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No. 63933-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MAX B. SPRAGUE and KRISTA SPRAGUE,

Appellants,

v.

SAFECO INSURANCE COMPANY OF AMERICA,

Respondent.

Appeal from King County Superior Court
Honorable James Cayce, Judge

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION, ASSIGNMENT OF ERROR & ISSUES

A. Introduction.

Unbeknownst to the Spragues, piers supporting their decks suffered severe structural decay. Shortly after discovery, the Spragues notified their homeowners insurer, Safeco, of their claim for collapse.

Structural engineers hired by Safeco investigated and determined that the deck piers were indeed in a state of collapse. Safeco asked the engineers whether the state of collapse occurred before or after September 1, 2003, a point in time when Safeco prospectively limited the Spragues' collapse coverage. The engineers opined that the collapse damage occurred before September 1, 2003. Safeco's cost expert estimated that it would cost nearly \$300,000 to repair the piers.

Safeco denied coverage and the Spragues filed suit. Both parties moved for summary judgment and the trial court granted summary judgment to Safeco. The Spragues timely filed this appeal.

The trial court erred because Safeco's all-risk policies before September 1, 2003 did not exclude collapse. Moreover, another part of Safeco's policies before September 2003 specifically identified "collapse" as a type of covered peril, just like fire, lightning, windstorm, hail and other common risks. Because collapse was recognized by Safeco to be a distinct peril and collapse was not excluded from the all-risk coverage, collapse was a covered loss under the pre-2003 policies.

Safeco denied the claim based on the policies' construction defect and rot exclusions. But both exclusions provide that ensuing losses that are not excluded by the policies remain covered. Thus, if a construction defect – for example, faulty wiring – leads to a loss that is not excluded – like fire or explosion – the loss remains covered notwithstanding the fact that a construction defect was the cause. The trial court erred by not recognizing that collapse was a non-excluded loss, i.e., a covered loss, just like fire or explosion under the pre-2003 policies and, as an ensuing loss, collapse remained covered. Accordingly, this Court should reverse the trial court and grant partial summary judgment on coverage to the Spragues.

B. Assignment of Error.

The trial court erred as a matter of law by interpreting the policies before 2003 to exclude coverage for the Spragues' collapse loss.

C. Issues Pertaining to Assignment of Error.

The Spragues' appeal raises three main issues:

1. Do Safeco's all-risk policies before 2003 cover collapse?
2. The policies before 2003 contain a construction defect exclusion and a rot exclusion, but both exclusions contain an ensuing loss clause. What is the proper interpretation of the ensuing loss clauses here?
3. If collapse is the result of construction defects or decay, and collapse is not excluded by the policies, does the collapse loss remain covered as a non-excluded ensuing loss?

II. STATEMENT OF THE CASE

A. The deck piers.

Max and Krista Sprague own a waterfront home on Maplewild Avenue S.W. that has three decks on its West side high above the ground.¹ The original home was built in 1978.² The Spragues bought the home in 1987 and remodeled it extensively in 1995-96, adding the decks at issue here.³ From the Spragues' perspective, every aspect of their remodel was "done by the book": the Spragues obtained the proper permits, hired an architect, a structural engineer and a reputable contractor.⁴ Safeco insured the Spragues' home continuously from time of purchase, through the remodel to the present day.⁵

The Spragues' 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.⁶ See photos at CP 14. Two of the middle fin walls continue up to a smaller third deck.⁷ The fin walls are covered with EIFS, Exterior Insulating and Finishing System, a foam and stucco cladding also known by the brand name "Dryvit."⁸

¹ See photo of decks by Safeco's engineers at CP 14.

² CP 12, ¶ 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ CP 13, ¶ 2.

⁷ *Id.*

⁸ *Id.*

B. The policies before September 1, 2003.

1. Collapse coverage.

In Safeco's policies before September 1, 2003, the deck piers are covered by the "all-risk" or "open peril" coverage that insures the Spragues' house.⁹ Safeco's insuring clause for the deck piers provides:

We insure for accidental direct physical loss to property described in Building Property We Cover except as limited or excluded.¹⁰

In other words, all risks of loss to the deck piers are covered by Safeco unless the peril is specifically excluded.

The policies that Safeco sold to the Spragues before September 1, 2003 do not contain a collapse exclusion for the all-risk Building Coverage.¹¹

In contrast to the all-risk Building Coverage, the Personal Property coverage of Safeco's policies is written on a specified peril basis, meaning only those perils specifically listed in that coverage grant are covered.¹² "Collapse" is one of the specifically enumerated covered perils, just like fire, lightning, windstorm or hail. The policies provide:

⁹ "Coverage A – Dwelling" applies both to the "residence premises," the Spragues' house itself, and the "structures attached to the dwelling," which includes the attached decks and deck piers. CP 51 (and CP 43 at ¶ 1); and CP 74 (and CP 43 at ¶ 2). There were two forms used by Safeco before 2003, but the all-risk building coverage grant for decks is the same. Compare CP 51 and CP 74. Safeco used Form CHO-4033/WAEP R1 6/92 (CP 47-70) until September 1, 1999 when that form was replaced with Form CHO-6033/EP 05/98. (CP 72-95). CP 43-44 at ¶¶ 1-3.

