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NO. \_\_\_\_\_

SUPREME COURT OF THE STATE  
OF WASHINGTON  
Court of Appeals No. 63933-1-I

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MAX B. SPRAGUE and KRISTA SPRAGUE,

*Respondents*

v.

SAFECO INSURANCE COMPANY OF AMERICA

*Petitioner*

**FILED**  
MAR 29 2011

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STATE OF WASHINGTON  
*WJK*

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**RESPONDENT SAFECO INSURANCE COMPANY OF  
AMERICA'S PETITION FOR REVIEW**

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M. Colleen Barrett, WSBA # 12578  
Kevin J. Kay, WSBA #34546  
BARRETT & WORDEN, P.S.  
Attorneys for Petitioner Safeco

2101 Fourth Avenue, Suite 700  
Seattle, Washington 98121  
(206) 436-2020



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## **I. Identity of Petitioner**

Safeco Insurance Company of America, Defendant at the trial court and Respondent before the Court of Appeals, seeks review of the decision designated in Part II of this petition.

## **II. Court of Appeals Decision**

Safeco seeks review of the Court of Appeals' published decision in *Sprague v. Safeco Insurance Co. of America*,<sup>1</sup> decided November 1, 2010.<sup>2</sup> Safeco's motion for reconsideration was denied on February 17, 2011.<sup>3</sup>

## **III. Issues Presented for Review**

1. The Safeco homeowners policy excludes damage to the Spragues' decks caused by construction defects, water intrusion, rot, and deterioration. Without any separate, independent, non-excluded peril, does the deterioration of the decks to the point of substantial structural impairment create coverage under an ensuing loss provision?
2. When a policy unambiguously excludes loss caused by construction defect, rot, and deterioration, can Washington Courts modify these exclusions by adding the term "collapse" to the policy and define it to mean substantial structural impairment so as to create ensuing loss coverage?

## **IV. Statement of the Case**

### **1. Background Facts**

The Spragues, owners of a house in Burien, completed a major

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<sup>1</sup> 158 Wn. App. 336, 241 P.3d 1276 (2010).

<sup>2</sup> A copy of the decision is attached in the Appendix at pages A-1 through A-5.

<sup>3</sup> A copy of the Order Denying Reconsideration is attached in the Appendix at page A-6.

remodel, including the addition of a decking system, in 1995-96.<sup>4</sup> The decking system involved multi-story decks supported by columns referred to as “fin walls”.<sup>5</sup> In 2004 or 2005, a contractor, brought in to address other problems, discovered serious defects in the decking system, problems that were related to the earlier remodel.<sup>6</sup> The contractor advised the Spragues that defective construction of the decks had allowed water to get inside the fin walls for years and was causing deterioration and rot of the structure.<sup>7</sup>

Safeco issued homeowners policies to the Spragues beginning in 1992.<sup>8</sup> In 2008, the Spragues filed a claim with Safeco, seeking payment of the cost to repair their decks.<sup>9</sup>

Safeco retained Pacific Engineering Technologies, Inc., (“PET”) to inspect the decks and determine the cause of the damage.<sup>10</sup> PET concluded that the decayed framing in the deck fin walls was caused by a combination of construction defects: 1) inadequate flashing between the beams of the decks and the deck piers; 2) possible inadequate flashing

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<sup>4</sup> CP 12-13; CP 197; CP 201-03; CP 208; CP 214.

<sup>5</sup> CP 12-14; CP 207; CP 214.

<sup>6</sup> CP 203-07; CP 209.

<sup>7</sup> CP 206-07; CP 209.

<sup>8</sup> CP 197.

<sup>9</sup> CP 15

<sup>10</sup> CP 197; CP 213-34. It should be noted that the PET reports located at CP 213-34 were inadvertently intermingled by the Superior Court Clerk. The first page of the June 2008 report is with the remaining pages of the October 2008 report and vice versa. *Compare* CP 106-15, *with* CP 213-34.

between the deck piers and the decks' guardrails; and 3) inadequate deck pier ventilation.<sup>11</sup> These defects led to water entering the structure, which led to fungus growth, rot, and deterioration.<sup>12</sup>

PET also concluded that the decayed wood posts in the fin walls supporting the decks were decayed to the extent that the decks were in a state of imminent collapse and suffered substantial impairment of structural integrity<sup>13</sup> before September 2003.<sup>14</sup>

After Safeco completed its investigation, it denied the Spragues' claim because the policies excluded coverage for losses caused by construction defect, water damage, deterioration, and wet and dry rot during the 1998 through 2003 policy periods.<sup>15</sup>

The relevant terms of the 1999-2003<sup>16</sup> policies are:

#### **BUILDING PROPERTY LOSSES WE DO NOT COVER**

We do not cover loss caused directly or indirectly by any of the following excluded perils. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss:

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<sup>11</sup> CP 226; CP 168.

<sup>12</sup> CP 227.

<sup>13</sup> For convenience only, the phrases "state of imminent collapse" and "substantial impairment of structural integrity" will hereinafter be collectively referred to as "substantial impairment." By use of this shorthand phrase, Safeco does not mean to indicate that the terms are synonymous or that they constitute "collapse" under Washington law.

<sup>14</sup> CP 225.

<sup>15</sup> CP 121-35.

<sup>16</sup> There are slight differences between the 1995-99 policies and the 1999-2003 policies which are not material to the issues raised in this appeal.

- ...
- 6. a. wear and tear, marring, scratching, deterioration;
  - ...
  - c. smog, rust, corrosion, electrolysis, mold, fungus, wet or dry rot;
  - ...

However, we do insure for any resulting loss from items 1. through 6. unless the loss itself is a Loss Not Insured by this Section.

...

9. **Water Damage**, meaning:

- a. flood, surface water, waves, tidal waves, tsunami, overflow of a body of water or spray from any of these, whether or not driven by wind;
- ...

17. **Planning, Construction or Maintenance**, meaning faulty, inadequate or defective:

...

- b. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- c. materials used in repair, construction, renovation or remodeling; ...
- ...

