

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Dec 16, 2014, 9:12 am
BY RONALD R. CARPENTER
CLERK

E

RECEIVED BY E-MAIL

bjh

No. 90651-3

THE SUPREME COURT
STATE OF WASHINGTON

QUEEN ANNE PARK HOMEOWNERS ASSOCIATION, a
Washington non-profit corporation, Appellant,

v.

STATE FARM FIRE AND CASUALTY COMPANY, a foreign
insurance company, Appellee

CERTIFICATION FROM THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

AMENDED BRIEF OF AMICUS CURIAE AMERICAN
INSURANCE ASSOCIATION

James T Derrig Attorney At Law PLLC
James T. Derrig, WSBA 13471
Attorneys for Amicus Curie

14419 Greenwood Ave N. Suite A-372
Seattle, WA 98133-6867
(206) 414-7228

 ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIESII

I. IDENTITY AND INTEREST OF AMICUS 1

II. ISSUES ADDRESSED BY THIS BRIEF 1

III. ARGUMENT 2

 A. “SUBSTANTIAL IMPAIRMENT OF STRUCTURAL INTEGRITY” IS A
 LEGAL TERM OF ART THAT, WHEN MISUSED AS A DEFINITION,
 REWRITES THE INSURANCE CONTRACT. 2

 1. *INTRODUCTION*.....2

 2. *IN ENGLISH USAGE, “COLLAPSE” IS NOT USED TO DESCRIBE
 PHYSICAL OBJECTS THAT MAINTAIN THEIR ORIGINAL SHAPE*.....4

 3. *THE “SUBSTANTIAL IMPAIRMENT” CASES INVOLVE SIGNIFICANT
 STRUCTURAL DEFLECTIONS*.....8

 B. IN THE CONTEXT OF AN INSURANCE POLICY, THE TERM “RISKS”
 REFERS TO THE HAZARDS INSURED BY THE POLICY AND DOES NOT
 MEAN “THREATS.” 16

IV. CONCLUSION.....20

TABLE OF AUTHORITIES

Cases

Allstate Ins. Co. v. Forest Lynn Homeowners Ass'n, 892 F. Supp. 1310, 1313-14 (W.D. Wash. 1995)..... 10

Allstate Ins. Co. v. Peasley, 131 Wn. 2d 420, 424, 932 P.2d 1244, 1246 (1997)..... 18

American Star Ins. Co. v. Grice, 121 Wash. 2d 869, 878 n.19, 854 P.2d 622 (1993)..... 14

Auto Owners Ins. Co. v. Allen, 362 So.2d 176 (Fla. App. 1978)..... 12, 13

Beach v. Middlesex Mut. Assurance Co., 532 A.2d 1297 (Conn. 1987) 11, 12, 13

Black v. National Merit Ins. Co., 154 Wash. App. 674, 688, 226 P.3d 175, 182 (2010)..... 6

Boeing Co. v. Aetna Cas. and Sur. Co., 113 Wn.2d 869, 886, 784 P.2d 507 (1990)..... 16

Cent. Mut. Ins. Co. v. Royal, 269 Ala. 372, 113 So. 2d 680, 683 (1959) .. 9

Clendenning v. Worcester Ins. Co., 700 N.E.2d 846, 847 (Mass. App. 1998)..... 9, 14

Doheny West Homeowners' Ass'n v. American Guarantee & Liab. Ins. Co., 60 Cal. App. 4th 400, 70 Cal. Rptr. 2d 260 (1997)..... 16, 18, 19

Fujii v. State Farm Fire & Cas. Co., 71 Wn. App. 248, 857 P.2d 1051 (1993)..... 7, 19

Hearst Communications, Inc. v. Seattle Times Co., 154 Wash. 2d 493, 504, 115 P.3d 262, 267 (2005) 4

Higgins v. Connecticut Fire In. Co., 430 P.2d 479, 479-80 (Colo. 1967) 10

Indiana Ins. Co. v. Liaskos, 297 Ill. App. 3d 569, 579, 697 N.E.2d 398, 405 (1998)..... 15

KAAPA Ethanol, LLC v. Affiliated FM Ins. Co., 660 F.3d 299, 305-06 (8th Cir. 2011) 16

