

12244-1

12244-1

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Feb 20, 2014, 2:18 pm
BY RONALD R. CARPENTER
CLERK

E

RECEIVED BY E-MAIL *bjh*

No. 89218-I

THE SUPREME COURT
STATE OF WASHINGTON

BAYVIEW HEIGHTS OWNERS ASSOCIATION, Appellant,

v.

TRAVELERS INDEMNITY COMPANY, Respondent/Cross-Appellant

RESPONDENT'S/CROSS-APPELLANT'S BRIEF

James T Derrig Attorney At Law PLLC
James T. Derrig, WSBA 13471
Attorneys for Respondent/Cross-Appellant
Travelers Indemnity Company
14419 Greenwood Ave N. Suite A-372
Seattle, WA 98133-6867
(206) 414-7228

 ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
I. NATURE OF THE CASE	6
II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL	6
III. STATEMENT OF ISSUES	6
IV. STATEMENT OF THE CASE	7
V. ARGUMENT	11
A. ARGUMENT CONCERNING COLLAPSE	11
1. Introduction	11
2. Decay Alone, No Matter How Extensive, Is Excluded Until The Structure Collapses.....	12
3. Collapse As Meaning A Change In Shape Such As Falling, Caving, Or Similar Structural Deflection	12
a. Collapse As “Rubble On The Ground.”	12
b. “Collapse” As Requiring A Change In Shape.	15
c. “Collapse” Is Not Ambiguous When Applied In Context To Structures, And That Context Requires A Change In Shape.....	19
4. The Material Impairment Standard	24
a. Collapse As An Imminent Structural Failure	24
b. Problems With The Imminent Collapse Standard.....	26
c. Existing Washington Cases Do Not Mandate Phrasing The Material Impairment Standard As “Substantial Impairment Of Structural Integrity.”	30

B. ARGUMENT CONCERNING ESTOPPEL	33
1. Procedural Posture And Standard Of Review.....	33
2. Facts Relevant To Estoppel	34
3. Travelers Was Not Estopped To Assert A Standard Other Than Bare "Substantial Impairment Of Structural Integrity."	36
a. Conforming To A Then-Controlling Legal Precedent Was Not Inequitable And Estoppel Does Not Apply To Issues Of Law.....	36
b. The Elements Of Equitable Estoppel Were Not Proven By Clear, Cogent And Convincing Evidence.....	38
c. Bayview Failed To Diligently Pursue Resolution Of the Legal Issue.....	40
VI. CONCLUSION	41
 APPENDIX	

TABLE OF AUTHORITIES

Cases

<i>401 Fourth St., Inc. v. Investors Ins. Group</i> , 583 Pa. 445, 879 A.2d 166 (2005).....	24
<i>Allstate Ins. Co. v. Forest Lynn Homeowners Ass'n</i> , 892 F. Supp. 1310 (W.D. Wash. 1995) <i>opinion withdrawn</i> , 914 F. Supp. 408 (W.D. Wash. 1996).....	15, 29
<i>Allstate Ins. Co. v. Peasley</i> , 131 Wn. 2d 420, 932 P.2d 1244 (1997).....	26
<i>Assurance Co. of America v. Wall & Assoc. LLC</i> , 379 F.3d 557 (9 th Cir. 2004).....	24, 29
<i>Auto Owners Ins. Co. v. Allen</i> , 362 So.2d 176 (Fla. App. 1978).....	16
<i>Beach v. Middlesex Mut. Assurance Co.</i> , 532 A.2d 1297 (Conn. 1987).....	15, 16, 19
<i>Boeing Co. v. Aetna Cas. and Sur. Co.</i> , 113 Wn.2d 869, 784 P.2d 507 (1990).....	28
<i>Buczek v. Continental Cas. Ins. Co.</i> , 378 F.3d 284 (3 rd Cir. 2004).....	24
<i>Cary v. Allstate Ins. Co.</i> , 130 Wn. 2d 335, 922 P.2d 1335 (1996).....	29
<i>Cent. Mut. Ins. Co. v. Royal</i> , 269 Ala. 372, 113 So. 2d 680 (1959).....	13
<i>Chemical Bank v. Washington Pub. Power Supply Sys.</i> , 102 Wn. 2d 874, 691 P.2d 524 (1984).....	36
<i>Clendenning v. Worcester Ins. Co.</i> , 700 N.E.2d 846 (Mass. App. 1998).....	15, 29
<i>Colonial Imports, Inc. v. Carlton Nw., Inc.</i> , 121 Wn. 2d 726, 853 P.2d 913 (1993).....	37
<i>Concerned Land Owners of Union Hill v. King County</i> , 64 Wn. App. 768, 827 P.2d 1017 (1992).....	36
<i>Doheny West Homeowners' Ass'n v. American Guarantee & Liab. Ins. Co.</i> , 60 Cal. App. 4th 400, 70 Cal. Rptr. 2d 260 (1997)....	23, 24, 29, 30
<i>Fantis Foods, Inc. v. North River Ins. Co.</i> , 332 N.J. Super. 250, 753 A.2d 176 (App. Div. 2000).....	24
<i>Farmers Ins. Co. v. Miller</i> , 87 Wn. 2d 70, 549 P.2d 9 (1976).....	21
<i>Fujii v. State Farm Fire & Cas. Co.</i> , 71 Wn. App. 248, 857 P.2d 1051 (1993).....	26
<i>Guile v. Ballard Community Hosp.</i> , 70 Wn. App. 18, 851 P.2d 689 (1993).....	33
<i>Harman v. Dep't of Labor Indus.</i> , 111 Wn. App. 920, 47 P.3d 169 (2002).....	39
<i>Higgins v. Connecticut Fire In. Co.</i> , 430 P.2d 479 (Colo. 1967).....	14, 19
<i>Hillhaven Properties Ltd. v. Sellen Const. Co., Inc.</i> , 133 Wn. 2d 751, 948 P.2d 796 (1997).....	29

<i>Hyatt v. Dep't of Labor & Indus.</i> , 132 Wn. App. 387, 132 P.3d 148 (2006).....	39
<i>Indiana Ins. Co. v. Liaskos</i> , 297 Ill. App. 3d 569, 697 N.E.2d 398 (1998)	17
<i>KAAPA Ethanol, LLC v. Affiliated FM Ins. Co.</i> , 660 F.3d 299 (8th Cir. 2011).....	24
<i>Leingang v. Pierce County Med. Bureau, Inc.</i> , 131 Wn.2d 133, 930 P.2d 288 (1997).....	36
<i>McDonald v. State Farm Fire & Cas. Co.</i> , 119 Wn. 2d 724, 837 P.2d 1000 (1992).....	11
<i>Mercer Place Condominium Assoc. v. State Farm Fire & Cas. Co.</i> , 104 Wash. App. 597, 17 P.3d 626 (2001).....	30
<i>Northwestern Mut. Ins. Co. v. Bankers Union Life Ins. Co.</i> , 485 P.2d 908 (Colo. Ct. App. 1971).....	17
<i>Nugent v. Gen. Ins. Co. of Am.</i> , 253 F.2d 800 (8th Cir. 1958).....	17
<i>Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner Ins. Co.</i> , 350 S.C. 268, 565 S.E.2d 306 (2002).....	21, 24, 28
<i>Overton v. Consolidated Ins. Co.</i> , 145 Wn.2d 417, 38 P.3d 322 (2002) ..	11, 17
<i>Panorama Village Condo. Owners Assoc. Board of Directors v. Allstate Ins. Co.</i> , 144 Wash.2d 130, 26 P.3d 910 (2001).....	30, 31
<i>Prekeges v. King County</i> , 98 Wn. App. 275, 990 P.2d 405 (1999).....	36
<i>Quadrant Corp. v. Am. States Ins. Co.</i> , 154 Wash. 2d 165, 110 P.3d 733 (2005).....	18, 22, 26
<i>Rosen v. State Farm Gen. Ins. Co.</i> , 30 Cal. 4th 1070, 70 P.3d 351 (2003)	29
<i>Seaman v. Farmers Ins. Exch.</i> , 140 Wash. App. 1026 (2007).....	30
<i>Sheikh v. Choe</i> , 156 Wn. 2d 441, 128 P.3d 574 (2006).....	33
<i>Sherman v. Safeco Ins. Co. of America, Inc.</i> , 716 P.2d 475 (Colo. App. 1986).....	14, 19
<i>Sprague v. Safeco Ins. Co. of Am.</i> , 158 Wn. App. 336, 241 P.3d 1276 (2010), <i>rev'd on other grounds</i> , 174 Wn.2d 524 (2012).....	35, 36, 37
<i>Sprague v. Safeco Ins. Co. of America</i> , 174 Wn.2d 524, 276 P.3d 1270 (2012).....	11, 19, 20, 22, 24, 31
<i>Thornewell v. Indiana Lumbermens Mut. Ins. Co.</i> , 33 Wis. 2d 344, 147 N.W.2d 317 (1967).....	17
<i>University of Cincinnati v. Arkwright Mut. Ins. Co.</i> , 51 F.3d 1277 (6th Cir. 1995).....	29
<i>Villella v. Public Employees Mut. Ins. Co.</i> , 106 Wn.2d 806, 725 P.2d 957 (1986).....	26

<i>Vision One, LLC v. Philadelphia Indem. Ins. Co.</i> , 174 Wn. 2d 501, 276 P.3d 300 (2012).....	27
<i>Weiner v. Selective Way Ins. Co.</i> , 793 A.2d 434 (Del. Super. 2002).....	21, 24, 28
<i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> , 142 Wash. 2d 654, 15 P.3d 115 (2000).....	31
<i>Wolstein v. Yorkshire Ins. Co. Ltd.</i> , 97 Wash. App. 201, 985 P.2d 400 (1999).....	26, 28
<i>Woody v. Stapp</i> , 146 Wash. App. 16, 189 P.3d 807 (2008).....	37
<i>Zoo Properties, LLP v. Midwest Family Mut. Ins. Co.</i> , 797 N.W.2d 779 (S.D. 2011).....	21, 24

Other Authorities

Annot., <i>What Constitutes "Collapse" Of A Building Within Coverage Of Property Insurance Policy</i> , 71 ALR.3d 1072 (1976)	13
---	----

Rules

RAP 2.4(b)	31
------------------	----

I. NATURE OF THE CASE

This case presents the issue of whether a building that stood straight and true for over a decade after Travelers' last insurance policy lapsed in 1999 nevertheless can be said to have "collapsed," when the plaintiff stipulates it has no evidence of an actual collapse or an imminent danger of one, but its engineer says that in 1999 the building suffered from "substantial impairment of structural integrity" as he defines that phrase.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

The trial court erred in its—

1. March 21, 2013 Order, which defined "collapse" to mean "'substantial impairment of structural integrity' ('SSI') with an imminent threat of collapse under the Travelers policies at issue herein," (CP 1358) rather than requiring a building to actually change shape before it can be called "collapsed."

2. June 11, 2013 Order, which denied Travelers' cross-motion for summary judgment on estoppel and ruled that Travelers was estopped to apply any standard for "collapse" other than the one specifically set forth in its denial letter, so that "[t]he standard for collapse in this case is that a collapse takes place when the building or any part of a the building is so substantially impaired that even the reserve strength due to the safety factors built into the building code allowable capacities is exhausted." (CP 1478)

III. STATEMENT OF ISSUES

1. When a policy covers "direct physical loss caused by collapse of a building or any part of a building," what degree of damage constitutes a collapse?

2. When a policy covers “damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building,” what degree of damage constitutes a collapse?

3. Did the trial court err by ruling on summary judgment that Travelers was estopped to use any standard for “collapse” other than the one specifically stated in its denial letter?

IV. STATEMENT OF THE CASE

Only the facts relevant to the alleged “collapse” are discussed here. Facts relevant to estoppel are discussed beginning at page 33.

