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SUPREME COURT OF THE STATE OF WASHINGTON

MAX B. SPRAGUE and KRISTA SPRAGUE, husband and wife,  
and Washington residents,

Respondents,

v.

SAFECO INSURANCE COMPANY OF AMERICA, a Washington  
corporation and domestic insurer

Petitioner.

RESPONDENT SPRAGUES' SUPPLEMENTAL BRIEF

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## I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether an all-risk policy that does not exclude collapse but identifies “collapse” as a type of peril necessarily covers collapse?
2. Does collapse resulting from construction defects remain covered when the construction defect exclusion provides that “any” ensuing loss not excluded by the policy is covered?
3. Should this Court add a requirement that a resulting loss must be “separate and independent” from the excluded cause?

## II. STATEMENT OF THE CASE

This case concerns the Spragues’ homeowners insurance claim for the imminent collapse of their deck support piers. The Spragues bought their home in 1987 and remodeled it extensively in 1995-96, adding the decks and piers at issue.<sup>1</sup> Safeco insured the Spragues’ home continuously from time of purchase, through the remodel to the present.<sup>2</sup>

The Spragues’ three decks are supported by six tall piers or “fin walls,” thin walls that look like fins that stand apart from the main structure of the home and run from concrete pads on the ground up to the bottom deck and continue through to the middle deck.<sup>3</sup> See photos at

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<sup>1</sup> CP 12, ¶ 1.

<sup>2</sup> *Id.*

<sup>3</sup> CP 13, ¶ 2.

CP 14. Two of the middle fin walls continue up to a smaller third deck.<sup>4</sup> The fin walls are covered with EIFS, Exterior Insulating and Finishing System, a foam and stucco cladding known by the brand name “Dryvit.”<sup>5</sup>

Safeco’s policies before September 2003 insured the Spragues’ home and attached deck structures with all-risk coverage subject to certain enumerated exclusions.<sup>6</sup> The pre-2003 policies’ exclusions for construction defects and rot are followed by broad ensuing loss clauses, providing that “any” ensuing loss not excluded by the policy is covered.<sup>7</sup> “Collapse” was not listed as one of the exclusions.<sup>8</sup> In another section of the pre-2003 policies, the personal property coverage, Safeco specifically identified “collapse” as a type of “peril” that Safeco insured against, just like fire, lightning and explosion.<sup>9</sup>

The Spragues discovered decay in the fin walls in March 2008 and notified Safeco in April 2008.<sup>10</sup> Several months later Safeco denied the

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> “Coverage A – Dwelling” applies both to the “residence premises,” and the “structures attached to the dwelling.” CP 51; and CP 74. There were two forms used by Safeco before September 2003, but the all-risk building coverage grant for decks is the same. Compare CP 51 and CP 74.

<sup>7</sup> CP 52 at ¶15 and CP 51 at ¶5. For the coverage form in effect for the 9/1/99 to 9/1/03 policy periods see CP 76 at ¶17 and CP 75 at ¶6.

<sup>8</sup> CP 51-52 and CP 74-76.

<sup>9</sup> CP 54 at ¶12 and CP 79 at ¶12.

<sup>10</sup> CP 15 at ¶ 1.

claim and the Spragues requested that Safeco reconsider in light of the coverage for collapse under prior policies.<sup>11</sup>

Engineers hired by Safeco, Pacific Engineering Technologies (PET), conducted a second investigation, warned Krista Sprague to stay off the decks, and directed a contractor to install shoring to hold up the decks.<sup>12</sup> Analyzing coverage under the pre-2003 policies, Safeco's adjuster initially concluded: "[I]f collapse occurred as an ensuing loss to the faulty construction exclusion, coverage would have been triggered."<sup>13</sup>

In October 2008, PET concluded:

[I]t is our opinion that the decayed wood posts in each of the six piers that support the multi-level deck cause a state of **imminent collapse** and have **substantial impairment of structural integrity**. It is also our opinion that said conditions first occurred *prior* to September 2003.<sup>14</sup>

PET also opined that the cause of the collapse was inadequate flashing of the EIFS at the deck piers and lack of EIFS ventilation.<sup>15</sup> Safeco's adjuster then wrote the following claim file note:

It appears from my review of the PET report that the conditions of significant structural impairment and imminent collapse existed prior to the point in time that the Safeco policy forms changed and defined the term collapse.