¹⁰ CP 51; CP 74. Building Coverage includes both Coverage A, Dwelling, and Coverage B, Other Structures. *See id.*

¹¹ CP 51-52 and CP 74-76.

¹² CP 54-55 and CP 78-79.

We insure for accidental direct physical loss to property described in Coverage C – Personal Property caused by a peril listed below except as limited or excluded.

* * *

12. Collapse of a building or any part of building.

This peril does not include settling, cracking, shrinking, bulging or expansion.¹³

Thus, Safeco's policies before September 1, 2003 recognize that collapse is a type of covered peril for personal property and the policies do not exclude collapse as a type of peril from the all-risk coverage provided for the deck piers.

2. Construction defect exclusion.

The pre-2003 policies contain the following construction defect exclusion:

BUILDING LOSSES WE DO NOT COVER

We do not insure or cover loss caused directly or indirectly by any of the following excluded perils:

* * *

15. Planning, Construction or Maintenance, meaning faulty, inadequate or defective:

- a. planning, zoning, development, surveying, siting;
- b. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- c. materials used in repair, construction, renovation or remodeling; or
- d. maintenance.

¹³ CP 54 and CP 79.

of property whether on or off the insured location by any person or organization. However, any ensuing loss not excluded or excepted in this policy is covered.¹⁴

Thus, the ensuing loss clause allows coverage for non-excluded losses that result from construction defects

3. Rot exclusion.

The pre-2003 policies also contain a rot exclusion. Like the construction defect exclusion, the rot exclusion also has an ensuing loss clause:

BUILDING LOSSES WE DO NOT COVER

We do not insure or cover loss caused directly or indirectly by any of the following excluded perils:

* * *

5. loss caused by:

* * *

c. smog, rust, mold, wet or dry rot;

* * *

Under items 1. thru 5., any ensuing loss not excluded is covered.¹⁵

¹⁴ CP 51-2 (emphasis added.) *See also* CP 74, 76 for the nearly identical construction defect exclusion (at CP 76, ¶17) in the coverage form in effect for the 9/1/99 to 9/1/03 policy periods.

¹⁵ CP 51 (emphasis added.) *See also* CP 74, 75 for the nearly identical mold exclusion (at CP 75 at ¶6) in the coverage form in effect for the 9/1/99 to 9/1/03 policy periods.

C. The policies after September 1, 2003.

Safeco's policies after September 1, 2003 completely changed and virtually eliminated the coverage for collapse. Beginning September 1, 2003, Safeco included an endorsement to the Spragues' policy that for the first time lists "Collapse" under the "Building Property Losses We Do Not Cover," the section of the policy listing all exclusions.¹⁶ While thus generally excluding "Collapse" from the all-risk building coverage, in the same endorsement Safeco adds back what turns out to be a severely limited "Additional Coverage" for collapse.¹⁷ The endorsement also deletes "Collapse" as a specifically enumerated covered peril under the Personal Property coverage.¹⁸ The endorsement states in relevant part:

BUILDING PROPERTY LOSSES WE DO NOT COVER

The following is added:

19. Collapse, except as provided in item 12. Collapse under Section I – Property Coverages, Additional Coverages. However, we do insure for any resulting loss unless the resulting loss is itself a loss not insured under this section.

PERSONAL PROPERTY LOSSES WE COVER

Item 12. Collapse is deleted.¹⁹

To further restrict the "Additional Coverage" for collapse, Safeco for the first time defines the term "Collapse" to mean actually fallen to the ground:

¹⁶ CP 98, and CP 44 at ¶ 4. The entire endorsement is CP 97-103.

¹⁷ CP 98.

¹⁸ CP 98.

¹⁹ CP 98.

1. Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its current intended purpose.
2. A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse.
3. A part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the building.
4. A building or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinking , or expansion.²⁰

D. The discovery of collapse conditions.

The Spragues discovered decay in the fin walls in March 2008, when a contractor who was making other, unrelated repairs for the Spragues suggested that they put vents in the fin walls as a precaution.²¹

The unrelated repairs addressed conditions discovered in 2007, when the Spragues found rot on the lower level exterior wall at a bay window feature, referred to by the Spragues as “the column.”²² The column feature is part of the exterior wall of the original house that was built in 1978 by the Spragues’ predecessors and extends from the bottom foundation to the top floor in approximately the center of the western face of the house.²³ The decks attach to the house on the western face.²⁴ But

²⁰ CP 99.