... However, any ensuing loss not excluded is covered.<sup>17</sup>

None of the pre-2003 policies use the term “collapse” except in connection with personal property damage (for which no claim is being

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<sup>17</sup> CP 268-70. *See also*, CP 197 at ¶7; CP 263-89. Additional policy provisions, not material to this matter went into effect in September 2003. *See*, CP 44; CP 97-103; CP 198.

made):

### **PERSONAL PROPERTY LOSSES WE COVER**

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 a building.**

This peril does not include settling, cracking, shrinking, bulging or expansion.<sup>18</sup>

After denial of their claim, the Spragues filed suit against Safeco.<sup>19</sup>

#### **2. Procedural Facts**

Both the Spragues and Safeco moved for summary judgment in the trial court.<sup>20</sup> On June 14, 2009, The Honorable James D. Cayce entered summary judgment in favor of Safeco and declared there was no coverage for the Spragues' loss because the efficient proximate cause and all ensuing losses were excluded.<sup>21</sup> The Court also concluded (and the Spragues conceded) that there was no coverage under the 2003 through 2008 policies' collapse provisions.<sup>22</sup>

The Spragues appealed, and on November 1, 2010, Division I of

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<sup>18</sup> CP 245; CP 272-73.

<sup>19</sup> See CP 3-7.

<sup>20</sup> See CP 19-42; CP 174-95.

<sup>21</sup> CP 355-58.

<sup>22</sup> CP 357.

the Court of Appeals reversed the trial court.<sup>23</sup>

A few days before the opinion in *Sprague* was published, Division II published its decision in *Vision One, LLC v. Philadelphia Indemnity Insurance Co.*,<sup>24</sup> holding that an ensuing loss provision did not apply to permit coverage for collapse of a concrete slab during construction of a condominium. Safeco subsequently moved for reconsideration of the *Sprague* opinion asserting, in part, that Division I had misapprehended the meaning and application of the ensuing loss provision and that it should reconsider its opinion in light of the Washington Supreme Court's decision in *McDonald v. State Farm Fire and Casualty Co.*<sup>25</sup> and the analysis of Division II in *Vision One*. Reconsideration was denied on February 17, 2011,<sup>26</sup> and Safeco timely filed this petition.

#### **V. Argument Why Review Should Be Accepted**

##### **1. Several criteria for review under RAP 13.4(b) apply.**

RAP 13.4(b) provides that this Court will accept review only if certain criteria are met, including:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; . . . or (4) If the petition involves

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<sup>23</sup> See *Sprague v. Safeco Ins. Co. of Am.*, 158 Wn. App. 336, 241 P.3d 1276 (2010).

<sup>24</sup> 158 Wn. App. 91, 241 P.3d 429 (2010).

<sup>25</sup> 119 Wn.2d 724, , 837 P.2d 1000 (1992).

<sup>26</sup> See, Appendix, at A-6.

an issue of substantial public interest that should be determined by the Supreme Court.<sup>27</sup>

As set forth below, this Court should accept review under RAP 13.4(b)(1) and (2) because the Court of Appeals' decision here is in conflict both with decisions of this Court and with other Court of Appeals decisions, including a recent decision by Division II of the Court of Appeals that is currently before this Court on review.

In addition, this Court should accept review under RAP 13.4(b)(4) because interpreting ensuing loss provisions and defining "collapse" with respect to insurance policies are issues affecting both insurers and a variety of insureds, and both have substantial interest in having this Court resolve these issues presented by the Court of Appeals' opinion.

**2. The *Sprague* decision conflicts with decisions of this Court, with the *Port of Seattle*<sup>28</sup> decision by Division I, and with the *Vision One* decision by Division II.**

Unless an exception applies, the Safeco policy indisputably excludes coverage for the Spragues' loss. Thus, the only issue is whether the ensuing loss exception applies.

Under the facts of this case, construction defects permitted water to go behind the decks' exterior where, over time, the water caused the wooden supports to rot. That condition constitutes the Spragues' loss.

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<sup>27</sup> RAP 13.4(b).

<sup>28</sup> *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 48 P.3d 334 (2002).

That is to say, the Spragues' loss consists of deterioration and rot of their decks caused by defective construction.

**A. The *Sprague* decision misinterprets the ensuing loss provision as set forth in this Court's decisions.**

In *McDonald v. State Farm*, the ground (fill dirt) on the side of the McDonalds' house slid away, causing the foundation to crack and tilt. Investigation disclosed that the earth movement was caused by faulty design and construction of the filled area. The McDonalds made a claim to their homeowners insurer, State Farm. The State Farm policy, an "all-risk" policy, excluded losses due to foundation cracking, earth movement, and faulty design and workmanship. The parties agreed that faulty design was the efficient proximate cause of the loss.<sup>29</sup> The Court of Appeals found that the ensuing loss clause of the exclusions was a grant of coverage for loss caused by negligent or faulty construction and materials.<sup>30</sup> This Court disagreed.<sup>31</sup>

Ensuing loss provisions are exceptions to policy exclusions<sup>32</sup> and

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<sup>29</sup> *McDonald*, 119 Wn.2d, at 727-29.

<sup>30</sup> *Id.*, at 734.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* See also, *Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 16, 990 P.2d 414 (1999) (citing, *McDonald*, 119 Wn.2d at 734 ); *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 274, 109 P.3d 1 (2004) (citing, *Capelouto*, 98 Wn. App. at 16).

do not create coverage.<sup>33</sup> Instead, they are intended to provide coverage for a covered ensuing loss even if an uncovered loss takes place. As stated in *McDonald v. State Farm*:

The ensuing loss clause may be confusing, but it is not ambiguous. Reasonably interpreted, the ensuing loss clause says that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered. The uncovered event itself, however, is never covered.<sup>34</sup>

In other words, Washington law requires that an additional resulting covered peril lead to damage independent from the damage caused by the excluded peril before an ensuing loss provision is triggered.<sup>35</sup>

In the present case, there is no loss other than an excluded loss. The Spragues' claim is for loss consisting of deterioration and rot caused by defective construction. The Spragues' argument, accepted by the Court of Appeals, that the exclusions for defective construction, deterioration, and rot should be read out of the policy when the deterioration or rot becomes worse, defies the rules of contract interpretation, as well as common sense.

