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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

Appellant,

vs.

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

Appellee.

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

**Honorable Arthur L. Alarcón, Honorable A. Wallace Tashima, and Honorable
Mary H. Murguía**

BRIEF OF APPELLEE

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I. NATURE OF THE CASE

Queen Anne Park Homeowners Association (the HOA) wants this Court to believe its collapse coverage case is like other collapse coverage cases. It is not: The HOA must show its buildings collapsed 16 years ago, in 1998, when its last State Farm insurance policy expired, even though the buildings were still standing straight and true at least 13 years later.

The HOA admitted actual falling down could not have been imminent in 1998 since the buildings remained standing 13 years later, without any falling, tilting, dropping, caving in, or imminent danger of doing so. Yet the HOA argues the collapse coverage applies to substantial impairment of structural integrity even absent actual or imminent collapse.

The district court granted State Farm summary judgment. The Court of Appeals for the Ninth Circuit certified the case to this Court.

II. ISSUE PRESENTED

The certified question states:

What does “collapse” mean under Washington law in an insurance policy that insures “accidental direct physical loss involving collapse,” subject to the policy’s terms, conditions, exclusions, and other provisions, but does not define “collapse,” except to state that “collapse does not include settling, crackling, shrinking, bulging or expansion?”

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS

1. The Policy

Appellee/defendant State Farm Fire & Casualty Co. insured the condominium of appellant/plaintiff Queen Anne Park Homeowners Association under an annual policy, as renewed, from October 18, 1992, to October 18, 1998. The policy covered "accidental direct physical loss" unless otherwise excluded or limited. Excluded were decay, deterioration, and continuous or repeated seepage. The policy also excluded collapse except as provided in extensions of coverage. (ER 136, 138-40, 241; SER 9) The exclusions are set forth in Appendix (App.) A.

An extension of coverage insured (ER 141):

... accidental direct physical loss to covered property involving collapse of a building or any part of a building caused only by...:

(2) hidden decay;

...
...
...

The extension of coverage specified that settling, cracking, shrinking, bulging, or expansion were not included in "collapse." (ER 142)

Coverage required that "loss commenc[e] during the policy period," i.e., from October 18, 1992, to October 18, 1998. (ER 152)

2. The Buildings

In 2009, 11 years after the State Farm policy expired, the HOA's buildings looked like this (SER 8), larger copy reproduced in App. B:



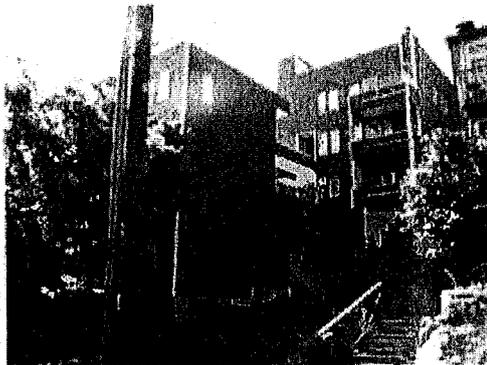
The buildings are framed with 2x6 studs and sided with cedar over building paper and either gypsum sheathing or gypsum sheathing over plywood. Sheathing is sheet-like material—often plywood or gypsum—between the siding and framing. *See* diagram at ER 126 (reproduced in App. C). The sheathing—whether gypsum or gypsum over plywood—functions as the HOA buildings' shear walls. (ER 121, 191)

The shear walls are part of the buildings' *lateral* load-resisting system, an integrated, building-wide system that transfers lateral loads throughout the structure into its foundation. Lateral system failure is caused by forces like wind or earthquake. (ER 91, 121) *See KPFF, Inc. v. Cal. Union Ins. Co.*, 56 Cal. App. 4th 963, 66 Cal. Rptr. 2d 36, 39 (1997). In contrast, the buildings' *vertical*, or gravity, load-resisting system

includes framing members such as beams and studs and resists the constant force of gravity that pulls down on the buildings. (ER 120-21)

3. The Claim

Twelve years after the State Farm policy expired, in August 2010, the HOA tendered a collapse claim. (SER 5-6) State Farm's retained engineer visited the site in October 2010. In June 2011, after investigative cuts were made in the buildings' envelope, both parties' engineers visited the site. (ER 189-90). The buildings looked like this (larger reproduction in App. D):