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<sup>11</sup> *Id.* at ¶¶ 2-3.

<sup>12</sup> *Id.* at ¶ 4.

<sup>13</sup> CP 168.

<sup>14</sup> CP 106 (emphasis added).

<sup>15</sup> CP 109.

Will await coverage counsel's recommendation, but I suspect that this loss will be covered...<sup>16</sup>

Safeco's contractor estimated the cost of repair to be \$282,980.<sup>17</sup>

The adjuster promised Krista Sprague that the insurer would review the claim another time<sup>18</sup> and then internally requested that reserves be increased to \$291,934 based on the likelihood of coverage.<sup>19</sup>

Safeco ultimately denied coverage<sup>20</sup> and the Spragues filed suit. On cross-motions for summary judgment, the trial court granted summary judgment to Safeco. The Court of Appeals held that the loss was covered and reversed.

### III. STANDARD OF REVIEW

The construction of insurance policy provisions presents a question of law subject to de novo review.<sup>21</sup>

### IV. ARGUMENT

#### A. Safeco's pre-2003 Policies Cover "Collapse."

The Spragues submit that analytically, the first question for the Court is whether Safeco's pre-2003 policies cover collapse or not. If the

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<sup>16</sup> CP 171.

<sup>17</sup> CP 117.

<sup>18</sup> CP 16 at ¶ 6.

<sup>19</sup> CP 119.

<sup>20</sup> CP 121-35.

<sup>21</sup> *Mercer Place Condo. Ass'n. v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 601, 17 P.3d 626 (2000).

pre-2003 policies cover collapse, the next question is whether the construction defect and rot exclusions bar coverage or whether the ensuing loss clauses to those exclusions preserve coverage for collapse.

Safeco's pre-2003 policies are all-risk policies; they cover all losses to the Spragues' home and attached deck structures unless the cause of loss, or peril, is specifically excluded in the exclusion section of the policy.<sup>22</sup>

"All Risk" insurance is a promise to pay upon the fortuitous and extraneous happening of loss or damage from any cause whatsoever unless that cause is specifically excluded... Under an all risk policy, any risk that is not specifically excluded is an insured peril.

*Frank Coluccio Const. Co., Inc. v. King County*, 136 Wn. App. 751, 767, 150 P.3d 1147 (2007) (citations omitted). Safeco does not dispute that the deck piers are covered by the insurer's all-risk coverage grant.

Safeco's policies before 2003 do not list collapse as one of the exclusions. When an all-risk policy does not exclude a particular peril, the peril is covered. The inescapable conclusion therefore is that Safeco

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<sup>22</sup> The policies cover "accidental direct physical loss to property described in Building Property We Cover except as limited or excluded." CP 51 and CP 74.

policies before 2003 cover the peril of collapse. Even Safeco appeared to concede this point below at the Court of Appeals.<sup>23</sup>

The conclusion that Safeco's policies before 2003 cover collapse is reinforced by the fact that elsewhere in the policies, Safeco specifically identifies "collapse" as one of the perils Safeco insures against. In the personal property coverage section of the policies, Coverage C, the policies provide a more narrow type of coverage known as "specified peril" coverage, where only those losses to personal property caused by specific types of listed perils are covered.<sup>24</sup> In Safeco's personal property coverage, the insurer specifically lists "collapse of a building or any part of a building" as one of sixteen covered perils, along with fire, lightning, windstorm, hail and explosion, among others.<sup>25</sup> Thus, Safeco itself specifically recognizes "collapse" as a distinct peril for which there is insurance coverage. Turning back to the all-risk coverage for the Building, Coverage A and B, Safeco does not list the peril of collapse in the exclusion section titled "Building Losses We Do Not Cover."<sup>26</sup> Thus,

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<sup>23</sup> See Safeco's Motion For Reconsideration before the Court of Appeals at p. 11; "It is true that, because the policies provide coverage for all direct physical loss, any direct physical loss to covered property, including collapse, however defined, falls within the insuring agreement."