Bayview Homeowners Association contends that its building collapsed while the building was insured by Travelers from December 17, 1996 through December 17, 1999. (CP 3, 977) Bayview first submitted its claim on April 20, 2011, 11½ years after the last policy terminated. (CP 1385) No part of the building sagged, caved, fell or otherwise

exhibited visible structural deflection.

(CP 1019-1024)

The picture shows the building as of January 2012.

(CP 1019; see appendix for photos CP 1020-1024)



All 3 Travelers policies exclude “Collapse, except as provided in the Additional Coverage for Collapse.”¹ (CP 1126, 1206, 1284) The 2 policies for 1996-1998 contain this Additional Coverage:

5. Collapse

- a. We will pay for direct physical loss or damage to Covered Property, Caused by Collapse of a building or any part of a building insured under this policy, if the collapse is caused by one or more of the following:

...

(2) Hidden decay;

....

- d. Collapse does not include settling, cracking, shrinkage, bulging or expansion

(CP 1120, 1200)

The 1998-1999 policy says:

b. Collapse

We will pay for loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building caused only by one or more of the following:

....

(2) Hidden decay;

....

Collapse does not include settling, cracking, shrinkage, bulging or expansion.

¹ The first two polices use the phrase “Coverage Extensions, Collapse,” while the third policy uses “Additional Coverage for Collapse.” No one claims the difference is material. For simplicity, this brief only uses the last phrase.

(CP 1278)

After suing Travelers, Bayview hired engineer Lee Dunham, who found wood rot at places in the building's frame, as shown in this page from his report. (CP 1001, 1104)

The following are representative photos of structural elements observed during the investigations and calculated to be in a state of SSI at the Bayview building:



Photo 3: Rim joist in a state of SSI, location 6



Photo 4: Glulam beam in a state of SSI, location 15

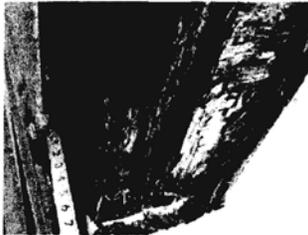


Photo 5: 2x4 corner studs and bottom plate in a state of SSI, location 16



Photo 6: 2x4 corner stud in a state of SSI, location 16

Dunham contends this rot created conditions of “substantial structural impairment,” which he abbreviates “SSI.” Dunham further contends that “SSI” takes place when a member no longer can support “code-prescribed loads.” (CP 1105; 1097-8) Contrary to what a layperson might assume, this does not mean the member has failed or is in any danger of failing. The following facts are not controverted:

1. Dunham’s analysis is based on code “allowable” stress. (CP 1099 line 8)
2. Code “allowable” stresses are not forensic tools used to determine when a structure will fail or even constitute a significant hazard. (CP 1098 line 14; 1099 line 11)
The average actual capacity of a wood structural member is 2.85 times the “allowable” capacity. (CP 1099 lines 1, 10, 20)
3. The difference between “allowable” and actual capacity exists because—as Travelers’ engineer explained—engineers design buildings so that the actual capacity

includes a substantial safety margin (also called “reserve strength”) far exceeding the “allowable” capacity. (CP 1098 line 23)

4. Because of this reserve strength, it is accepted practice for structural engineers to design new buildings that are overstressed to 110% of the code “allowable” stress, as the reserve strength makes the overstress insignificant. (CP 1100 line 1) Dunham’s approach thus could result in a brand new, correctly designed and constructed building being called “collapsed” because it does not meet code “allowable” stresses. (Id.)

5. To illustrate: Using Dunham's “allowable” capacity approach, a decaying condominium deck is in a state of “SSI” (and thus “collapsed”) even when, because of the reserve strength, it remains capable of holding two full-sized Cadillacs stacked on top of each other and thus has no realistic potential for failure. (CP 1100 lined 12) In fact, structures² deemed “SSI” by Dunham’s engineering firm have actually been loaded to 160% of the code-required load with almost no measurable deflection. (CP 1099 line 15)

Bayview stipulated it has no evidence that any of the safety margins (“reserve strength due to the safety factors built into the building code allowable capacities”) in the Bayview building were exhausted when Travelers insured the premises, or that there was an imminent threat of collapse during that time. (CP 1483) Bayview contends, however, the rot created “substantial impairment of structural integrity” and thus at least part of the building had “collapsed” when Travelers insured it.³ (Id.)

² Not the Bayview structure, but structures in other “collapse” claims.

³ Dunham also contends he can trace the “SSI” back into Traveler’s policy periods. Travelers has assumed, *arguendo*, that he can do so, but does not admit to this.

V. ARGUMENT

A. ARGUMENT CONCERNING COLLAPSE

1. Introduction

The facts frame the legal issue presented in this case: Whether arguably “substantial” structural damage can be called a “collapse,” when the building remains in its original shape, was not in any imminent danger of structural failure, and stands straight and true over a decade after it allegedly “collapsed”? On a superficial level, case law contains three competing interpretations of collapse:

1. Actual collapse. Although some authorities say this standard requires “reduction to a flattened form or rubble,” this inaccurately characterizes the case law and creates much confusion. A building does not have to completely fall flat for a collapse to occur. The ordinary meaning of “collapse,” however, requires a structure to change shape, through falling, caving, or similar structural deflection, even if the structure remains partly standing.

2. The material impairment standard, which comes in two flavors:

a. Imminent collapse. Under this standard, collapse includes not only actually falling or caving, but also an imminent risk of such a failure. First articulated in 1997, this standard represents the overwhelming trend in the modern case law.

b. Substantial impairment of structural integrity. This older standard originally was developed to create coverage for structures that had partially fallen down but were not yet “rubble on the ground.” While such a result is correct, the standard is poorly phrased and is being used here to rewrite the contract to create

coverage for damage that, while abstractly “substantial,” does not involve any plausible application of “collapse.”

2. **Decay Alone, No Matter How Extensive, Is Excluded Until The Structure Collapses**

All 3 Travelers policies exclude “decay” but qualify the exclusion by stating “[b]ut if loss or damage by . . . collapse, as provided in the Additional Coverage for Collapse, results, we will pay for that resulting loss or damage.” (CP 1175, 1255, 1304-5). Consequently, decay alone, no matter how extensive, is not covered. *See Sprague v. Safeco Ins. Co. of America*, 174 Wn.2d 524, 276 P.3d 1270 (2012).

This remains true until there is a covered “resulting loss.” *Id*; *see, also, McDonald v. State Farm Fire & Cas. Co.*, 119 Wn. 2d 724, 734, 837 P.2d 1000, 1005 (1992). Bayview claims the covered resulting loss consists of “collapse,” which it further defines as “substantial impairment of structural integrity.”

3. **Collapse As Meaning A Change In Shape Such As Falling, Caving, Or Similar Structural Deflection**

a. **Collapse As “Rubble On The Ground.”**

An undefined term in an insurance contract is given its plain, ordinary, and popular meaning as set forth in standard English dictionaries. *See, Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 428, 38 P.3d 322, 327 (2002). As will be seen, when applied to physical objects such as buildings the ordinary meaning of “collapse” requires a change in shape, such as falling down, caving in or similar structural

deflection. The deflection, however, does not have to be so extreme that the building is reduced to “rubble on the ground.”

These generic pictures of two collapsed barns illustrate the concept:



Neither of these buildings is “rubble on the ground,” but both have collapsed. They have fallen down, caved in, and otherwise deflected in a manner demonstrating structural distress.

Some cases *appear* to define collapse according to the following dictionary definition, which in turn suggests that so long as one brick is left standing, no collapse has taken place:

1: to break down completely : fall apart in confused disorganization : crumble into insignificance or nothingness : disintegrate

....

2 : to fall or shrink together abruptly and completely : fall into a jumbled or flattened mass through the force of external pressure : fall in

Websters New International Dictionary (unabridged online ed. 2014)(see appendix).

Because of the above definitions, an ALR article has mischaracterized the “actual collapse” cases as requiring “reduction to a flattened form or rubble.” Annot., *What Constitutes “Collapse” Of A Building Within Coverage Of Property Insurance Policy*, 71 ALR.3d 1072 (1976).

This mischaracterization has created considerable confusion. The cases cited for this “rubble on the ground” standard do not involve such extreme conditions. Rather, the damage often involves no change in shape at all. The first case cited by the ALR demonstrates this. *See, Cent. Mut. Ins. Co. v. Royal*, 269 Ala. 372, 113 So. 2d 680, 683 (1959). There, the court found no collapse as a matter of law when:

There was no falling in, no loss of shape, no reduction to flattened form or rubble of the building or any part thereof. The building was still in its original form and condition with the exception of a few cracks.

Id. at 375, 113 So. 2d at 683 (underline added).

Thus, under *Central Mutual*, there is no collapse where there is no change in shape and the building stands in its original form. The case does not say how much

structural deflection must occur before a collapse exists, let alone that a "collapse" occurs only after the building is reduced to "rubble on the ground."

Similarly, the second case cited by the ALR for its "rubble on the ground" interpretation involved only cracks and minor settling:

Plaintiffs, a few weeks after moving into their new home, observed hairline cracks in a lower wall. After a few months, cracks by separation appeared around one or more doors and windows, and a slight upheaval appeared in the basement floor. . . . There was no other material damage to the structure. The building was neither distorted nor changed from its original form and character from the time it was insured.

Higgins v. Connecticut Fire In. Co., 430 P.2d 479, 479-80 (Colo. 1967)(underline added).

Higgins correctly held that under the facts, there was no collapse. Although the court noted that the house "was not, in whole or in part, reduced to a flattened form," it never said that damage short of "rubble on the ground" cannot be a collapse. *Id.* at 481 (underline added). The ALR should not have cited this case for such a proposition.

In fact, a later Colorado appellate case distinguished *Higgins*, finding "collapse" as a matter of law when a roof had fallen more than 2½ feet, the upper tiers of bricks had fallen out and the walls were bowed, but the building was not reduced to flattened form or rubble. See, *Sherman v. Safeco Ins. Co. of America, Inc.*, 716 P.2d 475, 476 (Colo. App. 1986). This was an actual collapse, although short of "rubble on the ground," and represents a correct application of the real "actual collapse" standard.

b. "Collapse" As Requiring A Change In Shape.

While a structure that has been *completely* reduced to flattened form certainly would be collapsed, could some lesser degree of damage nonetheless qualify as a collapse? The answer is that there must be a change in shape, such as falling down,

caving in or similar deflection demonstrating structural distress. This test, not “rubble on the ground,” is the real “actual collapse” standard for determining whether an insured collapse has taken place. *See, Clendenning v. Worcester Ins. Co.*, 700 N.E.2d 846, 847 (Mass. App. 1998)(no collapse when decayed area still standing and was “no more crooked than the rest of the house”). When this real actual collapse standard is applied, as opposed to the ALR’s mistaken characterization, the distinction between an actual collapse and “substantial impairment of structural integrity” as actually used in the case law is largely a semantic one, as most of the substantial impairment cases involve actual, albeit partial, collapses.

For example, *Beach v. Middlesex Mut. Assurance Co.*, 532 A.2d 1297 (Conn. 1987), is the most frequently cited cases for the proposition that “any substantial impairment of structural integrity is a collapse.” *See, e.g., Allstate Ins. Co. v. Forest Lynn Homeowners Ass’n*, 892 F. Supp. 1310, 1314 (W.D. Wash. 1995) *opinion withdrawn*, 914 F. Supp. 408 (W.D. Wash. 1996), *citing Beach, supra*. But the damage in *Beach* far exceeded something merely “substantial.” The home’s foundation had “tipped over into the basement and no longer was supporting the house.” 532 A.2d at 1298-9.