The ensuing loss provisions do not compel a different result; they

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<sup>33</sup> *McDonald*, 119 Wn.2d, at 734-36; *Wright*, 124 Wn. App. at 274-75 (citing, *Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 16, 990 P.2d 414 (1999)).

<sup>34</sup> *McDonald*, 119 Wn.2d at 734.

<sup>35</sup> See, e.g., *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 911-13, 48 P.3d 334 (2002); *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 274-75, 109 P.3d 1 (2004).

cannot be used to *create* coverage for losses caused by deterioration and rot and defective construction, losses that are excluded by the policies.

The Court of Appeals erred when it concluded there was a different loss, not excluded by the terms of the policy:

[T]he losses that are faulty construction and rot are not covered, but the “ensuing losses,” those that result from such faulty construction or rot, are covered because such an ensuing loss is not excluded elsewhere in the policy.<sup>36</sup>

The “ensuing loss” to which the court refers is the deteriorated and rotted condition of the decks, which the court defines as “collapse.”<sup>37</sup> However, the Safeco policies exclude building coverage for losses caused by defective construction, deterioration, and rot, regardless of how the damage is characterized or to what point it progresses. The ensuing loss provision cannot create coverage for deterioration and rot amounting to substantial impairment.

Indeed, the Court of Appeals’ decision conflicts with this Court’s decision in *Kish v. Insurance Company of North America*.<sup>38</sup> In that case, the plaintiffs, insureds under all-risk homeowners policies, sought coverage when their houses were damaged by flood waters that had overtopped a

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<sup>36</sup> *Sprague*, 158 Wn. App. at 341, ¶ 7.

<sup>37</sup> The court said, “[W]e hold that the findings of Safeco’s own experts that the building was in a state of imminent collapse and that there was substantial impairment to the structure of the building were sufficient to establish collapse in the present case.” *Id.* at 342, ¶ 9.

<sup>38</sup> 125 Wn.2d 164, 883 P.2d 308 (1994).

protective dike. The policies excluded losses resulting from flood or surface water. At trial, the jury determined that record-breaking rainfall was the efficient proximate cause of plaintiffs' losses, and the court entered judgment for plaintiffs on the ground that rainwater was not an excluded peril.<sup>39</sup> This Court reversed.<sup>40</sup>

The Court said, "An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss."<sup>41</sup> "[R]ain," the Court went on, "is merely another characterization of flood in this case."<sup>42</sup> To allow such re-characterization would render exclusions meaningless.

It should be noted that no court construing Washington law, including this Court, has determined whether a loss consisting of deterioration of a house's structure to the point of substantial impairment is outside the exclusions for losses caused by deterioration or rot or defective construction. Several decisions have considered, without deciding, the scope of coverage for "the risk of direct physical loss involving collapse" or similar language,<sup>43</sup> for which coverage these

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<sup>39</sup> *Id.*, at 166-69.

<sup>40</sup> *Id.*, at 173.

<sup>41</sup> *Id.*, at 170 (quoting, *Chadwick v. Fire Ins. Exch.*, 21 Cal. Rptr. 2d 871, 874 (Cal. Ct. App. 1993)).

<sup>42</sup> *Id.* at 171.

<sup>43</sup> See, e.g., *Mercer Place Condo. Owners Ass'n. v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 17 P.3d 626 (2000) (considering "accidental direct physical

exclusions do not apply, but no Washington appellate opinion has decided either that (1) the unadorned term “collapse” means anything but falling down or (2) a loss falling within the exclusions for defective construction or deterioration or rot would be covered if the condition of the property were given a different name.

The Court of Appeals in this case cites *Mercer Place Condominium Association v. State Farm Fire & Casualty Company*<sup>44</sup> for the proposition that the term “collapse” should be interpreted to mean “substantial impairment of structural integrity” despite acknowledging that the parties in *Mercer* had agreed to that definition.<sup>45</sup> The Court’s analysis is neither rigorous nor correct. *Mercer Place* did not decide or analyze whether the undefined term “collapse” by itself means substantial impairment without actual collapse, and it certainly did not decide that deterioration and rot amounting to substantial impairment is not excluded by the terms of a policy excluding deterioration and rot. The *Mercer Place* policy, like other policies extending “collapse” coverage, provided coverage for losses “involving collapse” caused by “hidden decay” or

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loss involving collapse” policy language coupled with a “deterioration” exclusion to determine whether policy covers precursors to “collapse”); *Panorama Village Condo. Owners Ass’n. Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001)(considering interplay between “risk of direct physical loss involving collapse caused by...hidden decay” and suit limitations clause to determine suit is barred).

<sup>44</sup> 104 Wn. App. 597.

<sup>45</sup> *Sprague*, 158 Wn. App. at 342.

other named perils.<sup>46</sup> No such coverage grant exists under the Safeco homeowners policy.

Here, the policies do not use or define the term “collapse” with regard to the building coverage portion of the policy. The Court of Appeals’ decision conflicts with *Kish* by characterizing deterioration and rot as “collapse” and ignoring the effect of the exclusions for deterioration and rot.

**B. The *Sprague* decision conflicts with the Division I decision in *Port of Seattle*.**

In *Port of Seattle v. Lexington Insurance Co.*,<sup>47</sup> the Port of Seattle sought coverage for upgrade expenses resulting from the need to make its computer systems Y2K compliant. Certain insurers denied the claims based, in part, upon an inherent vice exclusion. The trial court granted summary judgment to the insurers, and an appeal followed.<sup>48</sup> Division I of the Court of Appeals affirmed the trial court’s dismissal on several grounds.<sup>49</sup>

The Port claimed that the ensuing loss provision of the inherent vice exclusion provided coverage for the upgrades.<sup>50</sup> The policy language at issue excluded coverage for loss caused by inherent vice unless loss by

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<sup>46</sup> *Mercer*, 104 Wn. App., at 599-600.

<sup>47</sup> 111 Wn. App. 901, 48 P.3d 334 (2002)

<sup>48</sup> *Id.*, at 905.