<sup>24</sup> CP 54-55 and CP 78-79.

<sup>25</sup> CP 55. When Safeco's policy forms changed in 1999, "collapse" was one of seventeen specifically identified covered perils. CP 79.

<sup>26</sup> CP 51-52 and CP 74-76.

by identifying collapse as a distinct peril in the personal property coverage and not excluding collapse from its all-risk building coverage, Safeco demonstrates an intention to cover the peril of collapse.

Safeco has argued that its pre-2003 policies do not mention collapse in the all-risk building coverage and the Court of Appeals “effectively added the term [collapse]” to that coverage.<sup>27</sup> But Safeco’s argument does not withstand a moment’s scrutiny: it ignores the basic structure of all-risk coverage. All-risk coverage consists of a broad grant of coverage for all risks of loss followed by specifically enumerated exclusions. It is true that the all-risk coverage does not specifically mention the term “collapse.” But that is simply because all-risk coverage does not specifically mention *any* risk of loss. Risks like fire and explosion, like collapse, are covered risks of loss, not because they are mentioned in the all-risk coverage grant but because they are not listed as one of the enumerated exclusions to the all-risk coverage.

In conclusion, an insurance policy that recognizes collapse as a distinct peril in the personal property coverage and does not exclude

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<sup>27</sup> Safeco’s Petition For Review at p. 18: “The pre-2003 Safeco policies in this matter do not include the term “collapse” in the structural damage section of the policies. Yet, the Court of Appeals effectively added the term, defined it to mean substantial structural impairment, and used that definition to create coverage under the ensuing loss clause.”

collapse from the all-risk building coverage, necessarily covers the risk of collapse.

**B. The Proper Interpretation of the Ensuing Loss Clause.**

Analytically, the next question is whether the construction defect and rot exclusions bar coverage or whether the ensuing loss clauses to those exclusions preserve coverage for collapse. The last line of Safeco's construction defect exclusion states: "However, any ensuing loss not excluded or excepted in this policy is covered."<sup>28</sup> Likewise, Safeco's "wet or dry rot" exclusion provides: "Under items 1. thru 5., any ensuing loss not excluded is covered."<sup>29</sup> The proper interpretation of an ensuing loss clause turns on whether the resulting loss itself is covered or excluded by the policy. If the resulting loss is otherwise covered (i.e., not excluded under an all-risk policy), then it "will remain" covered.<sup>30</sup> The mere fact that an excluded cause leads to the otherwise covered ensuing loss does not defeat coverage.

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<sup>28</sup> CP 52. For policies between 1999 and 2003, *see* CP 76, where the policy provides: "However, any ensuing loss not excluded is covered."

<sup>29</sup> CP 51. For policies between 1999 and 2003, *see* CP 75, where the policy provides: "However, we do insure for any resulting loss from items 1. through 6. unless the resulting loss is itself a Loss Not Insured by this Section."

<sup>30</sup> *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992).

The resulting loss language has been interpreted to mean that the loss is covered under the policy if the ensuing loss is covered.

Reasonably interpreted, the ensuing loss clause [of the construction defect exclusion] says that if one of the specified uncovered events takes place, *any ensuing loss which is otherwise covered by the policy will remain covered.*

*McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992) (emphasis added). A resulting or ensuing loss provision is an exception to an exclusion, and preserves coverage where a covered loss is caused by an excluded peril. *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 274, 109 P.3d 1 (2004). In *Wright*, the Court of Appeals held that mold, which was specifically excluded by the policy, was not covered under an ensuing loss clause. But the Court noted: “if an ensuing loss that is not specifically excluded occurred ... coverage would be available under the ensuing loss provision.” 124 Wn. App. at 275, fn. 16.