A foundation wall that has tipped over has changed shape so as to fail structurally, and it thus has actually collapsed within the ordinary meaning of that term. Nevertheless, the insurer incorrectly argued there was no collapse because there was no “sudden and *complete* catastrophe,” as the building had to fall completely flat. 532 A.2d at 1299-1300 (*italics added*). In the course of rejecting this argument, the Connecticut court said “collapse means any substantial impairment of the structural integrity of a building.” *Id.*

at 1300. This result is correct, but the phrase implies coverage far broader than what was necessary to decide the case and far beyond what the ordinary meaning of “collapse” can encompass.

The first case the *Beach* court cited for its “substantial impairment” statement, *Auto Owners Ins. Co. v. Allen*, 362 So.2d 176 (Fla. App. 1978), also involved an actual collapse, not just abstractly “substantial” impairment. Uncontroverted expert testimony described the following damage:

He stated that one exterior wall of the building had collapsed and a second was leaning out from the interior wall a significant distance. It was his opinion that the roof was kept from immediately falling only by resting on the interior walls and that “the function of the wall and building (including the function of supporting the superstructure) was impaired and the total building . . . was in imminent danger of falling further.”

362 So. 2d at 176-77.

These facts describe the actual collapse and failure of part of the building’s structural system, coupled with an imminent danger of complete failure. The insurer nevertheless contended there was no collapse because the loss did not involve “a building, or any part of it, which has been reduced to a flattened form or rubble.” 362 So.2d at 177. While the insurer’s “rubble on the ground” position was wrong and *Auto Owners* correctly held there was collapse, the court overstated its holding by using a phrase— “material and substantial impairment of the basic structure”—broader than what was required to decide the case. 362 So.2d at 177.

The above discussion compares “actual collapse” cases in which the buildings which have not changed shape with “substantial impairment” cases involving significant structural deflections. In between these extremes, both the “actual collapse” and the “substantial impairment” cases have agreed that small changes in shape can be too

structurally insignificant to implicate the concept of “collapse.” Compare, e.g., *Northwestern Mut. Ins. Co. v. Bankers Union Life Ins. Co.*, 485 P.2d 908, 909-10 (Colo. Ct. App. 1971)(no actual collapse when 7 nonstructural veneer panels fell off masonry wall) and *Nugent v. Gen. Ins. Co. of Am.*, 253 F.2d 800, 802 (8th Cir. 1958)(no collapse when doors and windows were out-of-plumb) with *Indiana Ins. Co. v. Liaskos*, 297 Ill. App. 3d 569, 579, 697 N.E.2d 398, 405 (1998)(cracks and shifting of footings did not create substantial impairment of structural integrity) and *Thornewell v. Indiana Lumbermens Mut. Ins. Co.*, 33 Wis. 2d 344, 350, 147 N.W.2d 317, 321 (1967)(no substantial impairment when basement wall bulged 2.5 inches but had not fallen).

This case law conundrum is not difficult to resolve. An undefined term in an insurance policy is given its ordinary meaning. *Overton*, 145 Wn.2d at 428. When applied to physical objects such as buildings, the ordinary meaning of "collapse" requires the structure to change shape, such as through falling down, caving in or other visible structural deflection. The deflection does not have to be so extreme that the structure is “rubble on the ground.” The cases using the phrase “substantial impairment of structural integrity” reached correct results, but in doing so they developed a legal term of art that, applied out of context, implies coverage far broader than what the term “collapse” can plausibly support. Here, the Bayview condominium never changed from its original form. It stands straight and true even now, and certainly did when Travelers insured it from 1997 to 1999. It has not, and was not, collapsed.

c. **“Collapse” Is Not Ambiguous When Applied In Context To Structures, And That Context Requires A Change In Shape.**

Some courts have said “collapse” is an ambiguous term. These statements are made in the context of explaining that a partial collapse—short of “rubble on the ground”—still is a collapse. That doesn’t help Bayview here.

Context is key. “[C]ontractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.” *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash. 2d 165, 181, 110 P.3d 733, 742 (2005) quoting *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 732 A.2d 100, 106 (Pa. 1999)(underline added). Many words might be called “ambiguous” in the sense that dictionaries contain multiple definitions, but that is not the test. A person signing a brokerage agreement with Merrill Lynch will understand that “stock” means securities and not a liquid used as the base for soup. Here, the word “collapse” is being used to describe physical damage to structures. The word, however, also is used in many other contexts, such as the collapse of a government or a mental breakdown. Dictionaries usually do not explain which of their definitions best applies to a particular context, but at least one dictionary specifically discusses “collapse” as applied to structures:

1. (of a structure) fall down or in; give way; *the roof collapsed on top of me. . . .*
2. (of a person) fall down and become unconscious, typically through illness or injury . . .
3. (of an institution or undertaking) fail suddenly and completely: *in the face of such resolve his opposition finally collapsed.*

New Oxford American Dictionary (3rd ed. 2010) p.339 (italics in original; copy in appendix).

Note that when applied to structures any requirement for a “complete” failure (as implied in the Webster’s definition quoted earlier) is not present; the requirement only appears in the context of institutions or undertakings. Thus, a structure must fall or give way but doesn’t have to do so “suddenly and completely.” This is consistent with the “actual collapse” cases, which have held there is no collapse when there is no change in shape, but collapse can exist as a matter of law when a building partially fails. *Compare, Higgins, supra*, 430 P.2d at 479-80 (no change in shape) *with Sherman, supra*, 716 P.2d at 476 (roof fell 2.5 feet). It also is consistent with the “substantial impairment” cases such as *Beach* that find coverage for partial collapses that are not yet rubble on the ground.

When applied to physical objects such as buildings, “collapse” always requires a visible change in shape. In the history of English literature the term has never been used to describe a physical object still in its original form. On the other hand, English literature is loaded with examples of “collapse” used to describe objects that have changed shape:

- Collapse like a snowman in the sun
- Collapse like a tent when the pole is kicked out from under it.
- Collapse—like empty garments.
- Collapse like the cheeks of a starved man.
- Collapsing like a cardboard carton thrown on a bonfire.

Similes Dictionary (1st Ed. 1988), *reprinted at* www.thefreedictionary.com (copy in appendix)

The need to consider “collapse” in the context of structures was recognized by the concurring opinion in *Sprague, supra*, 174 Wn.2d at 524, 276 P.3d at 1270. In that case deck support walls suffered from advanced decay, but there was no evidence the walls

were deflecting or distorting. Indeed, visible structural distress was so absent that the building owners were unaware of a problem until construction workers installing vents in the walls stripped off some siding and found decay. *Id.* at 526.

The majority ultimately resolved the case without construing the term “collapse.” The concurrence, however, explained there was no collapse within the common, ordinary meaning of the word as applied to structures:

The dissent disagrees, highlighting a portion of *Webster’s* definition of “collapse,” which is as follows: “ ‘a breakdown of vital energy, strength, or stamina.’ ” Dissent at 1274 (quoting Webster’s, *supra*, at 443). It is apparent that this portion of *Webster’s* definition of “collapse” has no application to the collapse of structures but, rather, relates to the kind of emotional or mental collapse that may be experienced by an individual. Here, of course, we are confronted with an alleged collapse of a structure, a deck, not the asserted loss of physical abilities or physical depression. Construing the term “collapse” in a commonsense way, as would a typical purchaser of insurance, and in the context of what occurred here, we should hold that the Spragues’ deck did not collapse.

174 Wn.2d at 538 (Alexander, J. concurring; underline added).

So is “collapse” ambiguous? Not in the present context. No reasonable meaning of the word “collapse” encompasses a building that not only remained in its original form, but did so for over a decade after the alleged “collapse.” No commonsense, typical purchaser of insurance would interpret “collapse” in that fashion and such a meaning would be unprecedented in the history of the English language.

Bayview wants to use “substantial impairment of structural integrity” not as a legal term of art, but as a new definition of “collapse”:

However, the court cannot rule out of the contract language which the parties thereto have put into it, nor can the court revise the contract under the theory of construing it, nor can the court create a contract for the parties which they did not make themselves, nor can the court impose obligations which never before existed.

Farmers Ins. Co. v. Miller, 87 Wn. 2d 70, 73, 549 P.2d 9, 11 (1976).

To the extent the phrase “substantial impairment of structural integrity” is a legal term of art, used to describe the fact there is coverage for partial collapses that have not yet become “rubble on the ground,” the phrase is poorly worded but justifiable. To the extent the phrase is used as a new definition of the term “collapse” it cannot be justified. It certainly doesn’t appear in any dictionary. And, as many courts have observed, the phrase revises the contract, creating a new insurance policy with coverage far broader than any plausible meaning of “collapse.” See *Zoo Properties, LLP v. Midwest Family Mut. Ins. Co.*, 797 N.W.2d 779, 782 (S.D. 2011)(“substantial impairment requirement broadly permits recovery for damage that, while substantial, does not threaten collapse”); see, also, *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner Ins. Co.*, 350 S.C. 268, 271, 565 S.E.2d 306, 308 (2002); *Weiner v. Selective Way Ins. Co.*, 793 A.2d 434, 444 (Del. Super. 2002)(similar observations)

Bayview’s approach starkly illustrates that observation, as it features two degrees of separation. It first discards the original term “collapse” and substitutes the abstract phrase “substantial impairment of structural integrity.” Then Bayview’s engineer defines that phrase to his personal liking. The end result of this two-step substitution is a new coverage with no relationship to the original term “collapse.” (CP 1088 line 13)

It is uncontroverted, for example, that using Bayview’s definition a deck still capable of holding two Cadillacs stacked on top of each other would be treated as “collapsed.” (CP 1100 line 14) Likewise, the present case involves a building that supposedly was “collapsed” for over a decade before the residents even suspected a problem and made an insurance claim. Insurance policies are supposed to be given a

“sensible construction as would be given to the contract by the average person purchasing insurance.” *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash. 2d 165, 171, 110 P.3d 733, 737 (2005) quoting *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wash.2d 413, 427–28, 951 P.2d 250 (1998). These results defy common sense.

A portion of the definition in Webster’s Third International Dictionary is often cited in support of the substantial impairment phrase. The portion says collapse can mean “a breakdown of vital energy, strength, or stamina.” *Sprague, supra*, 174 Wn.2d at 534 (Stephens, J. dissenting). But this definition does not help Bayview.

First, the definition is chiefly concerned with human psychology and physiology, not physical objects which must change shape to “collapse.” See, *Sprague, supra*, 174 Wn.2d at 538 (Alexander, J. concurring). Second, Webster’s definition requires a *breakdown* of strength and not merely “substantial” impairment. In fact, Webster’s uses this complementary definition for the term “breakdown”:

a : a physical, mental, or nervous collapse : a sometimes sudden marked loss of health, strength, faculties, or ability to cope

<suffering a *breakdown* after years of overwork>

Webster’s New International Dictionary (unabridged online ed. 2014) (underline added; copy in appendix).

For example, after a long day of work a person might be less mentally sharp than when the day was new, perhaps enough to lessen her concentration as she drives home. This is impairment and the impairment might even be described as “substantial” when measured with reference to medical criteria. But it would be a gross exaggeration to say the person has mentally “collapsed.” Likewise, regardless of how “substantial” Bayview

might argue the rot damage is, its building did not break down and collapse when Travelers insured it in 1999.