<sup>49</sup> *Id.* at 906-20

<sup>50</sup> *Id.* at 911

a non-excluded peril ensued, in which even the ensuing loss would be covered.<sup>51</sup> The Court of Appeals rejected the argument because the only peril was the excluded inherent vice:

The Port . . . attempts to paint its losses as something other than an excluded loss. The only peril suffered by the Port, however, was the excluded inherent vice. For it to claim that its losses during testing and assessment constitute a separate, covered peril would render the inherent vice exclusion meaningless.<sup>52</sup>

In reaching its decision, the court examined the facts and analysis in *Vermont Electric Power Co. v. Hartford Steam Boiler Inspection & Insurance Co.* where the United States District Court for the District of Vermont found there was no coverage under an exclusion for defective design, with an ensuing loss exception, when a defective design led to damage to the insured's transformers.<sup>53</sup> The *Port of Seattle* opinion quoted the *Vermont* court when noting that it was the type of case where the loss was caused by the excluded risk, not an ensuing loss:

“An ensuing loss would be one which occurred subsequent to the overheating of the transformers, for example, fire destruction of the building which housed the transformers.” This case presents precisely the type of situation in which the loss is directly related to the original excluded risk. Thus, the design defect alone was not the initial loss from which the damage to the transformers ensued. If the damage to the transformers

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<sup>51</sup> *Id.* at 910.

<sup>52</sup> *Id.* at 913

<sup>53</sup> *Id.* at 912 (analyzing and discussing *Vermont Elec. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 72 F.Supp.2d 441 (D.Vt. 1999)).

is considered an ensuing loss then the exception swallows the exclusion.<sup>54</sup>

*Port of Seattle*, consistent with this Court's decision in *McDonald*, requires that an additional resulting covered peril lead to damage independent from the damage caused by the excluded peril before an ensuing loss exception is triggered.<sup>55</sup> As Division I recognized, providing coverage under an ensuing loss provision when the only cause of damage is an excluded peril renders the exclusion meaningless.<sup>56</sup>

The *Sprague* decision conflicts with *Port of Seattle* by painting the Spragues' loss as something other than a loss caused by construction defects, deterioration, or rot. The Spragues seek to recover the cost to repair their decks, which have rotted and deteriorated due to faulty design. As *Port of Seattle* makes clear, such loss is excluded.

**C. The *Sprague* decision conflicts with the Division II decision in *Vision One* (now pending review in this Court).**

Only days before the opinion in this matter issued, Division II of the Court of Appeals issued its opinion in *Vision One, LLC v. Philadelphia*

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<sup>54</sup> *Id.* (quoting *Vermont Elec. Power Co.*, 72 F. Supp. 2d at 445) (footnote omitted).

<sup>55</sup> See, e.g., *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 911-13, 48 P.3d 334 (2002). See also, *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 274-75, 109 P.3d 1 (2004).

<sup>56</sup> *Port of Seattle*, 111 Wn. App. at 911-13.

*Indemnity Insurance Co.*<sup>57</sup> In that case, a concrete slab collapsed during construction of a condominium complex. Vision One, the developer, made claim against its property insurer, Philadelphia Indemnity, for the loss. Philadelphia Indemnity denied coverage because the loss was caused by defective design and faulty workmanship, both excluded. The insured, Vision One, asserted that the resulting loss exception applied; Philadelphia Indemnity answered that, because there was no separate and independent loss, there was no resulting loss.<sup>58</sup> The Court of Appeals agreed with Philadelphia Indemnity, reversing the trial court.<sup>59</sup>

Citing *McDonald*, the *Vision One* court noted that the resulting loss provision, an exception to an exclusion, “applies when an excluded peril causes a separate and independent covered peril.”<sup>60</sup> The court went on to say, “Damage resulting from the covered peril is then covered under the resulting loss provision, *while damage resulting from the initial excluded peril remains uncovered.*”<sup>61</sup> The court in *Vision One* described an example where the exception would apply.<sup>62</sup> Following the 1906 San Francisco earthquake, gas-fed fires destroyed property in the city. Most

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<sup>57</sup> 158 Wn. App. 91, 241 P.3d 329 (2010).

<sup>58</sup> *Id.*, at 96-97; 107-09.

<sup>59</sup> *Id.*, at 107-11.

<sup>60</sup> *Vision One*, 158 Wn. App. at 107.

<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> *Id.*, at 107-08.

property insurance policies covering property in the city provided coverage for fire but not for earthquake. “Because an excluded peril (earthquake) caused an independent covered peril (fire),” the court explained, “the resulting fire damage was covered as a ‘resulting loss.’ But earthquake damage remained uncovered.”<sup>63</sup>

In this matter, there is no dispute that the cause of the damage to the Spragues’ decks was the excluded peril of construction defects, which led to the excluded perils of rot and deterioration. While the decks have deteriorated to the point where there is substantial impairment, there were no other perils causing that condition. Thus, under the holding of *Vision One*, the ensuing loss provisions would not be triggered and there would be no coverage for the Spragues’ claimed loss. The *Sprague* decision conflicts with the *Vision One* decision.

Vision One petitioned for Supreme Court review of the decision by Division II, arguing that “the reasoning of the *Sprague* court would require a different result in the present [*Vision One*] case.”<sup>64</sup> This Court granted review. Thus, not only does *Vision One* conflict with *Sprague*, but the issues common to both will be heard by this Court. Supreme Court review should be granted.

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<sup>63</sup> *Id.*

<sup>64</sup> See Petition for Review in *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, Washington State Supreme Court Cause No. 85350-9.

3. **The *Sprague* decision also conflicts with long-standing Washington law on the interpretation of insurance policies because it added the term “collapse” to the policy and defined it to encompass substantial impairment so as to trigger the ensuing loss clause.**

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.<sup>65</sup> This is contrary to established authority of this Court on the interpretation of insurance policies, which requires that insurance policies be construed as contracts, considered as a whole, and be given a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.”<sup>66</sup> Where the policy is clear and unambiguous, the court is prohibited from modifying the language or creating ambiguity where none is present.<sup>67</sup> Yet, that is exactly what the Court did here.