Nugent v. Gen. Ins. Co. of Am., 253 F.2d 800, 802 (8th Cir. 1958) 14

Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 428, 38 P.3d 322, 327 (2002)..... 4, 15

Quadrant Corp. v. Am. States Ins. Co., 154 Wash. 2d 165, 181, 110 P.3d 733 (2005)..... 4

Scottsdale Ins. Co. v. Int'l Protective Agency, Inc., 105 Wash. App. 244, 249, 19 P.3d 1058, 1061 (2001) 7

<i>Sherman v. Safeco Ins. Co. of America, Inc.</i> , 716 P.2d 475, 476 (Colo. App. 1986)	10
<i>Silver v. Colorado Cas. Ins. Co.</i> , 219 P.3d 324, 330 (Colo. App. 2009)	11
<i>Tanner Elec. Co-op. v. Puget Sound Power & Light Co.</i> , 128 Wash. 2d 656, 674, 911 P.2d 1301, 1310 (1996)	5
<i>Thornewell v. Indiana Lumbermens Mut. Ins. Co.</i> , 33 Wis. 2d 344, 350, 147 N.W.2d 317, 321 (1967)	15
<i>Villella v. Public Employees Mut. Ins. Co.</i> , 106 Wn.2d 806, 808 & 812, 725 P.2d 957 (1986)	19
<i>Vision One, LLC v. Philadelphia Indem. Ins. Co.</i> , 174 Wn. 2d 501, 513, 276 P.3d 300, 306 (2012)	19
<i>Wolstein v. Yorkshire Ins. Co.</i> , 97 Wash. App. 201, 212, 985 P.2d 400, 407 (1999)	18
<i>Zoo Properties, LLP v. Midwest Family Mut. Ins. Co.</i> , 797 N.W.2d 779, 782 (S.D. 2011)	12

Other Authorities

Annot., <i>What Constitutes “Collapse” Of A Building Within Coverage Of Property Insurance Policy</i> , 71 ALR.3d 1072 (1976)	9
---	---

I. IDENTITY AND INTEREST OF AMICUS

The American Insurance Association is a national trade association representing over 300 property and casualty insurance companies that collectively underwrite more than \$108 billion in direct property and casualty premiums, including some 30 percent of all commercial lines of property and casualty insurance in this State. AIA members range in size from small companies to the largest insurers and underwrite virtually all lines of property and casualty insurance. On issues of importance to the property and casualty insurance industry, AIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts.

II. ISSUES ADDRESSED BY THIS BRIEF

1. Whether the phrase “substantial impairment of structural integrity” is a definition which can be substituted for the word “collapse” without changing the contract’s meaning, or is better treated as a legal term of art used to describe the concept that a building can “collapse” without being completely reduced to rubble?

2. Whether the phrase “risks of loss,” means the hazards insured by the insurance contract rather than “threat of loss”?

III. ARGUMENT

A. “SUBSTANTIAL IMPAIRMENT OF STRUCTURAL INTEGRITY” IS A LEGAL TERM OF ART THAT, WHEN MISUSED AS A DEFINITION, REWRITES THE INSURANCE CONTRACT.

1. INTRODUCTION

According to the HOA, a collapse consisting of “substantial impairment of structural integrity” occurred at some point between October 1992 and October 1998. However, the building occupants were unaware that any part of their building had collapsed, as no claim was made until 2010. (SER 5) Even a structural engineer inspecting the building in 2011 was unable to readily indentify any “collapsed” areas and had to make openings in the building walls to look inside. (ER 121 line 16) What he observed was not visible structural deflection, but decay to sheathing that, in his opinion, “substantially impaired the structural integrity of the wall’s lateral load-resisting capacity.” (Id., line 18) However, the engineer does not identify any actual damage the building sustained from a lateral load exceeding that load-resisting capacity.¹ Thus, the HOA’s theory is that the building has been

¹ Examples of lateral loads include winds and earthquakes. (ER 91) Unlike gravity, which is ever present, lateral forces are intermittent and highly variable. Thus, it is not particularly surprising that a reduced lateral load capacity might never result in actual damage. *See, Buczek v. Continental Cas. Ins. Co.*, 378 F.3d 284 (3rd Cir. 2004).