4. The Material Impairment Standard

a. Collapse As An Imminent Structural Failure

As has been shown, the “actual collapse” and “substantial impairment” cases both are guilty of making abstract legal pronouncements that can be applied out of context. Lawyers cherry pick favorable language and litigation ensues. In 1997 a California court tried to make sense of this legal mishmash. In *Doheny West Homeowners' Ass'n v. American Guarantee & Liab. Ins. Co.*, 60 Cal. App. 4th 400, 70 Cal. Rptr. 2d 260 (1997), a parking garage suffered from an arguably “substantial” reduction in structural capacity. There was no change in shape and no imminent danger of a structural failure. The court looked at the facts of earlier cases and concluded the damage had to be substantial enough to create an imminent danger of actual collapse:

Doheny West argues that the out-of-state cases that reject the “actual collapse” standard, as we do, interpret “collapse” to mean “substantial impairment of structural integrity.” We do not agree. Those cases do not extend coverage to impairment of structural integrity, even if the impairment is substantial, if it is unrelated to actual collapse. Instead, those cases either implicitly or explicitly require that collapse be imminent and inevitable, or all but inevitable.

60 Cal. App. 4th at 406-08, 70 Cal. Rptr. 2d at 264-65 (underline added; citations omitted).

In the years since *Doheny*, acceptance of the imminent collapse standard has been almost universal. As the 8th Circuit observed in 2011:

Courts have required proof of imminence because that requirement “is consistent with the policy language and the reasonable expectations of the insured” and “avoids both the absurdity of requiring an insured to wait for a seriously damaged building to fall and the improper extension of coverage” that would convert the policy “into a maintenance agreement.” *Doheny W. Homeowners' Ass'n v. Am. Guar. & Liab. Ins. Co.*, 60 Cal.App.4th 400, 70 Cal.Rptr.2d 260, 264 (1997). For these reasons, numerous courts have required proof of a serious impairment “that connotes imminent collapse threatening the preservation of the building.” *Fantis Foods, Inc. v. N. River Ins. Co.*, 332 N.J.Super. 250, 753 A.2d 176, 183, 185 (2000). Other cases, while not addressing the issue, have noted that actual collapse was imminent in extending coverage to material impairments of structural integrity. *See* cases cited in *Doheny*, 70 Cal.Rptr.2d at 264–65.

KAAPA Ethanol, LLC v. Affiliated FM Ins. Co., 660 F.3d 299, 305-06 (8th Cir. 2011)(selected citations omitted); *see Zoo Properties, supra*, 797 N.W.2d at 782; *401 Fourth St., Inc. v. Investors Ins. Group*, 583 Pa. 445, 458-60, 879 A.2d 166, 173-74 (2005); *Buczek v. Continental Cas. Ins. Co.*, 378 F.3d 284, 290-91 (3rd Cir. 2004); *Assurance Co. of America v. Wall & Assoc. LLC*, 379 F.3d 557 (9th Cir. 2004); *Ocean Winds, supra*, 350 S.C. at 270-71, 565 S.E.2d at 308 (2002); *Weiner, supra*, 793 A.2d at 444 (Del. Super. 2002); *Fantis Foods, Inc. v. North River Ins. Co.*, 332 N.J. Super. 250, 260, 753 A.2d 176, 183 (App. Div. 2000)(all adopting imminent collapse test).

An important distinction should be kept in mind. Since 1997 several reported⁴ opinions have failed to discuss whether the material impairment standard is better phrased as “imminent collapse” or as “substantial impairment of structural integrity.” For example, the *Sprague* dissent mentioned substantial impairment without discussing imminent collapse. 174 Wn.2d at 534. When courts actually discuss the choice and make

⁴ Almost all of Bayview’s post-1997 decisions are unreported.

it, they have almost universally opted for imminent collapse. See *KAAPA Ethanol*, 660 F.3d at 306 (same observation).

b. Problems With The Imminent Collapse Standard

The trial judge initially adopted a standard she described as “‘substantial impairment of structural integrity’ (‘SSI’) with an imminent threat of collapse[.]” (CP 1358) This phrasing clarifies the degree of impairment required for coverage, stating that the decay can’t just be “substantial” in the abstract, but must be substantial enough to create an imminent threat that the building will fall down, cave in, etc. Bayview stipulates that it has no evidence of such damage. (CP 1483)

Travelers cross-appeals this ruling because the judge’s definition dispenses with any need for the building to change shape. To the extent the imminent collapse test is used to describe a situation in which a building has begun to fall but the structure is not yet “rubble on the ground,” it accurately reflects the meaning of “collapse.” A building’s support beams, for example, might sag or buckle sufficiently to indicate their utter failure is imminent. The trial court’s formula, however, suggests that coverage can exist when there has not yet been a change in shape, but such a change is certain to begin in the very near future. This extends the coverage beyond what was written.

The argument for such a coverage extension is found in *Doheny, supra*. The policy before it covered not just “collapse” but “risks of direct physical loss involving collapse of a building.” The court held that this language encompassed not only an actual collapse, but a threat of collapse:

It is undisputed that the clause covers “collapse of a building,” that is, that there is coverage if a building falls down or caves in. However, the clause

does not limit itself to “collapse of a building,” but covers “risk of loss,” that is, the threat of loss.

70 Cal.Rptr.2d at 263 (footnotes and selected citations omitted).

Doheny said the term “risk” means “threat,” so the coverage includes not only actual collapses, but imminent ones. In this appeal, the third Travelers policy, in effect for 1998-1999 uses the same “risks of collapse” language as the *Doheny* policy. (CP 1278)

Doheny incorrectly focused on a single sentence in the policy. Courts, however, consider the policy as a whole. See, *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn. 2d 165, 171, 110 P.3d 733, 737 (2005). “The insurance contract must be viewed in its entirety; a phrase cannot be interpreted in isolation.” *Allstate Ins. Co. v. Peasley*, 131 Wn. 2d 420, 424, 932 P.2d 1244, 1246 (1997). Thus, the term “risk” must be read in context and consistent with the purpose of the insurance. See, *Wolstein v. Yorkshire Ins. Co. Ltd.*, 97 Wash. App. 201, 212, 985 P.2d 400, 407 (1999).

Travelers’ 1998-1999 policy begins with this grant of coverage:

4. Covered Causes of Loss

RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

- a. Limited in Paragraph **A.5.**, Limitations; or
- b. Excluded in Section **B.**, Exclusions.

(CP 1275; emphasis in original)

Courts have not had any trouble concluding that under this grant for “risks” there must be actual, physical damage, not just a threat of future damage, before coverage can exist. See, *Villella v. Public Employees Mut. Ins. Co.*, 106 Wn.2d 806, 808 & 812, 725 P.2d 957 (1986); *Fujii v. State Farm Fire & Cas. Co.*, 71 Wn. App. 248, 857 P.2d 1051

(1993). This conclusion is consistent with the ordinary meaning of the term “risk,” which includes:

3.

d : an insurance hazard from a (specified) cause or source

<war *risk*>

<disaster *risk*>

Webster's Third New International Dictionary, Unabridged. (Online ed. 2013)(copy in appendix).

risk (risk) *n.* **1** A chance of encountering harm or loss; hazard; danger. **2** In insurance, hazard of loss, as of a ship or cargo, or of goods or other property; also, degree of exposure to loss or injury. **3** An obligation or contract of insurance on the part of the insurer: to take a *risk* on a cargo. **4** An applicant for an insurance policy considered with regard to the advisability of placing insurance upon him. See synonyms under DANGER, HAZARD.

Funk & Wagnalls Standard Dictionary (International ed. 1970)(underline added; copy in appendix).

Because “risk” appears in an insurance contract, a reasonable person applying the ordinary and popular meaning would understand from the context that it refers to the type of hazards insured by the contract.⁵ *Accord, Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn. 2d 501, 513, 276 P.3d 300, 306 (2012)(noting that term “risks” refers to the perils insured against). Travelers’ Additional Coverage for “risks of direct physical loss involving collapse” is consistent with the policy’s initial coverage grant for “risks of direct physical loss.” Both phrases refer not to “threat of loss” as *Doheny* incorrectly

⁵ Just like a person signing a brokerage agreement with Merrill Lynch will understand that “stock” means securities and not the end of a rifle that is placed against the shoulder.

concluded, but to the hazards insured by the contract. *See, Wolstein, supra*, 97 Wash. App. at 212, 985 P.2d at 407 (1999)(interpreting phrase “all risks”).

This is the interpretation consistent with the *entire* contract read as a *whole*. If “risks” means “threat” or “chance,” then the insurance contract is converted from physical damage coverage into some sort of agreement for financing the cost of avoiding future damage. *See generally, Boeing Co. v. Aetna Cas. and Sur. Co.*, 113 Wn.2d 869, 886, 784 P.2d 507 (1990)(distinguishing between insured “property damage” and uninsured measures undertaken to prevent such damage).

A second problem with the *Doheny* “risks of collapse” approach is that many policies do not use the “risks of collapse” language. In the present appeal, the 2 Travelers policies in effect from 1996-1998 do not use the “risks of collapse” phrase. (CP 1120, 1200) Thus, the Court would have to interpret “risk” to mean “threat” or “potential for,” and also would have to fashion another interpretation for the policies that do not used the term “risk” in the Collapse coverage.

In addition to focusing on the “risk” term, *Doheny* and several other courts have justified extending Collapse coverage to imminent collapses that have not yet started on the basis that requiring the collapse to begin would be bad public policy—it would encourage a building owner to wait for the structure to fail so that she could make a covered collapse claim. *See, Doheny*, 70 Cal.Rptr.2d at 263; *see, also, Ocean Winds, supra*, 565 S.E.2d at 308; *Weiner, supra*, 793 A.2d at 444. This observation is legally incorrect, because an anticipated collapse that an owner allowed to happen would not be a covered, fortuitous loss. *See, Hillhaven Properties Ltd. v. Sellen Const. Co., Inc.*, 133

Wn. 2d 751, 767, 948 P.2d 796, 803 (1997); *University of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1283 (6th Cir. 1995).

In any event, “[a]pplying the same logic, with the same lack of restraint, courts could convert life insurance into health insurance.” *Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070, 1077, 70 P.3d 351, 355 (2003). Absent direction from the legislature, an insurer is free to limit its liability and notions of public policy should not be used to expand coverage. *See, Peasley, supra*, 131 Wn. 2d at 432, 932 P.2d at 1250; *Cary v. Allstate Ins. Co.*, 130 Wn. 2d 335, 339-40, 922 P.2d 1335, 1338 (1996).

c. **Existing Washington Cases Do Not Mandate Phrasing The Material Impairment Standard As “Substantial Impairment Of Structural Integrity.”**

Bayview’s primary argument is that prior Washington cases universally favor phrasing the material impairment standard as “substantial impairment of structural integrity,” rather than “imminent collapse.” Implicitly, Bayview also argues the case law uses “substantial impairment of structural integrity” not just as a legal term of art, but as a new definition of “collapse.” None of these cases bind the present Court and all are far less applicable than Bayview pretends.

Bayview cites the federal district court decision in *Forest Lynn, supra*, 892 F. Supp. at 1310. The damage there, however, included a change in shape suggesting an actual collapse. *Id.* at 1312 (“Some beams are deformed and have crushed or compressed”); *see Clendenning, supra*, 700 N.E.2d at 848 (same observation). In addition, *Forest Lynn* is a 1995 opinion predating the 1997 *Doheny West* decision, so it

provides no insight whatsoever into whether “imminent collapse” is a better way to phrase the material impairment standard.

The federal courts hardly are unanimous. In the post-*Doheny* case of *Assurance Co. of America v. Wall & Assoc. LLC*, 379 F.3d 557 (9th Cir. 2004), the court decided that Washington would follow *Doheny*, and concluded the coverage was for “imminent collapse.” *Id.* at 563.

Existing state court decisions also are unhelpful. Great weight is place on a footnote in *Mercer Place Condominium Assoc. v. State Farm Fire & Cas. Co.*, 104 Wash. App. 597, 602 n.1, 17 P.3d 626, 628 (2001). However, that footnote is preceded by this statement:

Washington has not decided the meaning of “collapse” as used in first-party insurance policies, and this case does not require us to do so, as Mercer Place and State Farm have agreed that the word “collapse” as used in Mercer Place’s policy means “substantial impairment of structural integrity.”