²¹ CP 15 at ¶ 1.

²² CP 13 at ¶ 3.

²³ *Id.*

the deck piers or fin walls at issue in this case are not directly attached to the western face of the house and are 3 ½ feet away from the house at their nearest point.²⁵ When the Spragues discovered the rot at the bay window feature, they submitted a claim to Safeco and the claim was denied.²⁶ The Spragues hired a contractor to repair the rot at their own cost and to re-do the entire connection and flashing between the decks and the western face of the house.²⁷ None of this work impacted the fins walls at all.²⁸

When the contractor completed that repair work, he suggested the Spragues hire him to install vents in the fin walls as a means to ensure that the fins walls would stay dry and air out if water or moisture ever got in.²⁹ When the contractor made openings in the fin walls to install vents in March 2008, he discovered severe decay.³⁰ The Spragues notified Safeco of the discovery of severe rot in the fin walls soon thereafter, in early April 2008.³¹

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ CP 15 at ¶ 1.

³⁰ *Id.*

³¹ *Id.*

E. Safeco's investigation.

In June 2008, Safeco sent out engineers from Pacific Engineering Technology (PET) to investigate.³² PET performed a cursory investigation and in July 2008, Safeco denied the claim.³³

In August 2008, Krista Sprague requested that Safeco consider the collapse coverage under prior policies.³⁴ In response, Safeco assigned Senior Analyst and Claim Representative Deborah Lee to the claim.³⁵

In September 2008, Safeco sent PET to conduct a more in-depth examination of the fin walls.³⁶ At that second investigation, PET's engineers warned Krista Sprague to stay off the decks and PET also directed a contractor to install shoring to hold up the decks.³⁷

In a claim file note under the title "Coverage Analysis," Safeco's adjuster, Ms. Lee, recorded her tentative conclusion regarding coverage under the pre-September 2003 policies:

Collapse coverage is neither excluded nor added as an additional coverage yet. Again, if collapse occurred as an ensuing loss to the faulty construction exclusion, coverage would have been triggered.³⁸

Ms. Lee then told Ms. Sprague that if the collapse damage occurred prior to a 2003 change in the policy language, the Spragues' loss

³² *Id.* at ¶ 2.

³³ *Id.*

³⁴ *Id.* at ¶ 3.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at ¶ 4.

³⁸ CP 168.

would be covered by Safeco, because collapse was not excluded in the pre-2003 policies.³⁹

PET wrote a report for Safeco on October 14, 2008 and concluded that the deck piers were in a state of collapse and that the collapse occurred before September 2003:

To summarize our findings, it 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 2003.⁴⁰

PET also concluded that the cause of the collapse was inadequate flashing at the deck piers and other construction defects.⁴¹ Ms. Lee then wrote the following in Safeco's claim file notes:

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.

Will await coverage counsel's recommendation, but I suspect that this loss will be covered...⁴²

Safeco's contractor estimated the cost of repair to be \$282,980.⁴³ Ms. Lee promised Krista Sprague that the insurer would review the claim another time⁴⁴ and then internally requested that reserves be increased to \$291,934 based on the likelihood of coverage.⁴⁵

³⁹ CP 16 at ¶ 5.

⁴⁰ CP 106 (emphasis added).

⁴¹ CP 109.

⁴² CP 171.

⁴³ CP 117.

⁴⁴ CP 16 at ¶ 6.

⁴⁵ CP 119.

F. Safeco denies the claim.

After a delay from October 2008 through February 2009, Safeco issued a longer, more detailed claim denial letter on February 26, 2009.⁴⁶

One of the central premises of Safeco's coverage denial was that, according to Safeco, the policies before 2003 "do not include additional coverage for collapse."⁴⁷ Characterizing the loss as "rot" and other excluded losses instead of "collapse," Safeco also took the position that there was no covered ensuing loss:

The exclusion for faulty, inadequate or defective workmanship, construction, renovation or remodeling states that any ensuing loss that is not otherwise excluded is covered. However the ensuing loss sustained as a result of the faulty construction was water intrusion which resulted in water damage, fungus, wet rot, dry rot and deterioration, all of which are expressly excluded from coverage. For this reason, the ensuing loss provisions contained in the Safeco policies issue from 1992 through 2003 do not apply.⁴⁸

The Spragues filed suit against Safeco the next day.⁴⁹

III. LEGAL ARGUMENT

A. Standards for Appellate Review and Insurance Policy Interpretation.

The construction of insurance policy provisions presents a question of law subject to de novo review by the Court of Appeals.⁵⁰

⁴⁶ CP 121-35.