(ER 207)

The HOA's engineer found hidden decay in some shear walls (plywood/gypsum sheathings), which he opined had substantially impaired their ability to resist lateral loads. He did *not* claim that—

- the buildings' gravity load-resisting system (e.g., framing) was substantially impaired,

- actual falling down was imminent or foreseeable, or
- the buildings were at all distorted, let alone to the point where they were unsafe or uninhabitable,

either then or when the policy was in effect, 13 years before. (ER 119-22)

State Farm's engineer, like the HOA's engineer, found no substantial impairment in the buildings' *gravity* load-resisting system, e.g., the framing. State Farm denied coverage since a loss involving collapse had not commenced when the policies were in effect 13 to 19 years earlier. (ER 189-90, 200-04, 218-21)

B. STATEMENT OF PROCEDURE

The HOA sued State Farm. In March 2012, based on its engineer's 2011 investigation, the HOA sought partial summary judgment declaring the collapse coverage covered substantial impairment of structural integrity caused by hidden decay in any kind of structural component. The district court denied the motion pending this Court's decisions in two cases. (ER 15-18, 119-22, 223-32, 240-44)

The two cases, *Sprague v. Safeco Ins. Co. of Am.*, 174 Wn.2d 524, 276 P.3d 1270 (2012), and *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 276 P.3d 300 (2012), did not decide what "collapse" means. But the *Sprague* concurrence said "collapse" is unambiguous and means actually falling down. 174 Wn.2d at 531-32. The dissent favored

using “substantial impairment of structural integrity,” and did not even mention the imminent collapse standard. *Id.* at 534.

In July 2012, without presenting new evidence about the buildings’ condition, the HOA renewed its motion. (ER 72-86) The district court ordered it to show cause why State Farm should not be granted summary judgment on the ground (ER 5-14)

that “collapse” requires imminence, as well as substantial impairment, and that “collapse” cannot, as a matter of law, be imminent for over thirteen (13) years, ... the period of time since State Farm’s policies were in effect.

In December 2012, more than *14 years* after the last State Farm policy expired, the HOA responded. Again it did not submit new evidence about the buildings’ condition. Instead, it said Washington courts would use substantial impairment of structural integrity to determine coverage. The HOA conceded that if imminence was required, it could not have existed when the State Farm policy was in effect, since the buildings were still standing 13 years [*sic*] later. Summary judgment for State Farm was entered. (ER 2-4, 26-27)

The HOA appealed. (ER 20-24) On cross-motions to certify, the Court of Appeals for the Ninth Circuit certified the question to this Court.

IV. SUMMARY OF ARGUMENT

Unlike some insurers, State Farm is not arguing “collapse” requires falling flat to the ground. Rather, State Farm recognizes the average

purchaser of insurance would define “collapse” to include something less than total destruction: a structure’s significant falling or caving, albeit not to the ground, or perhaps imminent falling or caving or similar damage.

The average purchaser of insurance has never heard of “substantial impairment of structural integrity” and would never think it means “collapse,” as used in “direct physical loss to covered property involving collapse.” But even if “substantial impairment of structural integrity” were in the layperson’s lexicon, it would not help the HOA because courts have typically employed this imprecise term to provide collapse coverage for buildings that have suffered significant falling, caving in, or damage amounting to imminent collapse, even if they did not fall to the ground.

This case is different: the buildings have not suffered such damage. Yet the HOA argues its buildings suffered substantial impairment of structural integrity 16 years ago, even though the buildings have been standing straight and true for more than a decade after the last State Farm policy expired. To expand “collapse” to include these buildings, let alone as they stood in 1998, is beyond the average insurance purchaser’s comprehension and thus unreasonable.

V. ARGUMENT

Despite the HOA’s implications to the contrary, this case is not like most other collapse coverage cases because—

- to obtain coverage, the HOA must show the buildings or some part of them collapsed *at least 16 years ago*, in October 1998, when the State Farm policy was in effect (ER 152; SER 9-10); *and*
- the damage to the buildings consists solely of hidden decay to gypsum and plywood sheathing, which is not part of the buildings' gravity load-resisting system (ER 121-22); *and*
- the policy excludes decay *not* in a "collapse" state¹ (ER 139, 141); *and*
- there is *no* evidence the buildings or any part of them—
 - were falling, tipping, dropping, or caving in or were in imminent danger of falling or otherwise so distorted they were unsafe, when the district court heard the case in 2012, let alone 14 years before, in 1998, when the policy expired (ER 121-22); *or*
 - will actually collapse during their normal useful lives (ER 121-22).