Id. (underline added)

Bayview also cites a several unreported decisions, some of which are cited in violation of RAP 10.3(a)(5).⁶

Another argument based on Washington authority is that the material impairment standard was implicitly adopted in *Panorama Village Condo. Owners Assoc. Board of Directors v. Allstate Ins. Co.*, 144 Wash.2d 130, 26 P.3d 910 (2001). Not so. In that case, an insurance policy limited the time for filing suit to “one year after a loss occurs.” 144 Wash.2d at 135. The court held that when the claim is for collapse due to hidden

⁶ And even those citations are incomplete. In 2007 Division One stated that existing Washington case law was “unsettled” and could equally support “imminent collapse” or “substantial impairment of structural integrity.” *Seaman v. Farmers Ins. Exch.*, 140 Wash. App. 1026 (2007).

decay, there is no occurrence until “(1) the date of actual collapse or (2) the date when the decay which poses the risk of collapse is no longer obscured from view.” *Id.* at 133-4. The argument thus becomes that by recognizing a distinction between actual collapse and “risk of collapse,” the Washington court implicitly adopted the material impairment standard. *See, Sprague, supra*, 174 Wash.2d at 534 (Stephens, J. dissenting).

The only thing *Panorama Village* “adopted” was both sides’ decision not to appeal a trial court order. The trial court imposed coverage for imminent collapse.⁷ Neither side appealed this ruling. Therefore, it was not a subject of review. RAP 2.4(b); *see, Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash. 2d 654, 693, 15 P.3d 115, 136 (2000). Thus, one will search *Panorama Village* in vain for any discussion of the correct standard for “collapse.” Rather, the trial court’s ruling established the law of the case and the parties and the reviewing court all implicitly assumed that “imminent collapse,” was the correct standard to apply.

Even if *Panorama Village* implicitly adopted the material impairment standard, it can’t possibly be read to favor “substantial impairment of structural integrity” over “imminent collapse.” The case involved an imminent collapse and the Court’s analysis of the suit limit would be the same regardless of how the material impairment standard is phrased.

Finally, Bayview quotes the dissenting opinion in *Sprague, supra*. But similar to *Panorama Village*, the rotted deck walls in *Sprague* “were in a state of imminent collapse[.]” 174 Wash.3d at 527. While Justice Stevens happened to use the older “substantial impairment” phrasing, the distinction between that phrase and “imminent

⁷ This fact is noted in the court of appeals decision, 99 Wash. App. at 276, and in West’s synopsis, at the Supreme Court level, 26 P.3d at 910, but is not mentioned in the body of the Supreme Court opinion.

collapse” was not material to her argument, which was that decay amounting to “collapse” was separate from the excluded decay. The dissent does not even mention the imminent collapse phrase, much less does it reject it.

B. ARGUMENT CONCERNING ESTOPPEL

1. Procedural Posture And Standard Of Review

After the trial court adopted an imminent collapse standard, Bayview moved for summary judgment contending Travelers was estopped to assert any standard other than bare “substantial impairment of structural integrity.” Travelers cross-moved for summary judgment. The trial court ruled that Travelers was estopped, but only to the extent that it had to use the same standard set forth in the denial letter, i.e., a collapse can take place when “the structure is so substantially impaired that even the reserve strength due to the safety factors built into the building code allowable capacities are exhausted.” (CP 1389, 1478). Subsequently, Bayview and Travelers stipulated in part:

Plaintiff has no evidence sufficient to create a genuine issue of material fact as to whether any of the following physical damage due to hidden decay existed in the building or any part of the building during any Travelers policy period: (a) substantial impairment of structural integrity with an imminent threat of collapse, and/or (b) that the building or any part of the building was so substantially impaired that even the reserve strength due to the safety factors built into the building code allowable capacities was exhausted.

(CP 1483)

The trial court granted summary judgment based on this stipulation. (CP 1490)

Bayview appeals from the estoppel order, arguing the Order did not go far enough. Travelers cross-appeals, contending it should not be estopped at all. Because

Bayview has no evidence of damage falling within the definition set forth in the estoppel order, the controlling issue is whether Travelers is estopped to apply any standard except bare and unqualified “substantial impairment of structural integrity.” If not, this Court should affirm. *See, Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 21-22, 851 P.2d 689, 691 (1993). Since the estoppel issue was resolved on summary judgment, review is *de novo*. *See, Sheikh v. Choe*, 156 Wn. 2d 441, 447, 128 P.3d 574, 577 (2006).

2. Facts Relevant To Estoppel

Bayview submitted its claim in April 2011. (CP 1385) Travelers denied the claim on June 14, 2011, stating:

In assessing whether damage constitutes a “collapse,” Travelers does not require the building to completely fall down or to be reduced to rubble. A collapse can take place when the structure is so substantially impaired that even the reserve strength due to the safety factors built into the building code allowable capacities are exhausted. It is questionable that such a condition exists here, but regardless, there is no basis for concluding that such a condition existed on or before December 17, 1999. The fact that the building was in continual use for over a decade demonstrates that no part of it was “collapsed” in 1999.

(CP 1389)

The letter ended with these paragraphs:

This concludes Travelers’ explanation. The purpose of this letter has been to provide a reasonable explanation, in relation to the facts and policy provisions, of the reasons Travelers presently is relying on for denying the claim. This letter is not intended to be an exhaustive list of every fact, policy provision, or legal principle which might apply in some way, nor is this letter intended to waive Travelers’ ability to rely on other reasons for denying any part of the claim, whether the reasons exist now or in the future.

All terms and conditions of the policy remain in effect without modification. Travelers continues to reserve all rights and defenses which exist now or which may arise in the future, including but not limited to

those based on the terms of the policies, the conduct of the parties, or the passage of time. No waiver or estoppel of any sort is intended and none should be inferred.

(CP 1390)

Bayview sued in October 2011. (CP 1) Several motions were filed and heard between Bayview and a co-defendant, Philadelphia Indemnity Insurance Company. Travelers did not participate in these motions. At no time during the litigation did Travelers ever state that “substantial impairment of structural integrity” was a proper definition of “collapse.”⁸

On January 8, 2013, Bayview’s engineer issued his report contending that “SSI” was present and had existed when Travelers insured the building. (CP 1392) The report made no mention of Travelers’ denial letter. Instead, the engineer adopted his own view of Washington law, stating:

Washington State courts have held that where additional coverage for collapse is provided, but the policy does not define “collapse,” the term shall be taken to mean “Substantial Structural Impairment.”

(CP 1394)

Five weeks later, on February 15, 2013, Bayview moved for partial summary judgment, asking that “collapse” be defined as “substantial impairment of structural integrity.” (CP 977) The motion said: “It is anticipated that defendants will argue for a definition of collapse either requiring actual collapse, or SSI along with a threat of imminent collapse[.]” (CP 981)

⁸ The underlined facts are mentioned because Bayview suggests in its brief that during Philadelphia’s motion practice Travelers acquiesced in Bayview’s coverage theory by failing to disclaim it, when the motions did not require Travelers to respond and Travelers published no statement accepting that theory.

Travelers argued just as Bayview had anticipated. The trial court denied Bayview's motion and adopted imminent collapse as a standard. (CP 1358)

Bayview then moved for summary judgment contending that because Travelers used the words "substantially impaired" in its denial letter, it was estopped from denying that "substantial impairment of structural integrity" was the correct standard. (CP 1375) To prove reliance, Bayview's estoppel brief asserted, without a supporting declaration, that in directing its litigation expert's investigation, Bayview had relied upon Travelers' alleged adoption of "SSI." (CP 1379) This contradicted the brief it had filed only weeks earlier (after the expert's report) where it claimed to "anticipate" that Travelers would argue for actual or imminent collapse. (CP 981)

3. **Travelers Was Not Estopped To Assert A Standard Other Than Bare "Substantial Impairment Of Structural Integrity."**
 - a. **Conforming To A Then-Controlling Legal Precedent Was Not Inequitable And Estoppel Does Not Apply To Issues Of Law**

Bayview's estoppel motion was based on Travelers denial letter, which said: "A collapse can take place when the structure is so substantially impaired that even the reserve strength due to the safety factors built into the building code allowable capacities are exhausted." The quoted phrase sets forth an imminent collapse standard used by an engineer in another case. When Travelers denied the claim in June 2011, that case was controlling precedent in Division One. *See, Sprague v. Safeco Ins. Co. of Am.*, 158 Wn. App. 336, 241 P.3d 1276 (2010), *rev'd on other grounds*, 174 Wn.2d 524 (2012). Division I ruled that collapse exists when certain structural conditions are met:

Here, Safeco's own expert, Pacific, determined that there was a "substantial impairment of structural integrity" to the fin walls and that they were in "a state of imminent collapse." The report itself, defined imminent collapse as occurring "when the structural supporting elements/assemblies are so severely damaged that even the reserve strength due to the safety factors built into the building code allowable capacities is exhausted."

.....

For purposes of the pre-2003 policies, we hold that the findings of Safeco's own experts that the building was in a state of imminent collapse and that there was substantial impairment to the structure of the building were sufficient to establish collapse in the present case.

158 Wn. App. at 342 (underline added).

Travelers' denial letter quoted, almost verbatim, the structural engineer's definition of "imminent collapse" in *Sprague*. That court specifically said damage meeting this criteria was "sufficient to establish collapse." 158 Wn. App. at 342.

To be equitably estopped, Travelers first must do something inequitable. See *Prekeges v. King County*, 98 Wn. App. 275, 283, 990 P.2d 405, 410 (1999), citing *Douchette v. Bethel School Dist.*, 117 Wn.2d 805, 811, 818 P.2d 1362 (1991). Travelers did nothing inequitable by acknowledging the standard in *Sprague*. Indeed, if Travelers had not acknowledged it, Travelers risked committing a tort. Cf. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288, 299 (1997) (no bad faith if insurer denies coverage based on an arguable interpretation of existing law). No good deed, it seems, can go unpunished: Travelers acknowledged the case law as it existed at the time, and now is being told such conduct is so heinous a court has no choice but to sanction Travelers with an estoppel.

Case law changes. Perhaps this is one reason equitable estoppel applies only to representations of fact, not to representations of law. *Chemical Bank v. Washington Pub.*

Power Supply Sys., 102 Wn. 2d 874, 905, 691 P.2d 524, 542 (1984); *Concerned Land Owners of Union Hill v. King County*, 64 Wn. App. 768, 778, 827 P.2d 1017, 1023 (1992). The correct collapse standard is an issue of law and estoppel does not apply here.

b. **The Elements Of Equitable Estoppel Were Not Proven By Clear, Cogent And Convincing Evidence**

The elements of equitable⁹ estoppel are:

(1) an admission, statement, or act inconsistent with a claim afterward asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury which would result to the relying party if the first party were allowed to contradict or repudiate the prior act, statement or admission.

See Colonial Imports, Inc. v. Carlton Nw., Inc., 121 Wn. 2d 726, 853 P.2d 913, 918 (1993). Each element must be proven by clear, cogent and convincing evidence. *Id.*, 121 Wn. 2d at 734-5. Thus, on summary judgment the court must determine whether a rational trier of fact could find that Bayview supported its claim with enough evidence to meet that standard. *See, Woody v. Stapp*, 146 Wash. App. 16, 22-23, 189 P.3d 807, 810 (2008).

To prove the first element, Bayview had to show that Travelers adopted bare and unqualified “substantial impairment of structural integrity” and then disclaimed it. But Travelers never adopted that standard. Instead, it quoted the “imminent collapse” definition applied in *Sprague*.

⁹ This case involves equitable estoppel only. Since this case does not involve breach of a duty to defend under a liability insurance policy, the special rule that liability insurers acting in bad faith can be estopped to deny coverage does not apply. *See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn. 2d 122, 131, 196 P.3d 664, 668 (2008).