⁴⁷ CP 125 and CP 127.

⁴⁸ CP 134.

⁴⁹ CP 3.

Interpretation of an insurance policy is a question of law. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 730, 837 P.2d 1000 (1992). The determination of whether coverage exists is a two-step process: first, the insured must show the policy covers his loss; second, to avoid coverage, the insurer must show specific policy language excludes the insured's loss. *McDonald*, 119 Wn.2d at 731. We determine coverage by "characterizing the perils contributing to the loss, and determining which perils the policy covers and which it excludes." *Bowers v. Farmers Ins. Exchange*, 99 Wn. App. 41, 44, 991 P.2d 734 (2000).

Wright v. Safeco Ins. Co. of Am., 124 Wn. App. 263, 271, 109 P.3d 1 (2004).

In interpreting the policy, this court should read the policy as a lay purchaser of insurance would read it and construe any ambiguities against Safeco:

Insurance policy language must be interpreted in accord with the way it would be understood by the average person. *National Union Fire Ins. Co. v. Zuver*, 110 Wn.2d 207, 210, 750 P.2d 1247 (1988). An insurance policy provision is ambiguous when it is fairly susceptible to two different interpretations, both of which are reasonable. *Stanley v. Safeco Ins. Co. of Am.*, 109 Wn.2d 738, 741, 747 P.2d 1091 (1988). If exclusionary language is ambiguous, it is proper to construe the effect of such language against the drafter. *National Union Fire Ins. Co.*, 110 Wn.2d at 210. ... Thus, if an insurance policy's exclusionary language is ambiguous, the legal effect of such ambiguity is to find the exclusionary language ineffective.

Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 690, 871 P.2d 146 (1994).

⁵⁰ *Mercer Place Condo. Ass'n. v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 601, 17 P.3d 626 (2000), *rev. denied*, 143 Wn.2d 1023 (2001).

B. Safeco's pre-2003 Policies Cover "Collapse."

With respect to the coverage for the deck piers, Safeco's pre-2003 policies are all-risk policies; they cover all losses to the building and attached deck structures unless the cause of loss, or peril, is specifically excluded in the exclusion section of the policy.⁵¹

"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. *Churchill v. Factory Mut. Ins. Co.*, 234 F.Supp.2d 1182, 1187-88 (W.D.Wash.2002). Under an all risk policy, any risk that is not specifically excluded is an insured peril. *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 378, 917 P.2d 116 (1996).

Frank Coluccio Const. Co., Inc. v. King County, 136 Wn. App. 751, 767, 150 P.3d 1147 (2007).

The exclusions for Building Coverage in 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 Safeco policies before 2003 therefore cover the peril of collapse.

Moreover, 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

⁵¹ 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.

listed perils are covered.⁵² 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.⁵³ Thus, Safeco itself specifically identifies "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."⁵⁴ Thus, by identifying collapse as a distinct peril and not excluding collapse from its all-risk building coverage, Safeco demonstrates an intention to cover the peril of collapse.

Although there are a number of reported decisions in Washington addressing coverage for collapse under all-risk policies, those decisions all analyze policies that contain a general collapse exclusion from the all risk coverage, but then add back a limited additional coverage for collapse.⁵⁵ Because those decisions all turn on whether there is coverage for collapse under the limited additional coverage, they do not necessarily resolve the

⁵² CP 54-55. The personal property coverage for years 1999 to 2003 is at CP 78-79.

⁵³ CP 55. When Safeco's policy forms changed in 1999, "collapse" was one of seventeen specifically identified covered perils. CP 79.

⁵⁴ CP 51-52. For policies after 1999 but before 2003, see CP 74-76.

⁵⁵ See, e.g., *Allstate Ins. Co. v. Forest Lynn Homeowners Assoc.*, 892 F. Supp. 1310, 1315 (W.D. Wash. 1995), publication withdrawn on settlement, 914 F.Supp. 408 (W.D. Wash. 1996); *Assurance Co. of America v. Wall & Associates LLC of Olympia*, 379 F.3d 557, 561 (9th Cir. 2004); *Mercer Place Condo Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 604, 17 P.3d 626 (2000); *Panorama Village Condominium Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001). See also argument at section III.C. of this brief below.

issue of whether an all-risk policy without a collapse exclusion covers the risk of collapse.