Thus, if construction defects lead to a fire, and fire is typically not excluded in all-risk policies, the fire loss remains covered by virtue of the ensuing loss clause. The same goes for collapse. Because Safeco recognizes that collapse is a specific type of peril and Safeco does not exclude collapse from the all-risk coverage for the deck piers, collapse is a covered loss. If collapse results from an excluded cause that has a broad

ensuing loss clause, there still is coverage. Thus, if construction defects lead to water intrusion and rot that is so bad that it leads to collapse, the collapse remains covered. Significantly, this was the same conclusion that Safeco's adjuster reached:

Again, if collapse occurred as an ensuing loss to the faulty construction exclusion, coverage would have been triggered.<sup>31</sup>

Safeco's adjuster's conclusion is also the straightforward and logical conclusion that a lay purchaser of insurance would likely reach.<sup>32</sup> The Court of Appeals correctly interpreted the ensuing loss clauses and should be affirmed.

**C. Safeco's Arguments Against Coverage Lack Merit.**

**1. Safeco's mantra that 'ensuing loss clauses do not create coverage.'**

Seizing on a phrase from the *Capelouto* decision,<sup>33</sup> Safeco repeats like a mantra that "ensuing loss clauses do not create coverage." The Spragues addressed this mantra extensively in their Reply Brief in the

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<sup>31</sup> CP 168.

<sup>32</sup> "[T]he proper inquiry is not whether a learned judge or scholar can, with study, comprehend the meaning of an insurance contract' but instead 'whether the insurance policy contract would be meaningful to the layman...'" *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 881, 784 P.2d 507 (1990) (quoting *Dairyland Ins. Co. v. Ward*, 83 Wn.2d 353, 358, 517 P.2d 966 (1974)).

<sup>33</sup> *Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 990 P.2d 414 (1999).

Court of Appeals at pp. 4 – 7. In short, what the Courts held in *Capelouto* and *McDonald* is that an ensuing loss clause does not automatically create coverage when the resulting loss itself is excluded by the policy, as it was in both cases. This Court in *McDonald* meant only that, as an exception to an exclusion, the ensuing loss clause is not itself a coverage grant operating independently of the policy's exclusions.

**2. Safeco's argument that the loss should be characterized as something other than collapse**

Safeco's cites to *Kish*<sup>34</sup> and argues that the Spragues are playing a characterization game by labeling the loss here as collapse. Instead, Safeco urges that the loss is merely construction defects, rot and water damage. Preliminarily, Safeco's limited water damage exclusion has no application here.<sup>35</sup> But more importantly Safeco's adjuster, Safeco's engineering experts at PET, and the Spragues themselves all characterized the loss here as one involving collapse.<sup>36</sup> Everyone aside from Safeco's

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<sup>34</sup> *Kish v. Ins. Co. of N. Am.*, 125 Wn.2d 164, 883 P.2d 308 (1994).

<sup>35</sup> See Spragues' Opening Brief in the Court of Appeals at pp. 27-28. Safeco nevertheless urges that the water damage to the deck piers was a type of excluded "surface water." But as many courts have explained, "surface waters are commonly understood to be waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence." See e.g., *Richman v. Home Ins. Co. of N. Y.*, 94 A.2d 164, 166 (Pa.Super. 1953) (citations omitted.)

<sup>36</sup> CP 168, CP 171 (the adjuster's claim file notes repeatedly refer to collapse coverage); CP 106 (Safeco's structural engineers concluded that

coverage lawyers characterized this loss as collapse. It is Safeco that is playing the characterization game to try to avoid its coverage for collapse.

**3. Safeco's fall-down interpretation of collapse.**

Safeco appeared to acknowledge below that its all-risk policy might cover collapse, but Safeco urged that collapse must mean fall-down-to-the-ground collapse. The Spragues addressed this argument extensively in their Reply Brief at pp. 9 – 14. The fall-down interpretation is at odds with the majority rule across the country, is unreasonable and should be rejected. Federal courts have predicted this Court would reject it.

**4. Safeco's newfound "separate property test."**

In its Supplemental Brief, Safeco advances a new argument for the first time in this case that under the "separate property test," the loss is not covered. Preliminarily, the Spragues note that Safeco never mentioned the separate property test as a basis to deny the claim either in its denial or in the courts below.<sup>37</sup> At the same time, Safeco argues paradoxically that the separate property test is not the law of Washington. Petitioner's Supplemental Brief at p. 12.