The second element is reasonable reliance. Bayview's claimed reliance is that its engineer used "substantial structural impairment" rather than imminent collapse. (CP 1378) But the expert did not get his "SSI" position from Travelers' letter. The expert's own report shows the source of his opinions was not Travelers, but his own belief about what "Washington State courts have held . . ." (CP 1392), and the expert will not even say that he read Travelers' letter prior to issuing his report. (CP 1444) He also did not use the criteria outlined in Travelers' letter, which said a collapse can take place when the reserve strength is exhausted. (CP 1389) Instead, he used a different approach, the same one he used in other claims, which requires the reserve capacity to remain 100% intact. (CP 1097-8, 1392)

Contrary to its later assertions, Bayview did not believe Travelers had committed itself to a bare substantial impairment standard. Why would it file a summary judgment motion on the definition of "collapse" if it believed Travelers had agreed to Bayview's standard? Bayview's motion even stated: "It is anticipated that defendants will argue for a definition of collapse either requiring actual collapse, or SSI along with a threat of imminent collapse[.]" (CP 981) Bayview fails to explain how it could be relying on Travelers' alleged commitment to its expert's personal definition of "SSI" while it was anticipating that Travelers would argue for a completely different legal standard. There was no clear, cogent and convincing evidence of actual reliance.

Even if there had been reliance on something Travelers said, the reliance must have been reasonable. Travelers' letter concludes, "Travelers continues to reserve all rights and defenses which exist now or which may arise in the future . . . No waiver or estoppel of any sort is intended and none should be inferred." (CP 1390) This language

precludes any reasonable belief that Travelers was even committed to the standard in the denial letter, much less to the very different standard eventually applied by Bayview's expert.

The last element of estoppel is injury caused by the reasonable reliance. Bayview asserted that it spent "thousands" on its litigation expert's investigation. (CP1378) But it does not show it would have spent any less if the legal test was something other than the expert's personal definition of "SSI." For example, Bayview's expert cut 16 inspection holes in the building's siding. (CP 1392-3) There is no affidavit from the expert saying he would have cut more, or less, or in different places if the legal standard changed. Only in its brief did Bayview suggest that its investigation would have to be redone. (1378) An unsupported assertion in a brief is not evidence. *See Doty-Fielding v. Town of S. Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054, 1057-58 (2008).

c. **Bayview Failed To Diligently Pursue Resolution Of the Legal Issue**

If, as Bayview now suggests, the physical details of its litigation expert's investigation were dictated by the legal standard to be applied, then Bayview could have and should have petitioned the trial court much earlier for a ruling on the correct standard for "collapse." As it was, suit was filed in October 2011, the expert report issued on January 8, 2013, and Bayview did not file its motion on the standard for collapse until February 2013.

"One condition of equitable relief requires the claimant to have diligently pursued his rights." *Hyatt v. Dep't of Labor & Indus.*, 132 Wn. App. 387, 398, 132 P.3d 148, 153 (2006)(citation omitted). "Equity aids the vigilant, not those who slumber on their

rights.” *Harman v. Dep't of Labor Indus.*, 111 Wn. App. 920, 927, 47 P.3d 169, 172 (2002), quoting *Leschner v. Dep't of Labor & Indus.*, 27 Wn. 2d 911, 927, 185 P.2d 113, 122 (1947). Bayview was not diligent. Instead of quickly obtaining resolution of a controlling legal issue, Bayview pressed forward with an investigation based on what its expert believed “Washington State courts have held . . .” (CP 1394)

VI. CONCLUSION

The cases using the old “substantial impairment of structural integrity” formula had the noble goal of finding coverage for collapses short of “rubble on the ground,” but this legal term of art is so poorly phrased that it is being applied out of context to rewrite the insurance policy.

The correct standard is actual collapse. This includes damage short of “rubble on the ground.” There must, however, be a change of shape, such as falling down, caving in or other structural deflection, even if the structure remains partially standing. If this standard is adopted, the judgment should be affirmed.

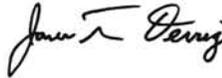
If actual collapse is not adopted, then imminent danger of actual collapse is the overwhelming modern trend and should be adopted. If it is, the judgment should be affirmed.

As a matter of law, the circumstances do not support equitable estoppel. Estoppel does not apply to representations of law, and Travelers should not be punished when it was only trying to follow the law as it existed at the time. Bayview has failed to prove each element of estoppel by clear, cogent and convincing evidence, and was not diligent

in obtaining resolution of the legal issue underlying this case. If the Court agrees, the judgment should be affirmed.

DATED this 19th day of February, 2014.

JAMES T. DERRIG
ATTORNEY AT LAW PLLC



James T. Derrig, WSBA 13471
Attorney for Travelers.

OFFICE RECEPTIONIST, CLERK

From: Jim Derrig <jim.derriglaw@me.com>
Sent: Thursday, February 20, 2014 2:17 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Cause No. 89218-I; Respondent's Brief
Attachments: Respondent's Brief (no appendix).pdf; trba-p-certserv(resp brf).pdf

I am attaching Respondent's Brief and the associated Certificate Of Service. As you instructed, the brief's appendix will be sent by regular mail and you will add it to the brief upon receipt.

Sincerely,

James T Derrig
James T Derrig Attorney at Law
A Professional Limited Liability Company
(ph) 206-414-7228
(efax) 1-866-867-1093
Jim.Derriglaw@me.com

89218-1

Filed

FEB 25 2014

Clerk of Supreme Court

APPENDIX



OAC_001158



OAC_001200



OAC_001201



2012.01.14

OAC_001202



OAC_001203



OAC_001216

Merriam-Webster Unabridged Dictionary

break·down *noun* \ˈbrāk-ˌdaʊn*plural -s*

1 : the action or result of breaking down; *especially* : a situation in which machinery becomes inoperative through breakage or wear : an ending of effective operation

<flooding of the mine caused by a *breakdown* of the pumps>

2 a : a physical, mental, or nervous collapse : a sometimes sudden marked loss of health, strength, faculties, or ability to cope

<suffering a *breakdown* after years of overwork>

b : ²_{BREAK} 3g

c : surrender to agitation or emotion : loss of self-control

3 a : failure of operation : disruption checking progress or effectiveness : a condition marked by futile ineffectiveness : COLLAPSE, DISINTEGRATION

<the *breakdown* of the negotiations between the countries>

<a *breakdown* of communications with the territories>

<a *breakdown* of tribal customs>

b : failure of insulation; *especially* : failure of an insulating material (as air, oil, porcelain, or rubber) to prevent passage of an electric discharge

4 a : a noisy rapid shuffling dance; *especially* : a dance engaged in competitively by groups or pairs in succession

b : a tune suitable for such a dance

5 : the part of a drop-forging die that distributes the metal of the work after it leaves the fuller by bending and shaping it in preparation for forging in the roughing die — called also *edger*; *side cut*

6 a : DECOMPOSITION; *especially* : chemical decomposition (as of a complex compound)

b : softening or plasticization of rubber especially by mastication

c : a disorganization of cellular tissue (as of stored apples) resulting in internal discoloration

7 a : division into categories

<a statistical *breakdown* of data>

ANALYSIS, CLASSIFICATION; *specifically* : division (of a job or operation) into several distinct processes or operations

b : an explanation or account with specific headings or categories

<a *breakdown* of the casualties according to various service branches>

: an itemized account

<a budget *breakdown*>

<a *breakdown* as to sources of revenue>

c : analysis of a movie script in the interest of economy and convenience in filming

B : any amateur wrestling maneuver by which a contestant in advantage position forces an opponent to the mat from a position on his or her hands and knees or from a bridge position

Origin of BREAKDOWN

break down

First Known Use: 1827 (sense 1)

Related to BREAKDOWN

Synonyms: crack-up, nervous breakdown, tailspin

Related Words: frazzle, freak-out, meltdown; alarm (*also* alarum), anxiety, apprehension, disquiet; excitability, nervousness; disturbance; agitation, discomposure, perturbation; basket case

Near Antonyms: aplomb, calmness, composure, coolness, imperturbability, placidity, self-possession, sereneness, serenity, tranquillity (*or* tranquility), tranquillness

Pronunciation Symbols

© 2014 Merriam-Webster, Incorporated

Merriam-Webster Unabridged Dictionary

¹
col·lapse *verb* \kə-'laps*inflected form(s): -ed/-ing/-s**transitive verb*

1 : to break down completely : fall apart in confused disorganization : crumble into insignificance or nothingness : DISINTEGRATE

<his case had *collapsed* in a mass of legal wreckage — Erle Stanley Gardner>

<a flimsy banking enterprise which *collapsed* — R. A. Billington>

2 : to fall or shrink together abruptly and completely : fall into a jumbled or flattened mass through the force of external pressure : fall in

<the sides of a limp empty boat *collapse*>

<our interest *collapses* like a pricked balloon — G. M. Trevelyan>

<a blood vessel that *collapsed*>

3 : to cave in, fall in, or give way : undergo ruin or destruction by or as if by falling down : become dispersed

<its passage ripped away the crown of the arch and immediately the whole bridge *collapsed* — O. S. Nock>

<a magnetic field *collapsing*>

4 : to suddenly lose force, significance, effectiveness, or worth

<all his annoyance *collapsed* in a heap — Hamilton Basso>

<*collapsing* currencies of unstable countries>

5 : to break down in vital energy, stamina, or self-control through exhaustion or disease : lose ability to perform accustomed activities : fall helpless or unconscious

<a fireman *collapsing* from the fumes>

<several oarsmen *collapsing* after the hard race>

<*collapsed* into tears>

6 : to fold down into a more compact shape : close together

<a *collapsing* opera hat>

<a telescope that *collapses*>

collapse **verb**

: to cause to collapse

<*collapse* the movement>

<*collapsing* an infected lung>

<the explosion *collapsed* several buildings>

<*collapse* an opera hat>

Origin of COLLAPSE

Latin *collapsus*, past participle of *collabi* to collapse, from *com-* + *labi* to fall, slide — more at sleep

First Known Use: 1732 (intransitive sense 2)

Related to COLLAPSE

Synonyms: buckle, cave (in), crumple, founder, give, go, go out, implode, tumble, yield, give way

Antonyms: click, come off, deliver, go, go over, pan out, succeed, work out

Related Words: deflate, flatten, melt, melt down; break, break down, conk (out), crash, die, fail, give out, stall; burst, shatter, smash, splinter, split; crack, crumble, pop, snap

Near Antonyms: inflate, rise, swell

Pronunciation Symbols

© 2014 Merriam-Webster, Incorporated

New Oxford American Dictionary

THIRD EDITION

Edited by

Angus Stevenson

Christine A. Lindberg

FIRST EDITION

Elizabeth J. Jewell

Frank Abate

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press, Inc., publishes works that further
Oxford University's objective of excellence
in research, scholarship, and education.

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam

Copyright © 2010 by Oxford University Press

First edition 2001

Second edition 2005

Third edition 2010

Published by Oxford University Press, Inc.

198 Madison Avenue, New York, NY 10016

www.oup.com

Oxford is a registered trademark of Oxford University Press

All rights reserved. No part of this publication may be reproduced,
stored in a retrieval system, or transmitted, in any form or by any means,
electronic, mechanical, photocopying, recording, or otherwise,
without the prior permission of Oxford University Press.

The Library of Congress Cataloging-in-Publication Data

Data available

ISBN 978-0-19-539288-3

1 3 5 7 9 8 6 4 2

Printed in the United States of America

on acid-free paper

1536233313150735

Notable songs: "Mona Lisa" (1950) and "Rambler" Rose" (1962).



Nat King Cole

Cole, Thomas (1801-48), US artist. He was one of the founders of the Hudson River School of painting.

cole /kɒl/ ▶ n. chiefly archaic a brassica, esp. cabbage, kale, or rape.