The Safeco policies clearly and unambiguously excluded damage caused by construction defects, rot, and deterioration. By adding the term

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<sup>65</sup> *Sprague*, 158 Wn. App. at 341-42.

<sup>66</sup> *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000) (quoting, *Am. Nat. Fire Ins. Co. v. B&L Trucking & Const. Co.*, 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998) (quoting, *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 627, 881 P.2d 201(1994))(citations omitted)).

<sup>67</sup> *Id.*

“collapse” and defining it to include substantial impairment the Court of Appeals impermissibly rewrote the unambiguous policy of insurance and modified the contract. Review is appropriate under RAP 13.4(b)(2).

**4. Interpreting ensuing loss provisions and defining “collapse” as used in insurance policies raises issues of substantial public interest that should be decided by the Supreme Court.**

Numerous Washington cases indicate that ensuing/resulting loss provisions are contained in several different types of insurance policies, including homeowners, commercial property, condominium, and builder’s risk policies.<sup>68</sup> Further, the definition of the term “collapse”, when it is undefined in the insurance policies, has never been interpreted to create coverage under an ensuing loss provision where otherwise excluded damage deteriorates a structure enough to impair structural integrity. Here, the Court of Appeals has offered to define a term, “collapse,” even though there is no context for the court to interpret the term since it is not contained within the terms of the grant of coverage.

Review should be accepted under RAP 13.4(b)(4) because interpreting of ensuing loss provisions and defining “collapse” with respect to policies of insurance affect a broad spectrum of individuals and

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<sup>68</sup> See, e.g., *Graham v. Pub. Employees Mut. Ins. Co.*, 98 Wn.2d 533, 656 P.2d 1077 (1983); *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 837 P.2d 1000 (1992); *Frank Coluccio Constr. Co. v. King County*, 136 Wn. App. 751, 150 P.3d 1147 (2007); *Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 990 P.2d 414 (1999); and *Sunbreaker Condo. Ass’n v. Travelers Ins. Co.*, 79 Wn. App. 368, 901 P.2d 1079 (1995), *review denied*, 129 Wn.2d 1020 (1996).

entities. The business of insurance is one affected by the public interest<sup>69</sup>, and the public—insureds and insurers alike—have a substantial interest in resolving the issues presented by the Court of Appeals’ opinion here.

## VI Conclusion

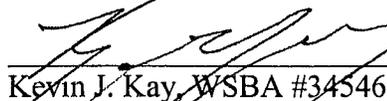
The Court of Appeals’ decision in this matter is in direct conflict with prior Supreme Court and Court of Appeals decisions including the *Vision One* decision pending review by this Court. Review is appropriate under RAP 13.4(b)(1) and (2). Further, review should be accepted under the substantial public interest criterion, RAP 13.4(b)(4), because ensuing loss provisions and the issue of what constitutes “collapse” affect a broad spectrum of insurers and insureds.

Respectfully submitted this 21<sup>st</sup> day of March, 2011

**BARRETT & WORDEN, P.S.**



M. Colleen Barrett, WSBA # 12578



Kevin J. Kay, WSBA #34546  
Attorneys for Safeco

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<sup>69</sup> See, e.g., RCW 48.01.030.

Declaration of Service

I hereby declare under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy the forgoing Petition for Review to be served via legal messenger on this 21<sup>st</sup> day of March, 2011 on the following counsel of record:

Dated this 21<sup>st</sup> day of March, 2011 at Seattle, Washington.

Angela Paulsen

# APPENDIX

Westlaw

241 P.3d 1276  
 158 Wash.App. 336, 241 P.3d 1276  
 (Cite as: 158 Wash.App. 336, 241 P.3d 1276)

Page 1

**H**

Court of Appeals of Washington,  
 Division 1.

Max B. SPRAGUE and Krista Sprague, husband  
 and wife, and Washington residents, Appellants,  
 v.

SAFECO INSURANCE COMPANY OF AMER-  
 ICA, a Washington corporation and domestic in-  
 surer, Respondent.

No. 63933-1-I.  
 Nov. 1, 2010.

**Background:** Insured homeowners brought action against issuer of homeowners' all-risk insurance policy, alleging coverage for imminent collapse of home's multi-level decks. The Superior Court, King County, James D. Cayce, J., 2009 WL 4662049, granted summary judgment to insurer. Insureds appealed.

**Holdings:** The Court of Appeals, Grosse, J., held that:

(1) the insurance policy provided coverage for collapse as an ensuing loss from an excluded peril, and  
 (2) the state of imminent collapse for the multi-level decks constituted "collapse" for coverage purposes.

Reversed and remanded.

West Headnotes

[1] Insurance 217 ◀▶2146

217 Insurance  
 217XVI Coverage--Property Insurance  
 217XVI(A) In General  
 217k2139 Risks or Losses Covered and Exclusions  
 217k2146 k. Corrosion or deterioration; mold or fungus. Most Cited Cases

Insurance 217 ◀▶2150

217 Insurance  
 217XVI Coverage--Property Insurance  
 217XVI(A) In General  
 217k2139 Risks or Losses Covered and Exclusions  
 217k2150 k. Collapse. Most Cited

Insurance 217 ◀▶2165(2)

217 Insurance  
 217XVI Coverage--Property Insurance  
 217XVI(A) In General  
 217k2139 Risks or Losses Covered and Exclusions  
 217k2165 Proximate Cause  
 217k2165(2) k. Combined or concurrent causes. Most Cited Cases

Homeowners had coverage under their homeowners' all-risk insurance policy for imminent collapse of the home's multi-level decks, though the policy's excluded perils included loss caused directly or indirectly by construction defects or rot, where the policy provided that any ensuing loss not excluded or excepted in the policy was covered, the state of imminent collapse resulted from the perils of construction defects and rot, and the policy did not exclude collapse as a peril.

[2] Appeal and Error 30 ◀▶893(1)

30 Appeal and Error  
 30XVI Review  
 30XVI(F) Trial De Novo  
 30k892 Trial De Novo  
 30k893 Cases Triable in Appellate Court  
 30k893(1) k. In general. Most Cited Cases

Insurance 217 ◀▶1863

217 Insurance  
 217XIII Contracts and Policies  
 217XIII(G) Rules of Construction

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241 P.3d 1276  
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217k1863 k. Questions of law or fact.  
 Most Cited Cases

Interpretation of an insurance contract is a matter of law, reviewed de novo.