“collapsed” for over a decade due to a reduced capacity to withstand a *hypothetical* lateral load never actually imposed on the building. This theory rests solely upon an engineer concluding that that the reduced capacity is, in his opinion, “substantial.” (ER 121)

To support this proposed (and counterintuitive) interpretation, the HOA points to some cases in which courts have held that even though a particular building had not yet been reduced to “rubble on the ground,”² it had deflected enough to suffer a “substantial impairment of structural integrity” that constituted a “collapse.” The HOA seizes upon this phrase and asks the Court to define collapse as any “substantial” structural impairment whatsoever, without regard to whether there has been an actual falling down, caving in or similar structural deflection (or even a threat thereof). The phrase “substantial impairment of structural integrity,” however, is not a definition that corresponds to “collapse” in the ordinary sense of the word. It is a legal term of art that has been used to describe situations in which a building arguably has changed shape enough to “collapse” within that ordinary meaning, but has not completely turned into “rubble on the ground.”

² ER 10 line 7 (Judge Zilly’s underlying memorandum opinion).

2. **IN ENGLISH USAGE, “COLLAPSE” IS NOT USED TO DESCRIBE PHYSICAL OBJECTS THAT MAINTAIN THEIR ORIGINAL SHAPE.**

AIA submits that “substantial impairment of structural integrity” is a legal term of art found only in case law and is not a definition of, or substitute for, the term “collapse.”

First, and most importantly, the present facts—in which a building suffering no identifiable deflection is supposed to have been “collapsed” for over a decade—cannot be reconciled with how the word “collapse” is used in the English language. Absent extraordinary circumstances, a court is supposed to use the “ordinary, usual, and popular meaning” of words in a contract. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 504, 115 P.3d 262, 267 (2005); *see, Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 428, 38 P.3d 322, 327 (2002). “[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).

When applied to physical objects such as buildings, “collapse” always requires a visible change in shape: In English literature, the term

has not ordinarily (or perhaps ever) been used to describe a physical object still in its original form. On the other hand, English literature is replete with examples of “collapse” being used to describe objects changing shape:

- Collapse like a tent when the pole is kicked out from under it—Loren D. Estleman
- Collapse—like empty garments—Joyce Cary
- Collapse like the cheeks of a starved man—Charles Dickens
- Collapsing like a cardboard carton thrown on a bonfire—Margaret Atwood

Similes Dictionary (1st Ed. 1988), reprinted at www.thefreedictionary.com (keyword “collapse”).

The ordinary, popular meaning of “collapse,” when applied to physical objects, involves falling down, caving in or similar structural deflection. If the ordinary, popular meaning includes physical objects still in their original form, then examples in popular literature should be readily available.

If none are, then a corollary follows. The court’s ultimate objective is to implement the intent of the parties to the contract. *See, Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wash. 2d 656, 674, 911 P.2d 1301, 1310 (1996). By treating “collapse” as meaning “substantial impairment of structural integrity” that does not involve any degree of falling down, caving, in or similar structural deflection, the

HOA is saying the parties to this contract intended a meaning so obscure that English literature shows no history of it.

While the way “collapse” is used in common English parlance dictates that structures must change shape, courts have sought to compare various dictionary definitions. That exercise cannot be performed in a linguistic vacuum. Dictionaries attempt to describe how words are actually being applied, and those descriptions should not be misused to create new applications that do not reflect real-world usage.

Many words have multiple definitions, but some definitions only apply in a specific context. See, e.g., *Black v. National Merit Ins. Co.*, 154 Wash. App. 674, 688, 226 P.3d 175, 182 (2010). With the word “collapse,” many have pointed out that one of Webster’s definitions describes “a breakdown of vital energy, strength, or stamina.” Since there is no mention of changing shape, it is argued that a loss of strength can be a “collapse” even if the loss has no visible effect on the structure.

As State Farm pointed out (Appellee’s brief at 34) this definition applies in biology and physiology, e.g., “the patient’s immune system collapsed” or “human encroachment caused the local ecosystem to collapse.” The word “collapse” often is used to describe the failure of non-corporeal concepts, such as political institutions or emotional states.