The HOA disregards all of the above facts in favor of a simplistic review of case law that, in fact, supports State Farm.

¹ Decay in a collapsed state is not covered unless hidden. (ER 141)

A. THE STATE FARM POLICY COVERS ACTUAL OR, ALTERNATIVELY, IMMINENT COLLAPSE.

The collapse coverage insuring agreement provided coverage for:

accidental direct physical loss to covered property involving collapse of a building or any part of a building caused only by... :

(2) hidden decay; ...

(ER 141) This Court must determine what “collapse,” as used in this insuring agreement, means.

The policy excludes from the collapse coverage “settling, cracking, shrinking, bulging or expansion.” (ER 142) These conditions, like hidden decay, are often precursors of collapse. Since insurance policy provisions should be harmonized when possible, *Miller v. Penn Mut. Life Ins. Co.*, 189 Wash. 269, 275, 64 P.2d 1050 (1937), settling, cracking, shrinking, bulging, expansion, or hidden decay alone is insufficient. The damage must be severe enough to constitute “collapse”:

It is difficult indeed to imagine a building collapsing without any of these symptoms appearing. The only reasonable interpretation of this language is that *mere* settling, cracking, shrinkage, bulging or expansion is not enough—there must also be an actual or imminent collapse of the structure.

Stamm Theatres, Inc. v. Hartford Cas. Ins. Co., 93 Cal. App. 4th 531, 113 Cal. Rptr. 2d 300, 307 (2001) (emphasis in original).

That is precisely State Farm's position—there must be actual or, alternatively, imminent collapse. Without imminent collapse, impairment that is “substantial,” regardless whether the building or any part has actually fallen or caved in or is about to do so, is not enough. There has been much judicial confusion, however, over what these terms mean. Many courts have ruled “actual collapse” can exist if there has been some falling or caving in short of total destruction; and most, if not all, courts that have used “substantial impairment of structural integrity” or the equivalent have done so where there has been some kind of falling or caving in *or* actual collapse is imminent. Absent these conditions, there can be no “collapse” within the collapse coverage insuring agreement.

1. The Average Purchaser of Insurance Thinks “Collapse” Means a Falling Down or Caving In.

So what does “collapse” mean? The cardinal principle of insurance policy construction is to read the policy as the average purchaser of insurance would. The seminal case of *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 784 P.2d 507 (1990), explained:

In this state, legal technical meanings have never trumped the common perception of the common man. “[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”

113 Wn. 2d at 881 (quoting *Dairyland Ins. Co. v. Ward*, 83 Wn.2d 353, 358, 517 P.2d 966 (1974)). Even knowing the gypsum/plywood sheathing was decayed, the average insurance purchaser would not think the HOA's buildings have collapsed, let alone 16 years ago when the last State Farm policy was in effect.

Where, as here, the policy does not define "collapse," Washington courts look to standard dictionaries to determine the average insurance purchaser's understanding of the term. *See Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 428, 38 P.3d 322 (2002). State Farm's collapse coverage uses "collapse" as a noun. Merriam-Webster sets forth the plain, ordinary, and popular meaning of that noun as follows:

1 : a situation or occurrence in which something (such as a bridge, building, etc.) suddenly breaks apart and falls down . . . — usually singular ▪ a fatal bridge *collapse* ▪ The earthquake caused the *collapse* of several homes. ▪ the *collapse* of the roof . . . ▪ The structure is in danger of *collapse*.

the action of collapsing: the act or action of drawing together or permitting or causing a falling together <the cutting of many tent ropes, the [collapse] of the canvas. Rudyard Kipling>

www.learnersdictionary.com/search/collapse%5B2%5D; WEBSTER'S
THIRD NEW INTERNATIONAL DICTIONARY 443 (1993); *see*
www.merriamwebster.com/dictionary/collapse.