[3] Insurance 217 ↪ 2103(2)

217 Insurance

217XV Coverage--in General

217k2096 Risks Covered and Exclusions

217k2103 Proximate Cause

217k2103(2) k. Combined or concurrent causes. Most Cited Cases

In analyzing insurance coverage, Washington State law follows the efficient proximate cause rule, under which rule the predominant cause of the loss determines coverage.

[4] Insurance 217 ↪ 2165(2)

217 Insurance

217XVI Coverage--Property Insurance

217XVI(A) In General

217k2139 Risks or Losses Covered and Exclusions

217k2165 Proximate Cause

217k2165(2) k. Combined or concurrent causes. Most Cited Cases

An ensuing loss provision in an insurance policy is an exception to an exclusion and preserves coverage when the loss is caused by an excluded peril.

[5] Insurance 217 ↪ 2150

217 Insurance

217XVI Coverage--Property Insurance

217XVI(A) In General

217k2139 Risks or Losses Covered and Exclusions

217k2150 k. Collapse. Most Cited

The state of imminent collapse for multi-level decks of a home, with substantial impairment to the structure of the decks, constituted "collapse," for purposes of homeowners' all-risk insurance policy

which provided coverage for collapse as an ensuing loss from an excluded peril.

\*\*1277 John P. Zahner, Foster Pepper PLLC, Seattle, WA, for Appellant.

M. Colleen Barrett, Kevin J. Kay, Barrett & Worden PS, Seattle, WA, for Respondent.

GROSSE, J.

[1] \*337 ¶ 1 A homeowner's all-risk insurance policy that does not cover losses to an excluded peril may, nonetheless, cover losses resulting from that excluded peril under an ensuing loss clause. Here, the home was in a state of collapse and the homeowner's insurance policy did not specifically exclude collapse. The policy, however, covered ensuing loss. In our judgment, collapse was a covered ensuing loss resulting from the perils of construction defects and rot, even though those perils were themselves excluded. We reverse and remand.

\*338 FACTS

¶ 2 Max and Krista Sprague (collectively Sprague) purchased their home in 1987, and it has been insured with Safeco Insurance Company of America (Safeco) continuously since 1992.<sup>FN1</sup> From 1995 to 1996, Sprague extensively remodeled the home and installed the decks that are the subject of this dispute. The decks are supported by six fin walls that are covered with Dryvit (Exterior Insulating and Finishing System). In March 2008, Sprague discovered decay in these "fin walls" and filed a claim with Safeco. Safeco hired an independent expert, Pacific Engineering Technologies (Pacific), to investigate the claim. Pacific's investigation revealed that the decayed wood posts in each of the six piers supporting Sprague's multi-level decks resulted in a substantial impairment of structural integrity and were in a state of imminent collapse. Pacific also determined that these conditions were present and occurred prior to 2003.<sup>FN2</sup> Pacific attributed the decayed wood framing to a combination of

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FN1. Safeco Policy Number OH635096 between September 1992 and September 2008.

FN2. The year 2003 marked the time that Safeco prospectively limited collapse coverage.

- Inadequate flashing between the deck beams and the deck piers
- Possible inadequate flashing between the deck guard rails and the deck piers
- Inadequate ventilation of the deck piers.

The policy specifically excluded damage as a result of construction defects and rot.

¶ 3 The pertinent provisions of the homeowner's insurance policy provide:

**\*\*1278 SECTION I-PROPERTY COVERAGES**

**BUILDING PROPERTY WE COVER**

**COVERAGE A-DWELLING**

\*339 We cover:

1. the dwelling on the residence premises shown in the Declarations used principally as a private residence, including structures attached to the dwelling; and
2. materials and supplies located on or next to the residence premises used to construct, alter or repair the dwelling or other structures on the residence premises.

....

**BUILDING LOSSES WE COVER**

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

**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:**

- a. wear and tear, marring, deterioration;

...

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

...

- g. birds, vermin, rodents, insects or domestic animals

....

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

....

**7. 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;

....

**14. Weather Conditions.** A weather condition which results in:

...

- c. flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

**\*340 15. Planning, Construction or Maintenance,** meaning faulty, inadequate or defective:

...

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b. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

c. materials used in repair, construction, renovation or remodeling; or

d. maintenance;

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.

¶ 4 Safeco denied coverage because the cause of the loss was defective workmanship and rot, both of which were excluded from coverage. Sprague argued that collapse was an ensuing loss and thus covered. Both parties moved for summary judgment and the trial court granted summary judgment to Safeco. Sprague appeals.

#### ANALYSIS

[2][3][4] ¶ 5 Interpretation of an insurance contract is a matter of law, reviewed de novo.<sup>FN3</sup> In analyzing coverage, Washington follows the efficient proximate cause rule.<sup>FN4</sup> Under this rule, the predominant cause of the loss determines coverage.<sup>FN5</sup> An ensuing loss provision, however, is an exception to an exclusion and preserves coverage when the loss is caused by an excluded peril.<sup>FN6</sup> Sprague contends that since collapse is not specifically excluded in the policies extant between 1999 and 2003, it is a covered ensuing loss under the policy language: "However, any ensuing loss not excluded is covered."

FN3. *McDonald v. State Farm Fire and Cas. Co.*, 119 Wash.2d 724, 730-31, 837 P.2d 1000 (1992).

FN4. *Findlay v. United Pac. Ins. Co.*, 129 Wash.2d 368, 372, 917 P.2d 116 (1996).

FN5. *See Graham v. PEMCO*, 98 Wash.2d 533, 538, 656 P.2d 1077 (1983).

FN6. *Wright v. Safeco Ins. Co. of Am.*, 124 Wash.App. 263, 274, 109 P.3d 1 (2004).