-ORIGIN Old English *cawel*, *caul*, related to Dutch *kool* and German *Kohl*, from Latin *caulis* 'stem, cabbage'; reinforced in Middle English by forms from Old Norse *kǫfl*. Compare with **KALE**.

col-ec-to-my /kɒl'ektəmɪ/ ▶ n. (pl. *colectomies*) surgical removal of all or part of the colon.

Cole-man /kɒlmən/, Ornette (1930-), US jazz saxophonist, trumpeter, violinist, and composer. His music is noted for its lack of harmony and chordal structure.

cole-man-ite /kɒlmə'nɪt/ ▶ n. a white crystalline mineral, typically occurring as glassy prisms, consisting of hydrated calcium borate.

-ORIGIN named after William T. Coleman (1824-93) + *-ite*.

Cole-man lan-tern /kɒlmən/ (also *Coleman lamp*) ▶ n. trademark a type of bright gasoline lamp used by campers.

Cole-op-ter-a /kɒlə'ɒptərə/ Entomology an order of insects that comprises the beetles (including weevils), forming the largest order of animals on the earth. ▶ (as plural noun *coleoptera*) insects of this order; beetles.

-ORIGIN modern Latin (plural), from Greek *koleopteros*, from *koleos* 'sheath' + *pteron* 'wing.'

cole-op-ter-an /kɒlə'ɒptərən/ Entomology ▶ n. an insect of the order Coleoptera; a beetle.

▶ adj. relating to or denoting coleopterans.

-DERIVATIVES **cole-op-ter-ous** /-tərəs/ adj.

cole-op-ter-ist /kɒlə'ɒptərɪst/ ▶ n. a person who studies or collects beetles.

-ORIGIN mid 19th cent.: from **COLEOPTERA** + *-ist*.

cole-op-tile /kɒlə'ɒptɪl/ ▶ n. Botany a sheath protecting a young shoot tip in a grass or cereal.

-ORIGIN mid 19th cent.: from Greek *koleon* 'sheath' + *ptilon* 'feather.'

cole-o-rhi-za /kɒlə'ɒrɪzə/ ▶ n. (pl. *coleorhizae* /-zɪ/) Botany a sheath protecting the root of a germinating grass or cereal grain.

-ORIGIN mid 19th cent.: from *koleos* 'sheath' + *rhiiza* 'root.'

Cole-ridge /kɒl(ə)rɪdʒ/, Samuel Taylor (1772-1834), English poet, critic, and philosopher. His *Lyrical Ballads* (1798), written with William Wordsworth, marked the start of English romanticism and included "The Rime of the Ancient Mariner." Other notable poems: "Christabel" and "Kubla Khan" (both 1816).

cole-seed /kɒl'si:d/ ▶ n. old-fashioned term for **RAPE**.

-ORIGIN late 17th cent.: from Dutch *koolzaad* 'cabbage or rape seed.'

cole-slaw /kɒl'slɔ:/ ▶ n. sliced raw cabbage mixed with mayonnaise and other vegetables, eaten as a salad.

-ORIGIN late 18th cent. (originally US): from Dutch *koolsla*, from *kool* 'cabbage' + *sla* (see **SLAW**).

Co-lette /kɒ'let/ (1873-1954), French novelist; born *Sidonie Gabrielle Claudine*. Notable works *Chéri* (1920), *La Fin de Chéri* (1926), and *Gigi* (1945).

cole-us /kɒlə's/ ▶ n. a tropical Southeast Asian plant of the mint family that has brightly colored variegated leaves and is popular as a houseplant. ▶ Genus *Salenostemon* (formerly *Coleus*), family Labiateae.

-ORIGIN modern Latin, from Greek *koleos* 'sheath' (because of the way the stamens are joined together, resembling a sheath).

cole-wort /kɒl'wɔ:t/, 'wɔ:rt/ ▶ n. chiefly archaic another term for **COLE**.

col-ic /'kɒlɪk/ ▶ n. severe, often fluctuating pain in the abdomen caused by intestinal gas or obstruction in the intestines and suffered esp. by babies.

-DERIVATIVES **col-ic-ly** adj.

-ORIGIN late Middle English: from Old French *colique*, from late Latin *colicus*, from *colon* (see **COLON**).

col-i-cin /'kɒlɪsɪn, -sɪn/ ▶ n. Biology a bacteriocin produced by a coliform bacterium.

-ORIGIN 1940s: from French *colicine* (from *coli*, denoting a bacterium) + *-in*.

col-ic-root /'kɒlɪk,rʊdɪ, -rʊdɪ/ ▶ n. a North American plant of the lily family, with a rosette of leaves and a spike of small goblet-shaped white or cream flowers. It was formerly used in the treatment of colic. ▶ *Alertris furinosa*, family Liliaceae.

col-i-form bac-te-ri-um /'kɒlə'fɔ:m, 'kɒl-/ ▶ adj. a rod-shaped bacterium, esp. *Escherichia coli* and members of the genus *Aerobacter*, found in the intestinal tract of humans and other animals. Its presence in water indicates fecal contamination and can cause diarrhea and other dysenteric symptoms. Also called **COLON BACILLUS**.

-ORIGIN early 20th cent.: from modern Latin *coli*, specific epithet in the sense 'of the colon' + *-i-form* + **BACTERIUM**.

Co-li-ma /kɒ'li:mə/ 1 a state in southwestern Mexico, on the Pacific coast.

2 the capital city of this state; pop. 123,587 (2005).

col-lin-e-ar /kɒ'li:nə/ (also *collinear*) ▶ adj. lying in the same straight line or linear sequence.

col-i-se-um /kɒlɪ'si:əm/ (also *colosseum*) ▶ n. [in names] a large theater or stadium: *the Charlotte Coliseum*.

-ORIGIN late 19th cent.: from medieval Latin, alteration of Latin *colosseum* (see **COLOSSEUM**).

col-li-tis /kɒ'lɪtɪs, kɒ-/ ▶ n. Medicine inflammation of the lining of the colon.

Coll /kɒl/ an island in the Inner Hebrides, west of Mull.

Coll, ▶ abbr. ▶ **Collateral**. ▶ **Collected** or **Collection** (used in written references to published works or sources). ▶ **College**. ▶ **Colloquial**.

col-lab-o-rate /kɒ'lə'bɔ:rət/ ▶ v. [no obj.] work jointly on an activity, esp. to produce or create something: *he collaborated with a distinguished painter on the designs*. ▶ cooperate traitorously with an enemy: *the indigenous elite who collaborated with the colonizers*.

-ORIGIN late 19th cent.: from Latin *collaborat-* 'worked with', from the verb *collaborare*, from *col-* 'together' + *laborare* 'to work.'

col-lab-o-ra-tion /kɒ'lə'bɔ:rətʃən/ ▶ n. 1 the action of working with someone to produce or create something: *he wrote on art and architecture in collaboration with John Betjeman*. ▶ something produced or created in this way: *his recent opera was a collaboration with Lessing*.

2 traitorous cooperation with an enemy: *he faces charges of collaboration*.

-DERIVATIVES **col-lab-o-ra-tion-ist** /-nɪst/ n. & adj. (sense 2).

-ORIGIN mid 19th cent.: from Latin *collaboratio(n)-*, from *collaborare* 'work together.'

col-lab-o-ra-tive /kɒ'lə'bɔ:rətɪv/ ▶ adj. produced or conducted by two or more parties working together: *collaborative research*.

-DERIVATIVES **col-lab-o-ra-tive-ly** adv.

col-lab-o-ra-tor /kɒ'lə'bɔ:rətɔ:r/ ▶ n. 1 a person who works jointly on an activity or project; an associate: *his collaborator on the book*.

2 a person who cooperates traitorously with an enemy; a defector: *he was a collaborator during the occupation*.

col-lage /kɒ'lɑ:ʒ, kɒ-/ ▶ n. a form of art in which various materials such as photographs and pieces of paper or fabric are arranged and stuck to a backing. ▶ a composition made in this way. ▶ a combination or collection of various things.

-DERIVATIVES **col-lag-ist** /-lɑ:ʒɪst/ n.

-ORIGIN early 20th cent.: from French, literally 'gluing.'

col-la-gen /'kɒlədʒɪn/ ▶ n. Biochemistry the main structural protein found in animal connective tissue, yielding gelatin when boiled.

-ORIGIN mid 19th cent.: from French *collagène*, from Greek *kolla* 'glue' + French *-gène* (see **-GENE**).

col-lap-sar /kɒ'ləp'sɑ:z/ ▶ n. Astronomy an old star that has collapsed under its own gravity to form a white dwarf, neutron star, or black hole.

-ORIGIN late 20th cent.: from **COLLAPSE**, on the pattern of words such as *puisar*.

col-lapse /kɒ'ləps/ ▶ v. [no obj.] 1 (of a structure) fall down or in; give way: *the roof collapsed on top of me*. ▶ [with obj.] cause (something) to fall in or give way: *it feels as if the slightest pressure would collapse it* | figurative *many people tend to collapse the distinction*

between the two concepts. ▶ (of a lung or blood vessel) fall inward and become flat and empty: (as adj. **collapsed**) *a collapsed lung*. ▶ [with obj.] cause (a lung or blood vessel) to do this.

2 (of a person) fall down and become unconscious, typically through illness or injury: *he collapsed from loss of blood*. ▶ sit or lie down as a result of tiredness or amusement: *exhausted, he collapsed on the bed* | *the three of them collapsed with laughter*.

3 (of an institution or undertaking) fail suddenly and completely: *in the face of such resolve his opposition finally collapsed*. ▶ (of a price or currency) drop suddenly in value.

4 fold or be folded to fit into a small space: [no obj.] *some cats collapse down to fit into a bag*. ▶ [with obj.] compress a displayed part of (a spreadsheet or other electronic document): *tabulation programs can be used to collapse this list in various ways*.

▶ n. an instance of a structure falling down or in: *the collapse of a railroad bridge* | *the church roof is in danger of collapse*. ▶ a sudden failure of an institution or undertaking: *the collapse of the Ottoman Empire*. ▶ a physical or mental breakdown: *he suffered a collapse from overwork* | *she's lying there in a state of collapse*.

-ORIGIN early 17th cent. (as **collapsed**): from medical Latin *collapsus*, past participle of *collabi*, from *col-* 'together' + *labi* 'to slip.'

col-laps-i-ble /kɒ'ləpsəbəl/ ▶ adj. (of an object) able to be folded into a small space: *a collapsible bed*.

-DERIVATIVES **col-laps-i-bil-i-ty** /kɒ'ləpsə'bɪlɪtɪ/ n.

col-lar /'kɒlə/ ▶ n. 1 a band of material around the neck of a shirt, dress, coat, or jacket, either upright or turned over and generally an integral part of the garment: *we turned our collars up against the chill*. ▶ short for **CLERICAL COLLAR**. ▶ a band of leather or other material put around the neck of a domestic animal, esp. a dog or cat. ▶ a colored marking resembling a collar around the neck of a bird or other animal. ▶ a heavy rounded part of the harness worn by a draft animal, which rests at the base of its neck on the shoulders.

2 a restraining or connecting band, ring, or pipe in machinery.

3 Brit. a piece of meat rolled up and tied. ▶ a cut of bacon taken from the neck of a pig.

4 Botany the part of a plant where the stem joins the roots.

▶ v. 1 [with obj.] put a collar on: *biologists who were collaring polar bears*.

2 [with obj.] informal seize, grasp, or apprehend (someone): *police collared the culprit*. ▶ approach aggressively and talk to (someone who wishes to leave): *he collared a departing guest for some last words*.

-DERIVATIVES **col-lared** adj. [in combination] a *fur-collared jacket*, *col-lar-less* adj.