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the decayed wood posts cause a state of imminent collapse); CP 15 at ¶3 (the Spragues requested that Safeco consider the pre-2003 policies' coverage for collapse).

<sup>37</sup> CP 121-35. Safeco is in essence attempting to deny the claim on new grounds on appeal three years after the claim was presented. Safeco's new arguments violate RAP 9.12.

Moreover, if the separate property test were to be adopted here, the collapse loss here satisfies that test. Here, defects with the EIFS' flashing and ventilation caused water entry and severe decay to the wooden support beams inside the fin walls to the point of imminent collapse. There was nothing wrong with the decks themselves; it was water entry and property damage to the wood inside the deck piers that put the piers and the decks in danger of collapse. Both the wooden supports inside the piers and the decks themselves are separate property – separate from the defective EIFS components that allowed the water entry.

**D. This Court Should Reverse the *Vision One* Decision.**

**1. *Vision One* violated Washington rules of interpretation.**

The Court of Appeals in *Vision One* broke several of Washington's rules of policy interpretation by requiring that for a resulting loss to be covered, the loss must be sufficiently "separate and independent" from the excluded cause of loss. The obvious problem is that the words "separate and independent" are not found anywhere in the resulting loss clause at issue in *Vision One*. The *Vision One* decision ignored the cardinal rule that courts do not add words or terms to the policy that the insurer chose not to include.<sup>38</sup> Second, Washington courts interpret policy language as a

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<sup>38</sup> "[B]ecause insurance policies are considered contracts, the policy language, and not public policy, controls. We will not add language to the

lay purchaser of insurance would understand it.<sup>39</sup> Third, clauses bringing a loss within coverage are liberally construed in favor of coverage while exclusionary clauses are strictly construed against the insurer.<sup>40</sup> Finally, if policy language is susceptible to two reasonable interpretations, then an ambiguity exists, and the court applies the interpretation most favorable to the insured.<sup>41</sup>

These established rules of policy interpretation are the cornerstones of Washington insurance law and reflect the reality that insurers control the language and present the consumer with a take-it-or-leave-it form.

[T]he contra proferentem rule is followed in all fifty states and the District of Columbia, and with good reason. Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.<sup>42</sup>

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policy that the insurer did not include." *American Nat. Fire Ins. Co. v. B & L Trucking and Const. Co., Inc.* 134 Wn.2d 413, 430, 951 P.2d 250 (1998).

<sup>39</sup> "[T]he proper inquiry is not whether a learned judge or scholar can, with study, comprehend the meaning of an insurance contract" but instead "whether the insurance policy contract would be meaningful to the layman..." *Boeing*, 113 Wn.2d at 881 (internal citation omitted).

<sup>40</sup> *Ross v. State Farm*, 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997).

<sup>41</sup> *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997).

<sup>42</sup> *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9<sup>th</sup> Cir. 1990).

Division II's decision turns these rules of policy interpretation upside down and the decision should be reversed.

**2. This Court Should Not Follow *Acme Galvanizing*.**

Division II's decision in *Vision One* to import a "separate and independent" requirement into the ensuing loss clause relies on a California Court of Appeals decision, *Acme Galvanizing*,<sup>43</sup> and an article discussing ensuing loss coverage in a practice section periodical of the American Bar Association. The Spragues respectfully submit that *Acme Galvanizing* should not be followed and the article misses the mark.

In *Acme Galvanizing*, the court denied coverage for a loss caused by the rupture of an 84-ton capacity steel kettle, which released "several tons" of molten zinc damaging surrounding equipment and other property.<sup>44</sup> The rupture of the steel kettle was the result of a defect in a welded seam, and loss caused by latent defects were excluded under the policy, subject to an ensuing loss clause that provided: "unless loss by a peril not otherwise excluded ensues and then the Company shall be liable only for such ensuing loss...." The Spragues submit that a countervailing reasonable interpretation of the latent defect exclusion and ensuing loss

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<sup>43</sup> *Acme Galvanizing Co. v. Fireman's Fund Ins. Co.*, 270 Cal.Rptr. 405 (Cal.Ct.App. 1990).