Therefore, it is not surprising that when Webster’s defines those uses, it

makes no mention of anything falling down, caving in, becoming more compact, etc. Indeed, since “collapse” can apply to incorporeal concepts, a dictionary must include definitions not discussing a physical change in shape. That doesn’t mean those are the correct definitions here.

A property insurance policy’s context is far different. It defines “covered property” as buildings. (SER 16) A building must suffer physical damage. (SER 18) *See, Fujii v. State Farm Fire & Cas. Co.*, 71 Wn. App. 248, 857 P.2d 1051 (1993); *accord, Scottsdale Ins. Co. v. Int’l Protective Agency, Inc.*, 105 Wash. App. 244, 249, 19 P.3d 1058, 1061 (2001). And here, the damage must be “physical loss involving collapse.” (SER 21) Thus, the correct dictionary definition in context is the one targeted at the “collapse” of a particular type of physical object: A building.

Webster’s, unfortunately, does not do an entirely clear job of explaining which definitions apply in which contexts. At least one dictionary clarifies the situation by specifically discussing “collapse” as applied to structures:

1. (of a structure) fall down or in; give way; *the roof collapsed on top of me. . . .*

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

The failure to appreciate the context of Webster's various definitions is one reason for the disconnect between the definition proffered in support of "substantial impairment of structural integrity" and the lack of any actual examples from real-world usage that support applying that definition to buildings. Again: If "collapse" as applied to buildings ordinarily means "substantial impairment of structural integrity" without any need for the structure to change shape, then some real-world examples should be provided for the Court to see. Otherwise, the argument can only be supported by misapplying the dictionary and, as will be shown below, the case law as well.

3. **THE "SUBSTANTIAL IMPAIRMENT" CASES INVOLVE SIGNIFICANT STRUCTURAL DEFLECTIONS**

The HOA proffers "substantial impairment of structural integrity" as a definition of "collapse." Once that phrase is substituted for the word actually used in the policy, coverage allegedly exists for any structural damage an engineer chooses to call "substantial." However, "substantial impairment of structural integrity" is not a definition. It is a legal term of art, developed in response to the argument that a "collapse" only takes place if the structural deflection is so extreme that the entire building has been reduced to rubble.

Some cases *appear* to define collapse according to the following dictionary definition, which in turn suggests that so long as one brick still rests on top of another, no collapse takes place:

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

See, e.g., Clendenning v. Worcester Ins. Co., 700 N.E.2d 846, 848 (Mass.App. 1998); *see, also*, Websters New International Dictionary (unabridged online ed. 2014).

An ALR annotation first published in 1976 referred to this line of cases as requiring “reduction to a flatted form or rubble.” Annot., *What Constitutes “Collapse” Of A Building Within Coverage Of Property Insurance Policy*, 71 ALR.3d 1072 (1976). However, that is not the only reasonable reading of those cases, because the physical damage at issue involved either no change in shape whatsoever or a change too minor to be called a “collapse.”

The first case cited by the ALR demonstrates this. *See, Cent. Mut. Ins. Co. v. Royal*, 269 Ala. 372, 113 So. 2d 680 (1959)(“The building was still in its original form and condition with the exception of a few cracks”). Similarly, the second case cited by the ALR for a “rubble on the ground” standard 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).

Although *Higgins* observed at one point that the house “was not, in whole or in part, reduced to a flattened form,” it did not hold that damage short of “rubble on the ground” can never constitute a collapse. *Id.* at 481. In fact, a later Colorado appellate case found “collapse” as a matter of law when the roof had fallen more than 2½ feet, the upper tiers of bricks had fallen out and the walls were bowed, even though the building had not been reduced to flattened form or rubble. *See, Sherman v. Safeco Ins. Co. of America, Inc.*, 716 P.2d 475, 476 (Colo. App. 1986).

The ALR annotation and several cases mischaracterize *Higgins* (a Colorado Supreme Court case) as adopting a “rubble on the ground” test and *Sherman* (a later Colorado Appellate court case) as adopting “substantial impairment of structural integrity.” *See, e.g., Allstate Ins. Co. v. Forest Lynn Homeowners Ass'n*, 892 F. Supp. 1310, 1313-14 (W.D. Wash. 1995). If that characterization was accurate, then it seems that Colorado does not adhere to the rule of vertical stare decisis. *But see*,

See, Silver v. Colorado Cas. Ins. Co., 219 P.3d 324, 330 (Colo. App. 2009)(recognizing rule).