-ORIGIN Middle English: from Old French *coller*, from Latin *collare* 'band for the neck, collar', from *collum* 'neck.'

col-lar beam ▶ n. a horizontal wooden joist or beam connecting two rafters and forming with them an A-shaped roof truss.

col-lar-bone /'kɒləbɒn/ ▶ n. either of the pair of bones joining the breastbone to the shoulder blades. Also called **CLAVICLE**.

col-lards /'kɒlərdz/ (also *collard greens*) ▶ n. a cabbage of a variety that does not develop a heart.

-ORIGIN mid 18th cent.: reduced form of *colewort*, in the same sense, from **COLE** + **WOAR**.

col-lared dove /dɒv/ ▶ n. an Old World dove related to the ringed turtle dove, with buff, gray, or brown plumage and a narrow black band around the back of the neck. ▶ Genus *Streptopelia*, family Columbidae: several species, in particular the sandy gray *S. decacota*, which originated in Asia, and has recently been found breeding widely in southeastern Florida.

col-lared liz-ard ▶ n. a lizard that is typically marked with spots and bands and has a distinctive black-and-white collar. It is found in dry rocky areas in the southern US and Mexico. ▶ *Crotaphytus collaris*, family Iguanidae.

col-lar stud ▶ n. a stud used to fasten a detachable collar to a shirt.

col-lar tie ▶ n. another term for **COLLAR BEAM**.

col-late /kɒ'lət, 'kɒlɪt, 'kælɪt/ ▶ v. [with obj.] 1 collect and combine (texts, information, or sets of figures) in proper order. ▶ compare and analyze (texts or other data): *these accounts he collated with his own experience*. ▶ Printing verify the order of (sheets of a book) by their signatures.

2 appoint (a clergyman) to a benefice.

▶ **PRONUNCIATION KEY** ɒ age, up; ɔ over, fur; a hat; ʌ ate; ɜ car; vlet; ɛ see; ɪ fit; ɪ by; ʊc sing; ɔ go; ɔ law, for; ɔ toy; ʊ good; ʊ go; ɔ our; ʊ thin; ɪ then; ɪ vision

Merriam-Webster Unabridged Dictionary

¹
risk *noun* \ˈrɪsk, ˈdɪəlektəl ˈresk\
 \ˈrɪsk, ˈdɪəlektəl ˈresk\
 \ˈrɪsk, ˈdɪəlektəl ˈresk\

plural -s

1 : the possibility of loss, injury, disadvantage, or destruction : CONTINGENCY, DANGER, PERIL, THREAT

<the infinite care and *risk* which are involved in the dangerous mission of bomb disposal — E. A. Weeks>

<foreign ships and planes refused to run the *risk* of attack — *Collier's Year Book*>

2 : someone or something that creates or suggests a hazard or adverse chance : a dangerous element or factor — often used with qualifiers to indicate the degree or kind of hazard

<the wife who didn't fix her husband a good breakfast ... wasn't a good *risk* — W. H. Whyte>

<must be kept clean and free from fire *risks* — Peter Heaton>

<a poor *risk* for surgery>

3 a (1) : the chance of loss or the perils to the subject matter of insurance covered by a contract
(2) : the degree of probability of such loss

b : AMOUNT AT RISK

c : a person or thing judged as a (specified) hazard to an insurer

<a poor *risk* for insurance>

d : an insurance hazard from a (specified) cause or source

<war *risk*>

<disaster *risk*>

4 : the product of the amount that may be lost and the probability of losing it — compare EXPECTATION 6B

— **at risk**

: in a state or condition marked by a high level of risk or susceptibility : in danger

<mistakes that put astronauts' lives *at risk* — M. R. Beschloss>

<patients *at risk* of infection>

— usually hyphenated when used attributively

<extra attention for *at-risk* students>

Origin of RISK

French *risque*, from Italian *risco*, *risico*, *rischio*

First Known Use: 1655 (sense 1)

Related to RISK

See Synonym Discussion at [danger](#)

Pronunciation Symbols

© 2014 Merriam-Webster, Incorporated



FUNK & WAGNALLS
STANDARD[®]
DICTIONARY
OF THE ENGLISH LANGUAGE

International Edition

with

SPECIAL SUPPLEMENTARY FEATURES

VOLUME TWO

FUNK & WAGNALLS
NEW YORK

Funk & Wagnalls Editorial Board for Dictionaries

ALBERT H. MARCKWARDT
Professor of English and Linguistics
Princeton University
Chairman

FREDERIC G. CASSIDY
Professor of English
University of Wisconsin

S. I. HAYAKAWA
Professor of English
San Francisco State College

JAMES B. McMILLAN
Professor of English
Chairman, Department of English
University of Alabama

FUNK & WAGNALLS STANDARD DICTIONARY *International Edition*

Copyright © 1971 by Funk & Wagnalls Publishing Company, Inc.
Previous Copyrights

© 1970, 1969, 1968, 1967, 1966, 1965, 1964, 1963, 1962, 1961, 1960, 1959 AND 1958, by Funk & Wagnalls Publishing Company, Inc.

"STANDARD" is a registered trademark of Funk & Wagnalls Publishing Company, Inc.

Library of Congress Catalog Card Number 69-11209

Copyright under the Articles of the Copyright Convention
of the Pan-American Republics and the United States.

Printed in the United States of America

A handful of unthreshed

ri- (*ri-*) *adj.* 1 Pertaining to riparian rights. 2 Growing on the sides or banks of water-courses, etc. [*L riparius* < *ripa* bank

ri- (*ri-*) *adj.* Growing or living on the banks of streams, as an animal

rip- (*rip-*) *n.* **Aeron.** 1 The cord, with the handle and fastening pins, which, when pulled, releases the canopy of a parachute from its pack. 2 A cord attached to the neck of a balloon, which, when pulled, releases the panel from the envelope.

rip- (*rip-*) *adj.* Grown to maturity and fit for use or grain. 2 Brought by ripening to a condition for use, as fully developed; matured. 4 In full bloom or ready; prepared; ready: The time for mowing. 5 Fit; opportune: The time for war. 6 Resembling a ripe fruit. 7 **Surg.** Ready for removal or opening, as an abscess. [*OE ripe* ready for ripening] — **ripe-ness** *n.*

ripe- (*ripe-*) *adj.* complete, consummate, finished, matured, mellow, perfect, perfectly seasoned. **Antonyms:** budding, immature, green, immature, imperfect, undeveloped.

rip- (*rip-*) *v.* **rip-** (*rip-*) *v.* To make or become

-rapped, -rap-ping To make a rip-rap in or upon; strengthen with rip-raps.

rip-roaring (*rip'rōr'ing, -rōr'-*) *adj.* **U.S. Slang** 1 Excellent; superior; exciting: a *rip-roaring* time. 2 Lively; full of vigor.

rip-roar-i-ous (*rip-rōr'ē-əs, -rōr'-*) *adj.* **U.S. Slang** Uproarious; boisterous; violent. — **rip-roar-i-ous-ly** *adv.*

rip-saw (*rip'sō'*) *n.* A coarse-toothed saw used for cutting wood in the direction of the grain.

rip-snort-er (*rip'snōrt'ər*) *n.* 1 Any person or thing excessively noisy, violent, or striking. 2 A violent windstorm.

rip-tide (*rip'tid'*) *n.* Water agitated and made dangerous for swimmers by conflicting tides or currents. Also called *rip, tiderip*.

Rip-u-ar-i-an (*rip'yō-ār'ē-ən*) *adj.* Designating or pertaining to a branch of the Frankish people that dwelt on both sides of the Rhine, near Cologne, in the fourth century. — *n.* A Ripuarian Frank. [*L ripuarius* < *ripa* bank]

Rip Van Win-kle (*rip van wing'kəl*) In Washington Irving's tale by that name in *The Sketch Book*, a Dutch villager, who, while out hunting in the Catskills, falls asleep for twenty years, and awakes to find his world changed and himself forgotten.

rise (*riz*) *v.* **rose, ris-en, ris-ing** *v.t.* 1 To move upward; go from a lower to a higher position. 2 To slope gradually upward: The ground rises here. 3 To have height or elevation; extend upward: The city rises above the plain. 4 To gain elevation in rank, status, fortune, or reputation. 5 To swell up: Dough rises. 6 To become greater in force, intensity, height, etc. 7 To become greater in amount, value, etc. 8 To become erect after lying down, sitting, etc.; stand up. 9 To get out of bed. 10 To return to life. 11 To revolt; rebel: The people rose against the tyrant. 12 To adjourn: The House passed the bill before rising. 13 To appear above the horizon: said of heavenly bodies. 14 To come to the surface, as a fish after a lure. 15 To have origin; begin: The river rises in the mountains. 16 To become perceptible to the mind or senses: The scene rose in his mind. 17 To occur; happen. 18 To be able to cope with an emergency, danger, etc.: Will he rise to the occasion? — *v.t.* 19 To cause to rise. 20 **Naut.** To cause, as a ship, to appear above the horizon by drawing nearer to it. — **to rise above** To prove superior to; show oneself indifferent to. — *n.* 1 The act of rising:

state of vigor and activity; growing: the rising generation. — *n.* 1 The act of one who or that which rises. 2 That which rises above the surrounding surface; specifically, a tumor; wen. 3 An insurrection or revolt; an uprising. 4 Yeast or leaven used to make dough rise; also, the quantity of dough prepared at once. — *prep. Dial.* 1 Approaching; going on: He's six years old, rising seven. 2 More than; upwards of: a crop rising 5,000 bushels.

risk (*risk*) *n.* 1 A chance of encountering harm or loss; hazard; danger. 2 In insurance, hazard of loss, as of a ship or cargo, or of goods or other property; also, degree of exposure to loss or injury. 3 An obligation or contract of insurance on the part of the insurer: to take a risk on a cargo. 4 An applicant for an insurance policy considered with regard to the advisability of placing insurance upon him. See synonyms under DANGER, HAZARD. — *v.t.* 1 To expose to a chance of injury or loss; hazard. 2 To incur the risk of. [*<F risque* < *Ital. rischio* < *risicare* dare, ult. < *Gk. rhiza* cliff, root] — **risk'er** *n.*

risk-y (*ris'kē*) *adj.* **risk-i-er, risk-i-est** Attended with risk; hazardous; dangerous. See synonyms under PRECARIOUS.

Ri-sor-gi-men-to (*rē-sōr'jē-men'tō*) *n.* The movement for the liberation and unification of Italy in the 19th century. [*<Ital., resurgence*]

ri-sot-to (*rē-sōt'tō*) *n.* Rice cooked in broth and served with meat, cheese, and various condiments. [*<Ital. <riso* rice]

ris-qué (*ris-kā', Fr. rēs-kā'*) *adj.* Bordering on or suggestive of impropriety; bold; daring; off-color: a *risqué* story or play. [*<F*]

Riss (*ris*) See GLACIAL EPOCH. [from *Riss*, name of a German stream]

ris-sole (*ris'ōl, Fr. rēs-sōl'*) *n.* In cookery, a sausagelike roll consisting of minced meat or fish, enclosed in a thin puff paste and fried. [*<F, <OF ruissole, rousole* < *LL russeola*, fem. of *L russeolus* reddish < *russus* red]

ris-so-lé (*rēs-sō-lā'*) *adj.* **French** Browned by frying.

Rist (*rēst*), **Charles**, 1874-1955, French economist.

ri-sus (*rī'səs*) *n.* A grin or laugh, especially the *risus sar-do-ni-cus* (*sār-don'i-kəs*), the twisted, grinning expression caused by spasm of the facial muscles, as in tetanus. [*<L, a grimace* < *ridere* laugh]

ri-tar-dan-do (*rē'tār-dān'dō*) *adj.* **Music** Slackening the speed gradually; retarding. [*<Ital.*]