Since one definition of the noun "collapse" is "the act . . . of collapsing," the definition of the verb "collapse" is also instructive:

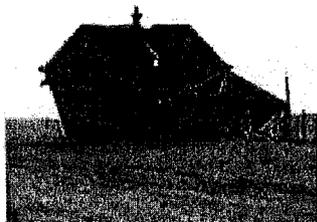
: to fall or shrink together abruptly and completely : fall into a jumbled or flattened mass through the force of external pressure <a blood vessel that *collapsed*>

: to cave or fall in or give way <the bridge *collapsed*>

: to fold down into a more compact shape <a chair that *collapses*>

www.merriam-webster.com/dictionary/collapse. The average purchaser of insurance would thus equate "collapse" with a falling down or in. No one claims that is what the buildings here have done, let alone in 1998.

Significantly, State Farm is *not* claiming "collapse" requires *completely* falling flat to the ground or *total* destruction (the "rubble-on-the-ground" standard). Although a few courts have adopted this standard at some insurers' urging, the average insurance purchaser would understand "collapse" to also include structural failures like the following, even though neither has fallen flat to the ground:



Indeed, the average purchaser of insurance might think a structure or part thereof could fall *even less* than these photos illustrate and still be deemed “collapse.” But the average purchaser, even knowing that gypsum and plywood sheathing had decayed, would never think buildings that look like this, with no structural deformation, have “collapsed”:



2. The Average Purchaser of Insurance Has Never Heard of “Substantial Impairment of Structural Integrity.”

Nowhere in Plaintiff-Appellant’s Opening Brief (“Opening Brief”) is the term “average purchaser of insurance” used. This is not surprising: *the average purchaser of insurance has never heard of “substantial impairment of structural integrity.”* The phrase is not in any standard dictionaries. Only some coverage lawyers and some judges think that “substantial impairment of structural integrity” is in some way equivalent to “collapse.” But insurance policies are not construed the way lawyers or learned judges might read them. *See Boeing*, 113 Wn.2d at 881.

Nonetheless, the HOA claims substantial impairment of structural integrity is a reasonable interpretation of “collapse” so that “collapse” must be ambiguous. But ambiguity can exist *only* if the insured’s interpretation of the policy is reasonable. See *Tyrrell v. Famers Ins. Co.*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000).

Moreover, a policy provision “can be ambiguous with regard to the facts of one case but not another.” *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 181, 110 P.3d 733, 737 (2005); see also *Grange Ins. Ass’n v. MacKenzie*, 103 Wn.2d 708, 712, 694 P.2d 1087 (1985). Even if “substantial impairment of structural integrity” were reasonable under some facts, it *cannot* be reasonable here. Buildings still standing straight and true at least 14 years (when the summary judgment motion was decided) after allegedly “collapsing,” without any suggestion that actual falling down or caving in is imminent, cannot have collapsed in 1998.²

That different courts disagree on a term’s meaning does not create ambiguity. *Crunk v. State Farm Fire & Cas. Co.*, 106 Wn.2d 23, 31-32, 719 P.2d 1338 (1986) (plurality); *Fed. Ins. Co. v. Pac. Sheet Metal, Inc.*, 54 Wn. App. 514, 774 P.2d 538, 539 (1989); *Graingrowers Warehouse*

² State Farm reserves the right to challenge whether the buildings were suffering from substantial impairment of structural integrity when the State Farm policies were in effect.

Co. v. Cent. Nat'l Ins. Co., 711 F. Supp. 1040, 1044 (E.D. Wash. 1989); accord *TravCo Ins. Co. v. Ward*, 284 Va. 547, 736 S.E.2d 321, 325 (2012). This Court has *always* maintained its independent right to determine whether a term is ambiguous.³ Thus, the HOA's claim that "unless ... these other judges who interpreted 'collapse' as [substantial impairment of structural integrity] did so *unreasonably*, then ... [this Court] must also adopt that definition" is wrong. (Opening Brief 9) (emphasis in original). In any event, as will be discussed, the vast majority of these other judges were faced with buildings in far worse shape than the buildings here.