<sup>44</sup> *Acme Galvanizing*, 270 Cal.Rptr. at 407.

clause in *Acme Galvanizing* is that the cost of repairing the kettle weld itself should be excluded, but the property damage caused by the rupture of the kettle and subsequent leakage of molten zinc should be covered.

But instead of adopting that reasonable interpretation, the court in *Acme Galvanizing* defined the initial excluded peril to include the kettle rupture itself:

Here, there was no peril separate from and in addition to the initial excluded peril of the welding failure *and kettle rupture*. The spillage of molten zinc was part of the loss directly caused by such peril, not a new hazard or phenomenon. If the molten zinc had ignited a fire or caused an explosion which destroyed the plant, then the fire or explosion would have been a new covered peril with the ensuing loss covered. That did not occur.

*Acme Galvanizing*, 270 Cal.Rptr. at 411 (emphasis in italics added). Having described the initial excluded peril as “the welding failure *and kettle rupture*,” the California Court of Appeals paved the way for its foregone conclusion. But what the *Acme Galvanizing* court failed to explain adequately was why a resulting explosion or a resulting fire (both deemed covered) should be treated categorically different from the resulting rupture of the kettle and the discharge of tons of molten metal. For example, what if a weld failed and the direct result was an explosion of a refinery tank or industrial pipeline? Why would damage from a *rupture* be excluded but damage from a tank or pipeline *explosion* be

covered? The obvious problems with *Acme Galvanizing* highlight again that Washington does not always follow judicially-crafted rules of interpretation from California.<sup>45</sup>

### **3. Insurers Know How to Write a Narrow Ensuing Loss Clause When They Want To.**

Predictably, *Acme Galvanizing* has been lauded by those lawyers working for the insurance industry, including attorney James Harrington. Mr. Harrington's August 2008 article in The Brief "Lessons of the San Francisco Earthquake of 1906: Understanding Ensuing Loss in Property Insurance" extols the holdings of those courts that have followed *Acme Galvanizing* or denied claims for resulting losses on other bases. But many of the cases cited by Mr. Harrington, including all of the Washington cases, involved situations where the resulting loss was itself excluded by a specific exclusion in the policy at issue.<sup>46</sup>

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<sup>45</sup> In *Ellis Court Apts. L.P. v. State Farm Fire and Cas. Co.*, 117 Wn. App. 807, 812, 72 P.3d 1086 (2003) the Court of Appeals considered and rejected the invitation to follow the "manifestation rule" for progressive property losses articulated in *Prudential-LMI Ins. v. Superior Court*, 274 Cal.Rptr. 387, 400, 798 P.2d 1230, 1244 (Cal. 1990). One of the principle reasons for the Court of Appeals' rejection of the California manifestation rule was that the policy language itself did not support the interpretation advocated by State Farm under Washington's established rules of policy interpretation. *Ellis Court*, 117 Wn. App. at 807.

<sup>46</sup> For example, Harrington cites to *Capelouto*, 98 Wn. App. 7 (because policy specifically excluded water that backs up from a sewer or drain, no coverage for sewage backing up through a sewer or drain); *Wright*, (denying coverage for mold under the ensuing loss clause to the

Moreover, despite its title, Mr. Harrington's article omits any discussion regarding what lessons *the insurers* have learned from the San Francisco Earthquake of 1906 in writing ensuing loss clauses to earthquake exclusions.

The Safeco policies sold to the Spragues provide this very limited resulting loss clause to the earthquake exclusion:

**Building Losses We Do Not Cover.**

6. Earth Movement, including earthquake, land shock waves or tremors before, during or after a volcanic eruption, landslide, subsidence [...]. This exclusion applies whether or not the earth movement is combined with water.