Outside of Washington, one court has explicitly recognized that a collapse loss should be covered when an all-risk policy does not exclude collapse and the loss is properly characterized as collapse. *Barash v. Ins. Co. of North America*, 114 Misc.2d 325, 329 (N.Y. S. Ct. 1982). In *Barash*, the policy contained exclusions for losses caused by earth movement and settling, shrinking or expansion in foundations, walls, and floors. *Id.* at 325-6. The homeowner discovered large cracks in the floor of the basement, which caused significant displacement in the slab, which further caused the walls and floors throughout the house to go out of plumb and out of level. *Id.* at 326. The parties in *Barash* agreed that the plaintiffs' loss was "caused by the presence under the slab of unsuitable fill containing organic materials... which over the years has deteriorated. This deterioration has created voids, which precipitated the collapse of the basement slab." *Id.* In its analysis of coverage, the court in *Barash* noted: "Since collapse was not excluded, it must be covered by this all-risk policy... In this case... everyone including the insurance adjuster and the experts, called this a collapse." *Id.* at 329 (emphasis added). Such is the case here with the Spragues' claim, as the adjuster Deborah Lee and Safeco's own experts considered the Spragues' deck piers to be in a state of collapse.

Other courts have implicitly reached the same conclusion as *Barash*. In *Texas Eastern Transmission Corp. v. Marine Office-Appleton*

& *Cox Corp.*, 579 F.2d 561, 566 (10th Cir. 1978), the court also found coverage for collapse under an all-risk policy:

[T]he action involves the collapse of an underground storage cavern being constructed to hold approximately 200,000 barrels of liquefied petroleum gas, at a time when construction was about 97% completed... The parties had acquired an “all risks” insurance policy from [the insurer].

579 F.2d at 563. The insurer argued that the collapse was caused by a design defect – excluded under the policy – and that the policyholder failed to establish an “external” cause of the collapse. *Id.* at 564. The court in *Texas Eastern Transmission* rejected the insurer’s arguments. “In the context of the instant case we believe the facts support a finding that the parties intended to insure against collapse of the cavern under the circumstances which occurred here.” *Id.* at 565. While the opinion in *Texas Eastern* does not explicitly say so, one may reasonably surmise that the all-risk policy being interpreted did not contain a collapse exclusion, given the court’s analysis of the relevant exclusions and the court’s and parties’ characterization of the loss as a “collapse.” *Id.* at 563, 565. The court in *Texas Eastern* also found persuasive three other cases involving collapse losses under all-risk policies, none of which appear to contain an exclusion for collapse. *Id.* at 565-66, analyzing *General American Transportation Corp. v. Sun Insurance Office, Ltd.*, 369 F.2d 906 (6th Cir. 1966); *Essex House v. St. Paul Fire and Marine Ins. Co.* 404 F.Supp. 978 (S.D.Ohio 1975); and *Millers Mutual Fire Ins. Co. v. Murrell*, 362 S.W.2d 868 (Tex. App. 1962).

In conclusion, an all-risk policy that recognizes collapse as a distinct peril and does not exclude collapse, covers the risk of collapse.

C. This Court Should Reject Safeco’s Argument that the Policies Before 2003 Lacked “Additional Coverage” For Collapse.

This Court should reject Safeco’s position in its denial letter that there is no coverage for collapse in its pre-2003 all-risk policies because those policies do not contain an “additional coverage” for collapse. As explained below, the so-called “additional coverage” for collapse is only a feature of all-risk forms that first contain a general exclusion for collapse. An understanding of the evolution of collapse coverage also reinforces the conclusion that an all-risk policy that does not contain a collapse exclusion necessarily covers collapse.

Property insurers began covering “collapse” of the insured building in approximately 1954.⁵⁶ But insurers began to write a general exclusion for collapse from all-risk coverage in the 1980s in response to development of the concurrent causation doctrine, a doctrine that recognizes that more than one cause can lead to a loss.⁵⁷ While insurers began to exclude collapse generally from all-risk coverage, the insurers added back a more limited, so-called “additional coverage” for collapse if

⁵⁶ Paula B. Tarr, William S. Daskam IV, Herbert J. Baumann, Jr., Insurance Coverage For Collapse Claims: Evolving Standards and Legal Theories, 35 Tort & Ins. L.J. 57, 58 (1999), cited in *Mercer Place Condo Ass’n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602, at fn. 1, 17 P.3d 626 (2000).

⁵⁷ Insurance Coverage For Collapse Claims: Evolving Standards and Legal Theories, 35 Tort & Ins. L.J. at 59.

the collapse was caused by certain enumerated perils, such as “hidden decay.”⁵⁸ This limited additional coverage for collapse was contained in the 1991 Washington Homeowners Policy (HO3) developed by Insurance Services Office (ISO), creators of widely used standardized insurance forms. The 1991 HO3 contains a grant of all-risk coverage and a general collapse exclusion from that coverage, but the general collapse exclusion excepts from the exclusion a limited additional coverage for collapse.⁵⁹