Where policy language is clear and unambiguous, it must be enforced as written. *Smith v. Cont'l Cas. Co.*, 128 Wn.2d 73, 82, 904 P.2d 749 (1995). Plain policy language cannot be ignored. *Black v. Nat'l Merit Ins. Co.*, 154 Wn. App. 674, 693-94, 226 P.3d 175 (2010). This Court will not create ambiguity where none exists or modify clear and unambiguous language under the guise of construing it. *Quadrant*, 154 Wn.2d at 171; *Rones v. Safeco Ins. Co. of Am.*, 119 Wn.2d 650, 654, 835 P.2d 1036

³ Some cases in which this Court has found a term unambiguous despite a split of authority include *N. Pac. Ins. Co. v. Christensen*, 143 Wn.2d 43, 51 n.6, 53, 17 P.3d 596 (2001) ("operator"); *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 99, 776 P.2d 123 (1989) ("accident"); *Truck Ins. Exch. v. Rohde*, 49 Wn.2d 465, 473, 475, 303 P.2d 659 (1956) ("accident" and "occurrence").

(1992). “Collapse,” as used in “direct physical loss to covered property involving collapse,” is clear and unambiguous.

Consequently, there is no reasonable way “collapse,” not to mention “direct physical loss . . . involving collapse”, can be read to include the imprecise term “substantial impairment of structural integrity.” Hence, the HOA’s contra proferentem argument must fail.

B. COLLAPSE COVERAGE CASES SUPPORT STATE FARM.

Courts have taken three major approaches to applying the collapse coverage: actual collapse, imminency, and substantial impairment of structural integrity. These categories are not sharply defined and can overlap. A survey of pertinent case law further demonstrates the buildings at issue have not collapsed, let alone collapsed on or before October 18, 1998, as the policy coverage requires.

1. Many Courts Have Adopted an Actual Collapse Standard.

The earliest adopted test for the collapse coverage is the “actual collapse” standard. This redundant term is used by courts to describe when some type of actual falling or caving in has occurred. The collapse peril first appeared in property policies in 1954. 1 REAL PROPERTY § 2.02[3][a], at 2-25 (S. Cozen ed. 2012); *Nugent v. Gen’l Ins. Co.*, 253 F.2d 800, 802 (8th Cir. 1958). In 1959, *Cent. Mut. Ins. Co. v. Royal*, 269 Ala. 372, 113 So. 2d 680 (1959), adopted what will be called the “rubble-on-the-ground”

test for “actual collapse.” In *Royal* the walls of a house had cracked and the foundation broke such that “segments of the wall had sunk or dropped.” 113 So. 2d at 681. Presumably because nothing had fallen flat to the ground, the court ruled there was no collapse as a matter of law.

Subsequently, some courts began to think the rubble-on-the-ground standard advocated by many insurers was too harsh and did not completely encompass the average insurance purchaser’s concept of “collapse.” A more relaxed actual collapse standard was adopted.

For example, in *Sherman v. Safeco Ins. Co.*, 670 P.2d 16-17 (Colo. App. 1983), the insured discovered that brick from the upper portion of his house had fallen to the ground. The roof ridge had fallen a few feet, and the roof was sagging. A sill plate—a timber normally anchored on top of a wall to connect it to the roof rafters—had slipped, removing the roof’s support. The court ruled there was “collapse” *Id.*

[W]hile not falling completely down to the ground, an object may nonetheless “collapse” by a flattening or breaking down because of a loss of its structural rigidity or by falling into or against itself.

Fid. & Cas. Co. v. Mitchell, 503 So. 2d 870 (Ala. 1987), relaxed the rubble-on-the-ground standard the Alabama court had previously seemed to adopt in *Royal*, 113 So. 2d at 683. In *Mitchell* termite damage

caused a staircase and its surrounding area to fall eight inches away from the primary walls. The court held there was a collapse:

While this insect damage did not reduce the house to flattened form or rubble, it nevertheless constituted a sufficient and actual collapse of some parts of the house, thereby destroying the structural integrity of the building.

Id. at 871 (1995). See *Hennessy v. Mut. of Enumclaw Ins. Co.*, 228 Or. App. 186, 206 P.3d 1184, 1188 (2009) (complete falling down unnecessary, but falling some distance required).

These cases illustrate the “collapse” definition the average purchaser of insurance would understand—not only rubble-on-the ground, but also a significant falling or caving in that does not reach the ground. Because this definition comports with the ordinary insured’s understanding of “collapse,” this is the definition State Farm is espousing.