The answer is that the ALR and some courts are confused and the cases can easily be reconciled: “Substantial impairment of structural integrity” is not an alternative definition “collapse,” but a term of art that courts have used to describe situations in which a building has not been reduced to rubble on the ground, but nonetheless has sustained enough structural deflection to constitute a collapse within the normal meaning of the word. Thus, far from adopting conflicting “tests” or “standards,” Colorado’s court of appeals and Supreme Court simply applied the normal meaning of a word to the particular facts before them.

Other cases can be read in similar fashion. *Beach v. Middlesex Mut. Assurance Co.*, 532 A.2d 1297 (Conn. 1987) is frequently cited for the “substantial impairment” proposition. The appeal was from a bench trial and thus the ultimate question was whether there was substantial evidence to support the trial court’s finding that the building “collapsed.” There was, in fact, such evidence, as the foundation had “tipped over into the basement and no longer was supporting the house.” 532 A.2d at 1298-9. The insurer argued that as a matter of law, collapse always requires a “sudden and *complete* catastrophe” in which the entire building falls completely flat. 532 A.2d at 1299-1300 (italics added). The BRIEF OF AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION - 11

Connecticut court decided the building had sustained enough damage to constitute a collapse, and in the course of so doing, stated that “collapse means any substantial impairment of the structural integrity of a building.” *Id.* at 1300.

Despite that phrase and what it implies, the fact is that the building sustained enough damage to constitute a “collapse” within the ordinary, popular meaning of that term. Overlooking the nature of the damage at issue in Beach, and then using the case as the basis for creating a new definition for the term “collapse,” creates coverage far broader than what the ordinary meaning of “collapse” can support. *See Zoo Properties, LLP v. Midwest Family Mut. Ins. Co.*, 797 N.W.2d 779, 782 (S.D. 2011)(similar observation).

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 “substantial” impairment:

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. Similar to *Beach*, the *Auto Owners* court held there can be a collapse even when damage was not quite as catastrophic as the insurer contended. In doing so, however, the court used a phrase—"material and substantial impairment of the basic structure"—that can be quoted out of context and misused to create coverage for damage not involving the ordinary meaning of "collapse." 362 So.2d at 177.

Another issue, often overlooked, is that *Beach* and many of the other "substantial impairment" cases involve policy forms that only cover collapse of the entire building. See, e.g., *Beach, supra, Auto Owners, supra*. The damage in *Beach* was arguably localized, in that some portions of the building remained standing. The question before the court thus became whether the damage was extensive enough to deem the entire building to be "collapsed." From that point of view, a statement like "any substantial impairment of the structural integrity of a building" makes a lot more sense, as the court was trying to explain how this

BRIEF OF AMICUS CURIAE AMERICAN INSURANCE
ASSOCIATION - 13

arguably local damage was extensive enough to be imputed to the entire structure.

The State Farm policy, and most modern ISO³ forms, cover “collapse of a building or any part of a building,” so this rationale for the “substantial impairment” phrase is simply absent here. (ER 141) Instead, the present appeal involves an attempt to rewrite the policy and expand coverage by substituting that phrase for the term actually in the contract.

The above discussion compares collapse cases in which there was no collapse (because the buildings had not significantly changed shape) with “substantial impairment” cases involving significant structural deflections. In between these extremes, both the “actual collapse” and “substantial impairment” cases agree that small changes in shape can be too structurally insignificant to implicate the concept of “collapse.” Compare, e.g., *Nugent v. Gen. Ins. Co. of Am.*, 253 F.2d 800, 802 (8th Cir. 1958)(no actual collapse when doors and windows were out-of-plumb) and *Clendenning v. Worcester Ins. Co.*, 700 N.E.2d 846, 847 (Mass. App. 1998)(no actual collapse when decayed area was “no more crooked than the rest of the house”) with *Indiana Ins. Co. v. Liaskos*, 297

³ “The Insurance Services Office (ISO) is an insurance industry trade association which develops standard form insurance policies and often secures regulatory approval[.]” *American Star Ins. Co. v. Grice*, 121 Wash. 2d 869, 878 n.19, 854 P.2d 622 (1993)(citation omitted).