Even the more limited “additional coverage” for collapse was broadly interpreted by courts across the country to cover any substantial impairment of structural integrity so long as it was caused by an enumerated peril. In 1995, a federal court in Washington rejected the insurer’s argument that the undefined term “collapse” in its all-risk policy meant that the building had to fall to the ground for there to be coverage. See *Allstate Ins. Co. v. Forest Lynn Homeowners Assoc.*, 892 F. Supp. 1310 (W.D. Wash.1995), *publication withdrawn on settlement*, 914 F.Supp. 408 (W.D. Wash. 1996). The court in *Forest Lynn* concluded that “the majority of modern courts considering this issue have determined that the term ‘collapse’ is ‘sufficiently ambiguous to include coverage for any substantial impairment of the structural integrity of a building.’” *Id.* at

⁵⁸ *Id.*

⁵⁹ CP 137-55. In the HO3, the coverage grant is at CP 142 (“Section I – Perils Insured Against”); the additional coverage for collapse is also contained on CP 142 at ¶8, above Section I; and the general exclusion for collapse is also contained on CP 142 as the first exclusion after the all-risk coverage grant.

1313-14 (citations omitted).⁶⁰ The policy in *Forest Lynn* contained a general collapse exclusion but added back limited coverage for collapse caused by, inter alia, “hidden decay.”⁶¹

Some insurers responded to such court interpretations of “collapse” by drafting forms that further limited the collapse coverage by defining collapse to mean the building had to actually fall down. While *Forrest Lynn* was decided in 1995, Safeco itself did not change the Spragues’ collapse coverage until September 2003, when Safeco added the endorsement that both defined collapse to mean fallen to the ground and excluded collapse generally from the all-risk coverage.⁶²

With the above evolution of collapse coverage in mind, it is critical to understand that when Safeco was insuring the Spragues’ home prior to 2003 with all-risk policies that did not exclude collapse, Safeco was writing other all-risk forms that excluded collapse generally and then added back the more limited additional coverage for collapse caused by enumerated perils.⁶³ Thus, prior to 2003, Safeco was certainly capable of, and in fact did, write a general collapse exclusion from all-risk coverage.

⁶⁰ In 2000, the Court of Appeals analyzed issues surrounding collapse coverage and noted *Forest Lynn*’s prediction of how the Washington Supreme Court would rule on the interpretation of collapse. *Mercer Place Condo Ass’n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602, at fn. 1, 17 P.3d 626 (2000). In *Mercer Place*, it was not necessary for the Court to interpret the term “collapse” because State Farm stipulated that collapse meant substantial impairment of structural integrity and State Farm actually paid for the repairs of all conditions rising to the level of substantial structural impairment. 104 Wn. App. at 600.

⁶¹ See general collapse exclusion 2.m. in excerpts of policy in the Appendix of *Forest Lynn*, 892 F. Supp. 1317.

⁶² CP 98.

⁶³ CP 163, 165.

Washington courts take note when an insurer excludes a loss on one form that was not used in the policy at issue but instead uses another form without the exclusion:

It is highly significant that National Union had available a form endorsement specifically excluding claims arising out of a merger or acquisition involving a particular entity... National Union did not use that available, standard form endorsement which would have identified with particularity the transaction which it now claims it intended to exclude. "In evaluating the insurer's claim as to meaning of language used, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question." 13 John A. Appleman & Jean Appleman, *Insurance Law & Practice* § 7403 (1976).

Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 688, 871 P.2d 146 (1994).⁶⁴ Here, Safeco chose not to sell the Spragues a type of policy like the standard HO3 form or Safeco's own other forms (see. e.g., CP 163, 165) that exclude collapse generally from the all-risk coverage. The only reasonable conclusion is that Safeco did not intend to exclude collapse generally in the pre-2003 all-risk policies sold to the Spragues.

Moreover, Safeco's position in its February 26 denial letter that its pre-2003 policies do not contain an "additional coverage" for collapse should be rejected. As explained above, the so-called "additional coverage" for collapse is a feature of collapse forms that first contain a

⁶⁴ See also *United Pacific Ins. Co. v. Larsen*, 44 Wn. App. 529, 532, 723 P.2d 8 (1986) ("Given United Pacific's past policy language it is apparent they knew how to limit coverage to the scope of permission granted. That it employed different and less explicit language in the instant policy is evidence that it meant to convey a different meaning.")

general exclusion for collapse. The “additional coverage” is a technique used for *narrowing* collapse coverage, a technique that Safeco itself used in some policies before 2003. This Court should not step in and effectively re-write the pre-2003 policies to exclude collapse when Safeco chose not to. “The industry knows how to protect itself and it knows how to write exclusions and conditions.” *Boeing Co. v. Aetna Cas. and Sur. Co.*, 113 Wn.2d 869, 887, 784 P.2d 507 (1990).

