century. It took shape during the second half of the seventeenth century and the first half of the eighteenth, when a common, printed form was gradually evolved from the wide variety of policies till then employed. It underwent a very conservative revision in 1779, the whole object of which was, not to draft an elegant or logical document, but to preserve the common form already in use. Hence almost every clause in the printed Lloyd's policy of to-day has been consecrated by centuries of usage. However clumsily it may be expressed, its meaning is clear, because it has "generations of legal interpretations hanging almost to every word, and almost certainly to every sentence." A Committee of lawyers and insurance experts could, no doubt, put much of it into clearer and more logical language; but then the leading cases decided on the old form would cease to be binding precedents, and the moment a dispute arose, the whole business of litigation would begin again. It is for this reason that the body of the policy has long been regarded as sacrosanct; not to be altered on any consideration whatever, and only to be enlarged in case of great necessity. The overriding or extra clauses written, stamped, or gummed on each policy to provide for contingencies unthought of in 1779, may require scrutiny by the insurers and the insured; but so far as the actual policy is concerned, all parties know definitely to what it commits them.

See, A History of Lloyds 130-131 (Macmillan & Co. 1928)

V. In this Case, the District Court's Opinion did not Appropriately Follow Florida's Recognized Rules of Construction, Compelling a Reversal of that Decision.

The Third District Court of Appeal's opinion, reported at *Fayad v. Clarendon National Ins. Co.,* 857 So. 2d 293 (Fla. 3d DCA 2003), unfortunately did not follow the required rules of policy construction that are so vital to provide consistency and protection to the insurance consumers of this State. Although the Third District recognized the differences between the language of the Fayad policy and the policy at issue in *State Farm Fire & Cas. Co. v. Castillo,* 829 So. 2d 242 (Fla. 3d DCA 2002),[3] that court did not recognized the significance of the distinction, or why the Fayad policy language should be read in a more restrictive way than the policy at issue in *Castillo*. *See Fayad,* 857 So. 2d 293.

Rather, the Third District chose to utilize the rules of policy construction to broaden the policy's exclusionary language, and to determine that inconsistent and ambiguous language should, in actuality, be read in a way to favor the non-existence of coverage. This broadening of the exclusion was utilized in both the dwelling and personal property context, in spite of the fact that the Fourth District

[3] The *Castillo* policy contained non-standard language that is not found in the ISO policy form.

Court of Appeal had appropriately applied these rules of construction to reach a contrary result in *Phoenix Ins. Co. v. Branch,* 234 So. 2d 396 (Fla. 4th DCA 1970).

The construction applied by the Third District suggests that coverage for "blasting" damage will never be covered. Yet the American Insurance Services Group publishes a pamphlet entitled *Blasting Damage and Other Structural Cracking, a Guide for Adjusters and Engineers* (3d ed. 1990) that teaches first party property adjusters how to adjust for the type of damages appellant's are claiming. It states, in part:

> If possible, inspection of the damage should be made jointly by adjusters representing the liability carriers and property insurers. The adjusters should always make a point of telling the property-owner who the company representatives are, what companies they represent, and what the purpose of the visit is.
>
> If the casualty interests agree that liability exists, they may be willing to take over the adjustment. But if the direct property adjuster is convinced that the blasting did not cause the damage, his company may wish to consult and cooperate in the investigation and defense of the claim with the blaster and his insurance carrier, if any.
>
> In those cases where the adjustment is concluded by property insurance carriers, the company may wish to ascertain from counsel whether the blasting took place in an absolute liability state, or whether it is necessary to prove negligence before the blaster can be held liable….

Blasting Damage and other Structural Cracking at 4-5. Thus, it is obvious the insurance industry recognizes that blasting type damages are covered under their standard policy terms or they would not make a specialized booklet for their

property adjusters and engineers dealing with the nuances of such losses, including subrogation recoveries after paying their policyholders.

In this case, the all-risk homeowners policy should have been construed so that the exclusion would be found ambiguous, as it reasonably could be construed. Thus, the exclusion will apply to only naturally-occurring, widespread disasters, which is the construction found to apply in a multitude of instances in other jurisdictions, as set forth in the Petitioners' Initial Brief. In this manner, the public (and insurers) are protected from insurers becoming insolvent when widespread damages from earthquakes, volcanoes and the like occur.[4] Yet, the small number of isolated "blasting" claims can be paid, eliminating devastating financial damage to isolated policyholders.

Further, as to the named peril personal property portion of the policy relating to "explosion", rather than finding the inconsistencies to favor non-coverage, the court should have, again, construed the policy in favor of the policyholder. Significantly, in a treatise published by the National Underwriter company, when discussing homeowners policy coverage interpretation, the author notes that, in the

[4] The insurance industry insures damage caused by earthquakes through endorsements. For example, there are two ISO commercial property endorsements that provide earthquake coverage: the earthquake and volcanic eruption endorsement, CP 10 40, and the earthquake and volcanic eruption endorsement, sublimit form, CP 10 45. *Commercial Property Insurance Vol. 1, V.W.9.*

ISO policy form, the term "explosion" is: "neither defined in the policy, nor is there any modifying language following the word so that a broad range of 'explosions' may be covered." Diane W. Richardson, *Homeowners Coverage Guide Interpretation and Analysis* 48 (National Underwriter Co. 1999). Again, the interpretation adopted by the Third District in its opinion is incorrect. Even the insurance industry recognizes a different interpretation of "explosion" than that interpreted by the Third District.

CONCLUSION

In conclusion, for the reasons set forth above, the relief advocated by the Petitioners should be granted. The opinion of the Third District Court of Appeal should be quashed, and the analysis of the Fourth District Court of Appeal followed on the issue of the proper interpretation of the "earth movement" exclusionary provision of the *Fayad* policy.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Lauri Waldman Ross, Esquire, Lauri Waldman Ross, P.A., Two Datran Center, Suite 1612, 9130 S. Dadeland Boulevard, Miami, Florida 33156, Harold B. Klite Truppman, Esquire, Harold B. Klite Truppman, P.A., 201 West Flagler Street, Miami, Florida 33130, and David J. Salmon, Esquire, Groelle & Salmon, P.A., 2925 10th Avenue North, Suite 302, Lake Worth, Florida 33461, and Mark Peeples, Esquire, Guy Burnette Jr. P.A., Heritage Oaks Business Center, 3019 Shannon Lake North, Suite 201, Tallahassee, FL 32309, this ____ day of _____, 2004.

_____

William F. Merlin, Jr., Esquire
Florida Bar No.: 364721
Mary E. Kestenbaum, Esquire
Florida Bar No.: 114596
Gunn Merlin, P.A.
777 South Harbour Island Blvd., Suite 950
Tampa, Florida 33602
Telephone: 813-229-1000
Facsimile: 813-229-3692
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

We certify that this Initial Brief uses 14 point Times New Roman Type, a font that is proportionately spaced.

_____

William F. Merlin, Jr., Esq.