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 of structural integrity when basement wall bulged 2.5 inches).

An undefined term in an insurance policy is given its ordinary, popular meaning. *See, Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 428, 38 P.3d 322, 327 (2002). When applied to physical objects such as buildings, the ordinary, popular meaning requires the structure to fall down, cave in, or sustain similar structural deflection before it has “collapsed.” The “substantial impairment” cases involve localized deflections falling short of a complete, catastrophic failure. In finding coverage, the courts developed a phrase that is a legal term of art, not a new definition that can replace the word used in the contract and that controls the coverage agreement upon which premiums are determined.

B. IN THE CONTEXT OF AN INSURANCE POLICY, THE TERM “RISKS” REFERS TO THE HAZARDS INSURED BY THE POLICY AND DOES NOT MEAN “THREATS.”

In *Doheny West Homeowners' Ass'n v. American Guarantee & Liab. Ins. Co.*, 60 Cal. App. 4th 400, 70 Cal. Rptr. 2d 260 (1997), the court looked at the facts of earlier cases and concluded the impairment had to be substantial enough to create an imminent danger of actual collapse. 60 Cal. App. 4th at 406-08, 70 Cal. Rptr. 2d at 264-65. In the years since *Doheny*, acceptance of the imminent collapse standard has been almost universal. See, *KAAPA Ethanol, LLC v. Affiliated FM Ins. Co.*, 660 F.3d 299, 305-06 (8th Cir. 2011)(collecting post-*Doheny* cases).

While “imminent collapse” is less ambiguous and far more workable than the nebulous “substantial impairment of structural integrity,” it nevertheless suffers from a significant problem. Specifically, *Doheny* misinterprets an industry-standard phrase—“risks of loss”—to mean “threat of loss” rather than as a reference to the perils insured by the policy. If *Doheny*'s holding is adopted without correcting this error, it could open the door for converting property insurance from physical damage coverage into an agreement for paying the present 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

BRIEF OF AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION - 16

between insured “property damage” and uninsured measures undertaken to prevent future damage). This would significantly undermine the underwriting basis for property insurance.

Doheney’s “imminent collapse” approach dispenses with the requirement for some degree of actual falling down, caving in, or similar structural deflection – as required by the ordinary meaning of “collapse” applied to structures. The fact that a structure is about to deflect does not change this requirement. The insurance policy is written in *present* tense, not future tense—it says “collapse,” not “about to collapse.”

While *Doheney* acknowledged this problem, the policy covered “risks of direct physical loss involving collapse.” In order to solve the problem, the court observed:

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. Further, on its terms it covers not only loss resulting from an actual collapse, but loss “involving” collapse. Thus, with the phrases “risk of loss,” and “involving collapse,” the policy broadens coverage beyond actual collapse.

70 Cal.Rptr.2d at 263 (footnote omitted)

The court thus equated “risk of loss” with “threat of loss” and accordingly extended coverage not only to “collapse” (which the court

recognized would require actual deflection) but to imminent danger of collapse.⁴

While the analysis is superficially plausible, *Doheny* incorrectly focused on a single sentence in the policy. “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 phrase ‘all risks’ must be read in context and be consistent with the purpose of the insurance.” *Wolstein v. Yorkshire Ins. Co.*, 97 Wash. App. 201, 212, 985 P.2d 400, 407 (1999).

The proper context here begins with the typical ISO forms referencing “risks of direct physical loss involving collapse,” which also contain this initial grant of coverage:

VI. PERILS INSURED AGAINST

This policy insures against risks of direct physical loss unless the loss is excluded in VII Exclusions below, subject to the provisions and stipulations herein and in the policy of which this form is made a part.

ISO Form MP 00 13 10 83, p.5 *reprinted in Miller’s Standard Insurance Policies Annotated* (West 6th Ed. 2014)(captioned as “Standard Ins. Policies Form: Businessowners and Special Multi-Peril SMPSB”)

⁴ This part of the *Doheny* rationale does not apply to State Farm, whose collapse language does not use the word “risks.” (SER 21)

The ISO Additional Coverage for “risks of direct physical loss involving collapse” parallels the policy’s initial coverage grant for “risks of direct physical loss.” Both phrases refer not to “threat of loss” as *Doheny* incorrectly 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”); *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).