¶ 6 Safeco's pre-2003 policies for Sprague are all-risk policies and cover losses to the building and attached deck structures, unless specifically excluded.<sup>FN7</sup> Safeco's policy did not exclude collapse as a peril. In *Wright v. Safeco Insurance Company of America*, we opined that an ensuing loss exception preserved coverage for damage from water leaks caused by faulty construction, despite the exclusion for construction defects.<sup>FN8</sup> However, there the loss claimed was from mold, and mold was itself specifically excluded. Thus, the ensuing loss provision did not operate because there was no covered loss.<sup>FN9</sup> Unlike *Wright*, the policy language here, excluding loss for construction defects, specifically permits coverage for any ensuing loss not otherwise excluded.

FN7. *See Frank Coluccio Constr. Co., Inc. v. King County*, 136 Wash.App. 751, 757 n. 1, 150 P.3d 1147 (2007) ("All-risk insurance covers all risks that are not specifically excluded in the terms of the contract, and takes the opposite approach of traditional policies, sometimes called 'named perils' or 'specific perils' policies, which exclude all risks not specifically named.").

FN8. 124 Wash.App. 263, 109 P.3d 1 (2004).

FN9. *Wright*, 124 Wash.App. at 274-75, 109 P.3d 1.

¶ 7 In conclusion, the losses that are faulty construction and rot are not covered, but the "ensuing losses," those that result from such faulty construction or rot, are covered because such an ensuing loss is not excluded elsewhere in the policy. Since Safeco's own experts have testified that the damage to the fin walls has placed the decks in a state of imminent collapse, there is no factual dispute. The fact that Safeco defined collapse to mean actually

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falling down in later polices is immaterial to the case at bar. Because the parties are in agreement that the damage occurred prior to 2003, the later definition of collapse does not apply.

¶ 8 Washington has not decided the meaning of "collapse" as used in insurance policies.<sup>FN10</sup> As noted in \*342*Mercer Place Condominium Association v. State Farm Fire and Casualty Company*, "[a] growing majority of jurisdictions have assigned the more liberal standard, 'substantial impairment of structural integrity,' to the use of 'collapse' in insurance policies, as opposed to the minority view, which requires that the structure actually fall down."<sup>FN11</sup> Indeed in *Mercer*, State Farm and its policy holder agreed that collapse "would be interpreted to mean 'substantial impairment of structural integrity.'" <sup>FN12</sup> The *Mercer* court noted that this same interpretation had been adopted by State Farm in prior claims involving a collapse clause.<sup>FN13</sup>

FN10. *Mercer Place Condo. Ass'n v. State Farm Fire and Cas. Co.*, 104 Wash.App. 597, 602, 17 P.3d 626 (2000).

FN11. 104 Wash.App. 597, 602 n. 1, 17 P.3d 626 (2000).

FN12. 104 Wash.App. at 600, 17 P.3d 626.

FN13. 104 Wash.App. at 600, 17 P.3d 626.

[5] ¶ 9 Here, Safeco's own expert, Pacific, determined that there was a "substantial impairment of structural integrity" to the fin walls and that they were in "a state of imminent collapse." The report itself, defined imminent collapse as occurring "when the structural supporting elements/assemblies are so severely damaged that even the reserve strength due to the safety factors built into the building code allowable capacities is exhausted." Safeco's own senior adjuster stated in her report:

It appears from my review of the [Pacific] 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."

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

**\*\*1280 \*343 Attorney Fees**

¶ 10 Because Sprague is entitled to coverage under the Safeco policy, Sprague is entitled to attorney fees under *Olympic Steamship Company v. Centennial Insurance Company* ("an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer's duty to defend is at issue").<sup>FN14</sup>

FN14. 117 Wash.2d 37, 53, 811 P.2d 673 (1991).

¶ 11 We reverse and remand.

WE CONCUR: SCHINDLER and ELLINGTON, JJ.

Wash.App. Div. I, 2010.  
*Sprague v. Safeco Ins. Co. of America*  
 158 Wash.App. 336, 241 P.3d 1276

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

MAX B. SPRAGUE AND KRISTA  
SPRAGUE, husband and wife, and  
Washington residents,  
  
Appellants,  
  
v.  
  
SAFECO INSURANCE COMPANY OF  
AMERICA, a Washington corporation  
and domestic insurer,  
  
Respondent.

No. 63933-1-I

ORDER DENYING MOTION  
FOR RECONSIDERATION

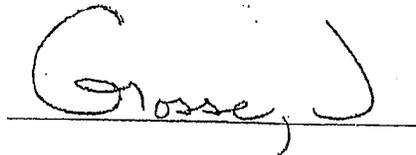
The respondent, Safeco Insurance Company of America, has filed a motion for reconsideration herein. The appellants, Max and Krista Sprague, have filed a response to the motion. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 17<sup>th</sup> day of February, 2011.

FOR THE COURT:



Judge

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2012 FEB 17 AM 8:30

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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

Appellants,

v.

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

Respondent.

No. 63933-1-1

DIVISION ONE

PUBLISHED OPINION

FILED: November 1, 2010

GROSSE, J. — A homeowner's all-risk insurance policy that does not cover losses to an excluded peril may, nonetheless, cover losses resulting from that excluded peril under an ensuing loss clause. Here, the home was in a state of collapse and the homeowner's insurance policy did not specifically exclude collapse. The policy, however, covered ensuing loss. In our judgment, collapse was a covered ensuing loss resulting from the perils of construction defects and rot, even though those perils were themselves excluded. We reverse and remand.

**FACTS**

Max and Krista Sprague (collectively Sprague) purchased their home in 1987, and it has been insured with Safeco Insurance Company of America (Safeco) continuously since 1992.<sup>1</sup> From 1995 to 1996, Sprague extensively

<sup>1</sup> Safeco Policy Number OH635096 between September 1992 and September 2008.

remodeled the home and installed the decks that are the subject of this dispute. The decks are supported by six "fin walls" that are covered with Dryvit (Exterior Insulating and Finishing System). In March 2008, Sprague discovered decay in these fin walls and filed a claim with Safeco. Safeco hired an independent expert, Pacific Engineering Technologies (Pacific), to investigate the claim. Pacific's investigation revealed that the decayed wood posts in each of the six piers supporting Sprague's multi-level decks resulted in a substantial impairment of structural integrity and were in a state of imminent collapse. Pacific also determined that these conditions were present and occurred prior to 2003.<sup>2</sup>

Pacific attributed the decayed wood framing to a combination of

- Inadequate flashing between the deck beams and the deck piers
- Possible inadequate flashing between the deck guard rails and the deck piers
- Inadequate ventilation of the deck piers.

