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## CANADIAN JOURNAL OF INSURANCE LAW: THE LAW ON SETTLEMENT, ANYTHING BUT SETTLED

### RBS Insurance Law Newsletter

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The Alberta Court of Appeal has weighed into the nation wide judicial debate on the applicability of “settlement” exclusions in “all-risk” property insurance policies. In *Engle Estate v. Aviva Insurance Co. of Canada*, 2010 ABCA 18, the applicability of such an exclusion was addressed in the context of loss caused to the insured by excavation activities at an adjacent property. This excavation resulted in settlement of the structural frame and floor slabs of the insured’s building. In determining that the subject exclusion did not apply the Court paid particular attention to the causal language used in the exclusion and the intention of the parties to the contract. In its analysis the Court specifically disagreed with a prior ruling of the British Columbia Supreme Court on the applicability of a very similar exclusion.

### Factual Background

The insured owned a tenanted commercial building covered by an “all risk” insurance policy. In 2006, construction began on a high-rise condominium project adjacent to the insured’s building. After the adjacent lot was excavated several stories deep tenants in the insured’s building began to notice cracks developing in the floors, walls and ceilings. A structural engineer retained by the insured determined the cause of these developments to be the excavation activity on the adjacent lot, specifically the inadequate underpinnings and shoring at the adjacent site together with vibrations, shaking and destabilizing effects of the excavation. These activities caused settlement of the structural frame and floor slabs which eventually lead to massive cracks occurring throughout the insured’s building. The chambers judge concluded that the subject settlement exclusion did not apply as the cracking was not inevitable but rather fortuitous. The exclusion was determined to apply only to natural forces and not in respect of non-natural forces. The question on appeal was whether the exclusion operated no matter the cause or only in respect of loss that occurred naturally.

### The Ruling

In determining the matter the Court reviewed over twenty precedents from multiple jurisdictions across



Canada and the United States and noted that the majority of those precedents dealt with exclusions that do not contain the words “caused by”. The prevailing view of the courts on such exclusions is that those settlement exclusions operate to exclude coverage for settlement type damage without regard to what caused the settlement. In *Engle Estate*, the subject exclusion did however contain causal language: *B) PERILS EXCLUDED This form does not insure against loss or damage caused directly or indirectly: 1) to “buildings” by: (iii) settling, expansion, contraction, moving, shifting or cracking...* In assessing the intention of the parties to the contract the Court agreed with the chambers judge that the word “settling” is commonly understood to mean that which is expected and occurs naturally and that such an interpretation is “fairer, more logical, and more in line” with the “all-risk” insurance obtained. The almost inevitable settling or shifting of a structure can be distinguished from that settlement occurring from unexpected and unnatural forces to the building or the erosion of its foundation. The words in the subject exclusion that follow “settling” indicated that the clause was meant to exclude passive, gradual, naturally occurring events rather than those brought about by fortuitous events. Finally, in determining the effect of the words “directly or indirectly” in the causal language of the exclusion the Court had reference to the language used in other perils excluded in the policy. Some of those other exclusions specifically referenced the difference between natural or man-made causes. On this basis, the Court found that the words “directly or indirectly” do not necessarily demonstrate an intent that the settlement exclusion apply to both natural and fortuitous events.

### **Considerations for Insurers and Brokers**

The avenue for coverage in this case was paved by the use of causal language in the exclusion. As briefly referenced above the majority of legal precedent on “settlement exclusions” addressed policies where the subject exclusion does not contain causal language. These exclusions simply state that claims for damage to property are covered except claims for “settling, expansion, contraction, moving, bulging, buckling, cracking or the falling of ceiling and wall plaster.” The British Columbia Court of Appeal has drawn a distinction between exclusions containing causal language and those that do not. The Manitoba Court of Appeal has refused to draw this distinction instead relying interpretive principles to find a difference between natural or normal settlement and fortuitous or man-made settlement. When determining the applicability of any “settlement exclusion” insurers and brokers are well advised to have particular note as to whether the exclusion contains causal language, whether other exclusions make a distinction between natural and man-made or fortuitous events, the jurisdiction in which the clause will be interpreted and, of course, the facts and opinions pertaining to the reason why the settlement, movement, cracking, etc. occurred.





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