Many courts have concluded that a coverage grant for “risks of direct physical loss” requires actual, physical damage, not merely 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 and popular meaning of the term “risk,” which includes:

d : an insurance hazard from a (specified) cause or source <war *risk*> <disaster *risk*>

Webster's Third New International Dictionary, Unabridged. (Online ed. 2014); *see, also*, Funk & Wagnalls Standard Dictionary (International ed. 1970).

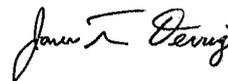
While the dictionary contains many other definitions of the term “risk,” the insurance definition is appropriate here, because “risk” appears in an insurance contract. A reasonable person applying the ordinary and popular meaning would understand from the context that the term refers to the type of hazards insured by the contract, not a threatened loss.

IV. CONCLUSION

The Certified Question asks the Court to define “collapse,” but “substantial impairment of structural integrity” is not a definition. Rather, it is a legal term of art that can be misused to rewrite the contract. The ordinary, popular meaning of “collapse” requires a structure to fall down, cave in, or suffer similar deflection, and the Court should so hold. If coverage is extended to imminent collapse, then this should be done only with an acknowledgement that in an insurance contract the term “risks” refers to the perils or hazards insured by the contract, not to a “threat of loss,” so that part of the *Dohoney* ruling is not being adopted here.

DATED this 26th day of November 2014.

JAMES T. DERRIG
ATTORNEY AT LAW PLLC



James T. Derrig, WSBA 13471
Attorney for Amicus Curiae
American Insurance Association.

THE SUPREME COURT
STATE OF WASHINGTON

RECEIVED BY E-MAIL

QUEEN ANNE PARK
HOMEOWNERS ASSOCIATION,

Appellant,

v.

STATE FARM FIRE AND
CASUALTY COMPANY,

Appellee

NO. 90651-3

CERTIFICATE OF SERVICE

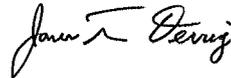
The undersigned hereby certifies that on or before December 6, 2014 a true and correct copy of the Amended Brief Of Amicus Curiae American Insurance Association was caused to be served on all counsel of record in this matter as follows:

1. Todd Hayes, Haper Hayes LLC, attorneys for Appellant, by hand delivery to counsel's address of record.
2. Pamela Okano and Jerret Sale, attorneys for Appellee, by email. Counsel has agreed to accept service by email.
3. Daniel Heffernan and Devon Thurtle Anderson, attorneys for *amicus* Bayview Heights Homeowners Association, by email. Counsel has agreed to accept service by email.

4. Phillip E. Joseph, Ball Janik LLP, attorneys for *amicus* Community Association Partners LLC and Bluestone and Hockley Real Estate Services, by email and by placing the documents in the U.S. Mail, which is the service method agreed to and practiced by that attorney.

Dated this 16th day of December 2014.

JAMES T. DERRIG
ATTORNEY AT LAW PLLC



James T. Derrig, WSBA 13471
Attorney for American Insurance
Association, *amicus curiae*

OFFICE RECEPTIONIST, CLERK

To: Jim Derrig
Cc: Todd Hayes; pjoseph@balljanik.com; ksturm@balljankik.com; Devon Thurtle Anderson; Joe Hampton; Okano, Pamela; Sale, Jerret
Subject: RE: Case No. 90651-3, Queen Anne Park HOA v. State Farm Fire and Casualty Company

Received 12-16-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jim Derrig [mailto:jim.derriglaw@me.com]
Sent: Tuesday, December 16, 2014 9:11 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Todd Hayes; pjoseph@balljanik.com; ksturm@balljankik.com; Devon Thurtle Anderson; Joe Hampton; Okano, Pamela; Sale, Jerret
Subject: Case No. 90651-3, Queen Anne Park HOA v. State Farm Fire and Casualty Company

I am attaching the Amended Brief Of Amicus Curiae American Insurance Association and the corresponding Certificate of Service.

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