The policy specifically excluded damage as a result of construction defects and rot.

The pertinent provisions of the homeowner's insurance policy provide:

## **SECTION I – PROPERTY COVERAGES**

### **BUILDING PROPERTY WE COVER**

#### **COVERAGE A – DWELLING**

We cover:

1. the dwelling on the **residence premises** shown in the Declarations used principally as a private residence, including structures attached to the dwelling; and

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<sup>2</sup> The year 2003 marked the time that Safeco prospectively limited collapse coverage.

2. materials and supplies located on or next to the **residence premises** used to construct, alter or repair the dwelling or other structures on the **residence premises**.

.....

**BUILDING LOSSES WE COVER**

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

**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:

- a. wear and tear, marring, deterioration;

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

- g. birds, vermin, rodents, insects or domestic animals

.....

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

.....

7. **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;

.....

14. **Weather Conditions**. A weather condition which results in:

- c. flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

---

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

- b. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

- c. materials used in repair, construction, renovation or remodeling;  
or
- d. maintenance;

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.

Safeco denied coverage because the cause of the loss was defective workmanship and rot, both of which were excluded from coverage. Sprague argued that collapse was an ensuing loss and thus covered. Both parties moved for summary judgment and the trial court granted summary judgment to Safeco. Sprague appeals.

#### ANALYSIS

Interpretation of an insurance contract is a matter of law, reviewed de novo.<sup>3</sup> In analyzing coverage, Washington follows the efficient proximate cause rule.<sup>4</sup> Under this rule, the predominant cause of the loss determines coverage.<sup>5</sup> An ensuing loss provision, however, is an exception to an exclusion and preserves coverage when the loss is caused by an excluded peril.<sup>6</sup> Sprague contends that since collapse is not specifically excluded in the policies extant between 1999 and 2003, it is a covered ensuing loss under the policy language: "However, any ensuing loss not excluded is covered."

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<sup>3</sup> McDonald v. State Farm Fire and Cas. Co., 119 Wn.2d 724, 730-31, 837 P.2d 1000 (1992).

<sup>4</sup> Findlay v. United Pac. Ins. Co., 129 Wn.2d 368, 372, 917 P.2d 116 (1996).

<sup>5</sup> See Graham v. Pemco, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983).

<sup>6</sup> Wright v. Safeco Ins. Co. of Am., 124 Wn. App. 263, 274, 109 P.3d 1 (2004).

Safeco's pre-2003 policies for Sprague are all-risk policies and cover losses to the building and attached deck structures, unless specifically excluded.<sup>7</sup> Safeco's policy did not exclude collapse as a peril. In Wright v. Safeco Insurance Company of America, we opined that an ensuing loss exception preserved coverage for damage from water leaks caused by faulty construction, despite the exclusion for construction defects.<sup>8</sup> However, there the loss claimed was from mold, and mold was itself specifically excluded. Thus, the ensuing loss provision did not operate because there was no covered loss.<sup>9</sup> Unlike Wright, the policy language here, excluding loss for construction defects, specifically permits coverage for any ensuing loss not otherwise excluded.

In conclusion, the losses that are faulty construction and rot are not covered, but the "ensuing losses," those that result from such faulty construction or rot, are covered because such an ensuing loss is not excluded elsewhere in the policy. Since Safeco's own experts have testified that the damage to the fin walls has placed the decks in a state of imminent collapse, there is no factual dispute. The fact that Safeco defined collapse to mean actually falling down in later policies is immaterial to the case at bar. Because the parties are in agreement that the damage occurred prior to 2003, the later definition of collapse does not apply.

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<sup>7</sup> See Frank Coluccio Constr. Co., Inc. v. King County, 136 Wn. App. 751, 757 n.1, 789-90, 150 P.3d 1147 (2007) ("All-risk insurance covers all risks that are not specifically excluded in the terms of the contract, and takes the opposite approach of traditional policies, sometimes called 'named perils' or 'specific perils' policies, which exclude all risks not specifically named.").

<sup>8</sup> 124 Wn. App. 263, 109 P.3d 1 (2004).

<sup>9</sup> Wright, 124 Wn. App. at 274-75.

Washington has not decided the meaning of "collapse" as used in insurance policies.<sup>10</sup> As noted in Mercer Place Condominium Association v. State Farm Fire and Casualty Company, "[a] growing majority of jurisdictions have assigned the more liberal standard, 'substantial impairment of structural integrity,' to the use of 'collapse' in insurance policies, as opposed to the minority view, which requires that the structure actually fall down."<sup>11</sup> Indeed in Mercer, State Farm and its policy holder agreed that collapse "would be interpreted to mean 'substantial impairment of structural integrity.'"<sup>12</sup> The Mercer court noted that this same interpretation had been adopted by State Farm in prior claims involving a collapse clause.<sup>13</sup>

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

It appears from my review of the [Pacific] 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."

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<sup>10</sup> Mercer Place Condo. Ass'n v. State Farm Fire and Cas. Co., 104 Wn. App. 597, 602, 17 P.3d 626 (2000).

<sup>11</sup> 104 Wn. App. 597, 602 n.1, 17 P.3d 626 (2000).

<sup>12</sup> 104 Wn. App. at 600.

<sup>13</sup> 104 Wn. App. at 600.

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

Attorney Fees

Because Sprague is entitled to coverage under the Safeco policy, Sprague is entitled to attorney fees under Olympic Steamship Company v. Centennial Insurance Company ("an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer's duty to defend is at issue").<sup>14</sup>

We reverse and remand.

Grosjean, J.

WE CONCUR:

Schiveller, J. Edenborn, J.

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<sup>14</sup> 117 Wn.2d 37, 53, 811 P.2d 673 (1991).