**We do cover direct loss by fire, explosion, theft or breakage of glass or safety glazing material which is part of a building, storm door or storm window. CP 52 (emphasis added).**

Safeco specifies just four ensuing losses that it will cover as a result of an earthquake: (1) fire, (2) explosion, (3) theft and (4) breakage of glass. Compare the above exclusion's limited ensuing loss clause with Safeco's

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construction defect exclusion, because the end result for which coverage was sought, mold, was also excluded by the policy). Harrington also references *McDonald* in a string citation. In *McDonald*, this Court denied coverage for the resulting losses of earth movement and foundation cracking because they were both specifically excluded by the policy. The mold and asbestos cases discussed by Harrington generally fall into the category of the Washington cases, where the resulting losses were specifically excluded by the policy.

broad ensuing loss clause for the construction defect exclusion: "However, any ensuing loss not excluded or excepted in this policy is covered." Or compare with the ensuing loss language for the rot exclusion: "Under items 1. thru 5., any ensuing loss not excluded is covered." Safeco's ensuing loss clauses for construction defects and rot were deliberately written more broadly, covering any and all ensuing losses that are not excluded from the all-risk coverage.

In short, when one considers the actual language that insurers are currently using in their earthquake exclusions and ensuing loss clauses, one may take away an entirely different "lesson" of the San Francisco Earthquake: insurers know how to write a narrow ensuing loss clause when they want to.<sup>47</sup> It is therefore inappropriate for courts to read new restrictive language into ensuing loss clauses when the insurers are fully capable of writing more narrow clauses when they want to.

**E. The Separate and Independent Limitation Defies Reasonable Application.**

Moreover, the judicially-crafted "separate and independent" limitation cannot be reasonably applied. On the one hand, the loss must result from the excluded cause in order to be a resulting loss. But the

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<sup>47</sup> "The industry knows how to protect itself and it knows how to write exclusions and conditions." *Boeing*, 113 Wn.2d at 887.

“separate and independent” standard suggests that a “direct” loss is not covered and only a separate intervening loss is covered. Examples of how unworkable a “separate and independent” requirement would be are provided in the briefing below.<sup>48</sup> The problem with the judicially-crafted “separate and independent” limitation is that there is no reasonable or principled basis to delineate which losses are sufficiently “separate and independent” and which losses are not.

**F. The Spragues Request Their Attorney Fees.**

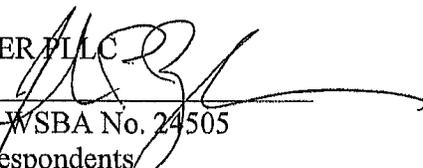
The Spragues request an attorney fees award because the trial court and appellate proceedings were necessary to establish coverage.<sup>49</sup>

**V. CONCLUSION**

Collapse resulting from construction defects is a covered ensuing loss under Safeco’s all-risk policies, just like fire or explosion. This Court should affirm *Sprague v. Safeco* and reverse *Vision One*.

RESPECTFULLY SUBMITTED this 11th day of August, 2011.

FOSTER PEPPER PLLC

  
John P. Zahner, WSBA No. 24505  
Attorneys for Respondents  
Max B. Sprague and Krista Sprague

<sup>48</sup> See Spragues’ Response In Opposition to Safeco’s Motion For Reconsideration at pp. 13-14 (discussing hypotheticals).

<sup>49</sup> *Olympic Steamship v. Centennial Ins.*, 117 Wn.2d 37, 51-54, 811 P.2d 673 (1991); *Panorama Village Condo. Ass’n. v. Allstate Ins.*, 144 Wn.2d 130, 142-45, 26 P.3d 910 (2001).

**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that I cause a true and correct copy of **Respondent Spragues' Supplemental Brief** to be served via email on the 11<sup>th</sup> day of August, 2011 to all counsel of record. A hard copy will be served via legal messenger on August 12, 2011 to, Barrett & Worden, P.S., Fourth & Blanchard Building, 2101 - 4th Avenue, Ste. 700, Seattle, Washington 98121 and by mail to all other counsel.

  
\_\_\_\_\_  
Colleen Hickman

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Dear Clerk,

Pursuant to RAP 13.7(d), attached is Respondent Spragues' Supplemental Brief re *Sprague v. Safeco Insurance Company*, consolidated with Case No. 85350-9, *Vision One v. Philadelphia Indemnity Insurance Company*.

*Colleen Hickman* on behalf of:

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