D. The Court Should Reject Safeco’s Argument that Collapse is Not Covered If It Is Caused by Construction Defects, Water Intrusion, or Decay.

Safeco also argued in the trial court below that there is no coverage for collapse because the pre-2003 policies exclude construction defects, water and decay. There are three reasons this Court should reject SAFECO’s argument: (1) there is an ensuing loss clause to the construction defect and decay exclusions; (2) the water damage exclusion clearly does not apply; and (3) because the pre-2003 policies do not place any restrictions or limitations as to what causes of collapse are covered or excluded, any condition rising to the level of collapse is covered.

1. The construction defect and rot exclusions contain an ensuing loss clause and collapse is a covered ensuing loss.

The last line of Safeco’s construction defect exclusion states: “However, any ensuing loss not excluded or excepted in this policy is

covered.”⁶⁵ Likewise, Safeco’s “wet or dry rot” exclusion provides: “Under items 1. thru 5., any ensuing loss not excluded is covered.”⁶⁶

This 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 clearly covered, 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-

⁶⁵ CP 52. For policies between 1999 and 2003, *see* CP 76, where the policy provides: “However, any ensuing loss not excluded is covered.”

⁶⁶ 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.”

risk coverage for the deck piers, collapse is a covered loss. If collapse ensues from another cause, there is still is coverage. Thus, if construction defects lead to water intrusion and rot that is so bad that it leads to collapse, the collapse loss remains covered. Significantly, this was precisely the conclusion that Safeco Senior Analyst Deborah Lee reached:

Again, if collapse occurred as an ensuing loss to the faulty construction exclusion, coverage would have been triggered.⁶⁷

Ms. Lee's conclusion is also the straightforward and logical conclusion that a lay purchaser of insurance would likely reach.⁶⁸

The Court of Appeals applied a similar analysis and reached the same conclusion in *Mercer Place Condo Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 17 P.3d 626 (2000). In *Mercer Place*, State Farm stipulated that its policy, which excluded collapse generally but added back a limited coverage for collapse, covered collapse and that collapse meant substantial impairment of structural integrity.⁶⁹ State Farm further paid for the repair of all conditions that rose to the level of substantial structural impairment.⁷⁰ The insured, Mercer Place Condo Association, however argued that State Farm should have gone further and should have repaired all construction defects that would later result in structural

⁶⁷ CP 168.

⁶⁸ “[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)).

⁶⁹ 104 Wn. App. at 600.

⁷⁰ *Id.*

impairment.⁷¹ The Court declined to hold that the policy covered the precursors to collapse. But in so holding, the Court of Appeals harmonized the decay and faulty construction exclusions and the collapse coverage, and noted that while decay and faulty construction by themselves are not covered, when they lead to collapse (substantial impairment of structural integrity), there is coverage:

Looking at the policy as a whole, adopting Mercer Place's argument would defeat the purpose of the policy's exclusionary provisions. The policy specifically excludes those losses flowing from such conditions as decay, continuous or repeated seepage or leakage of water, or faulty construction or design, *except to the extent that such conditions are found to have created substantial impairment of structural integrity during the policy period.*

104 Wn. App. at 604 (emphasis added). In other words, the Court of Appeals reads the interplay between the collapse coverage and the faulty construction and decay exclusions the same way that the Spragues advocate here. While rot and construction defects may by themselves be excluded, when they are bad enough to lead to a collapse or substantial impairment of structural integrity within the policy period, that resulting collapse is covered.

Similar reasoning was employed by our Supreme Court in *Dickson v. United States Fidelity and Guaranty*, 77 Wn.2d 785, 466 P.2d 515 (1970). In *Dickson*, the Court analyzed coverage for a boom collapse under an all-risk policy that contained an exclusion for latent defects,

⁷¹ *Id.*

gradual deterioration or mechanical breakdown. The parties in *Dickson* did not dispute that a defective weld in the crane boom was a latent defect. Analyzing the coverage, the Supreme Court in *Dickson* noted that the latent defect exclusion, exclusion (d), did not say that loss or damage “caused by or resulting from” the latent defect was excluded. 77 Wn.2d 789. But the “caused by or resulting from” phrase was used for the other exclusions. *Id.* The Court reasoned that the difference in language was important:

When the insurance company changed the language of exclusion (d) from the language it used in the other exclusionary clauses, it thereby manifested an obvious intent that the clause Not read ‘loss or damage caused by or resulting from * * * latent defects,’ but rather that the exclusion apply only to the latent defect itself.

* * *

Had the insured made claim under this policy for the cost of repairing the defective weld or for repairs to the machine necessitated by wear and tear, deterioration or breakdown, the quoted exclusion would apply. This, however, is not such a claim.

77 Wn.2d at 790. Thus, the Court in *Dickson* reached the same conclusion that the Spragues advocate here. When the policy language of an exclusion for construction defects (or in *Dickson*’s case, latent defects) demonstrates an intention to cover the resulting loss from the construction defects, the court must give meaning to that policy language.

2. Safeco's water damage exclusion is inapplicable.

Safeco also has argued that the Spragues' loss is not covered because the construction defects led to water intrusion and water damage, and water damage is expressly excluded. The pre-2003 policies, in fact, only excludes a narrow subset of water damage:

Water Damage, meaning:

- a. Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;
- b. Water which back up through sewers or drains originating outside of the residence premises' plumbing system or water which enters into and overflows or discharges from a sump; or
- c. Water below the surface of the ground, including water which exerts pressure on, or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

Direct loss by fire, explosion or theft resulting from water damage is covered.⁷²

Safeco's water damage exclusion does not exclude all water damage, only those categories of water damage explicitly set forth in items a. (flood, surface water, waves, etc.), b. (sewer or drain back-up), and c. (water below the ground's surface).⁷³ None of those excluded categories of water

⁷² CP 52. The policies in effect from 1999-2003 modified the water damage exclusion slightly, but without affecting the analysis here. CP 75-76.

⁷³ CP 52. CP 75-76.

damage apply to the Spragues' situation, where rain water has intruded into the structural supports of their decks and decayed them to the point of imminent collapse. Clearly, Safeco's water damage exclusion is inapplicable, and the insurer's argument on water intrusion should be rejected as a matter of law.

3. In the pre-2003 policies, Safeco does not define collapse or place any restrictions on what could cause the collapse. Consequently it is irrelevant to coverage if construction defects cause the collapse.

Safeco is asking this court to interpret its pre-2003 policies to exclude collapse when collapse is caused by construction defects. But Safeco did not make any provision in the pre-2003 policies to define collapse or state what causes of collapse were excluded. As such, Safeco is required to cover all conditions rising to the level of collapse.

The conclusion that collapse is covered on the prior policies because they did not exclude or define collapse was the same conclusion that Safeco's adjuster Deborah Lee initially reached, reported to Ms. Sprague, and recorded in her claim file notes:

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.

Will await coverage counsel's recommendation, but I suspect that this loss will be covered...⁷⁴

⁷⁴ CP 171.

Even the narrower form of collapse coverage (that excludes collapse generally but provides limited coverage for enumerated causes of collapse) has been interpreted to provide coverage when construction defects lead to hidden decay that leads to collapse.⁷⁵

The same rationale should be applied to the interpretation of a policy that does not exclude or define collapse. In the pre-2003 policies, Safeco agreed to cover “collapse of a building or any part of a building” without further material restriction, clarification or definition of collapse. Therefore, it is strictly irrelevant what caused the collapse under the pre-2003 policies, because Safeco recognized in its coverage that all conditions rising to the level of collapse are covered. As long as the conditions are bad enough to be considered in a state of collapse, there is coverage.

E. The Spragues Are Entitled To Recover Their Attorney Fees.

If the Spragues prevail on this appeal, the Spragues are entitled to be awarded their attorney fees below and on appeal, because both the litigation below and this appeal were necessary to establish coverage.⁷⁶

IV. CONCLUSION

This case is significant on two levels. First, the trial court’s error has saddled the Spragues with a \$300,000 collapse loss that under the

⁷⁵ *Forest Lynn Homeowners Assoc.*, 892 F. Supp. at 1315 (rejecting Allstate’s argument that the collapse loss was not covered because inadequate design and construction detail allowed rain and surface water to penetrate the structures, causing the decay.)

⁷⁶ *E.g.*, *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).

correct policy interpretation should have covered by Safeco's policies. This Court should right this wrong and place the loss with the insurer that accepted a premium and contractually agreed to take on the risk of collapse.

On a broader level, the significance of this case extends far beyond a narrow band of collapse claims. If Safeco and other insurance companies are permitted to deny claims improperly based on their construction defect exclusion without properly applying the ensuing loss clause, the insurers will have carte blanche to deny claims for fire, explosions, and other covered losses by pointing to some construction defect that contributed to or caused the loss. Can one imagine a refinery or pipeline explosion that does not involve some aspect of defective construction or design? There is a dearth of published authority in Washington where a claim was found to be within the ensuing loss clause of an exclusion. This case presents an opportunity for this Court to explain the proper interpretation of an ensuing loss clause.

RESPECTFULLY SUBMITTED this 5th day of October, 2009.

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DATED this 5th day of October, 2009.

A handwritten signature in cursive script that reads "Colleen Hickman". The signature is written in black ink and is positioned above a horizontal line.

Colleen Hickman

PROOF OF SERVICE - 2