2. Many Courts Have Adopted an Imminent Collapse Standard.

Even if this Court does not adopt an actual collapse standard, it should adopt an imminency standard for the collapse coverage.

a. Express Imminent Collapse

(1) The Cases

Decisions applying an express imminency test separate from substantial impairment of structural integrity were first issued in the 1990’s and have become increasingly common since. The seminal case is

Doherty W. Homeowners' Ass'n v. Am. Guar. & Liab. Ins. Co., 60 Cal. App. 4th 400, 70 Cal. Rptr. 2d 260 (1997), which involved a parking garage with a swimming pool on top. Substantial spalling and cracking occurred in girders, columns, and walls, especially near the pool vault.

Unlike the policy here, the *Doherty* policy covered “*risks of* direct physical loss involving collapse” *Id.* at 262 (emphasis added). The court held this language means collapse must be actual or imminent, with “imminent” meaning “likely to happen without delay; impending, threatening” or “likely to occur at any moment, impending.” *Id.* at 264. *Accord, Assur. Co. of Am. v. Wall*, 379 F.3d 379 F.3d 557 (9th Cir. 2004) (Wash. law). Several courts have adopted this express imminency test for collapse.⁴

(2) The State Farm Policy

Unlike policies that cover “risks of direct physical loss,” the State Farm collapse coverage does not use the phrase “risks of.” Instead, it requires “direct physical loss ... involving collapse.”

The omission of “risks of” is significant. In *Assur. Co. of Am. v. Wall & Assocs., LLC*, 379 F.3d 557 (9th Cir. 2004), the district court had

⁴ *401 Fourth St., Inc. v. Investors Ins. Grp.*, 2003 Pa. Super. 154, 823 A.2d 177 (2003), *aff'd*, 583 Pa. 445, 879 A.2d 166 (2005); *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Co.*, 350 S.C. 268, 565 S.E.2d 306 (2002); *Zoo Props., LLP v. Midwest Family Mut. Ins. Co.*, 797 N.W.2d 779 (S.D. 2011).

ruled that “collapse” requires a sudden falling down. Construing Washington law, the Court of Appeals for the Ninth Circuit reversed. Noting that the policy covered “risks of” direct physical loss involving collapse, the appellate court explained (*id.* at 557):

The district court erred in interpreting the term “collapse” in isolation; the collapse provision contains additional language indicating an intent to extend broader coverage. We hold, therefore, that the collapse provision here provides coverage not only for actual collapse but also for imminent collapse.

The State Farm policy does not use “risks of.” Instead, it provides a narrower coverage for “direct physical loss . . . involving collapse.” Thus, the policy requires more than just “imminent collapse.”

b. Substantial Impairment of Structural Integrity with Imminency

Imminent actual collapse has also been held to be a requirement in some substantial impairment of structural integrity cases, regardless of policy language. For example, in *Buczek v. Cont'l Cas. Ins. Co.*, 378 F.3d 284 (3d Cir. 2004), condominium support pilings were decayed. An expert testified falling would not occur absent 90 mph winds, estimated to happen only every 20 years.

The court held the collapse coverage requires substantial impairment of structural integrity that “connotes *imminent* collapse threatening the preservation of the building as a structure or . . . health and

safety”⁵ *Id.* at 290 (quoting *Fantis Foods, Inc. v. N. River Ins. Co.*, 332 N.J. Super. 250, 753 A.2d 176, 183 (2000)) (emphasis added by *Buczek* court). Accordingly, the court ruled there was no coverage because an event that might happen every 20 years was not imminent. *Id.* at 291. See *Ocean Winds Council of Co-Owners, Inc v. Auto-Owners Ins. Co.*, 241 F. Supp. 2d 572, 576 (D.S.C. 2002) (under express imminent collapse test, collapse threat due to weather or seismic event not imminent collapse).

3. “Substantial Impairment of Structural Integrity” Is Not as Broad as the HOA Claims.

Some courts have called “substantial impairment of structural integrity” the “modern” way to read the collapse coverage. That is an inapt characterization. Use of “substantial impairment of structural integrity” has its roots as far back as 1959, when some courts were searching for something less harsh than rubble-on-the-ground. And, as *Doheny* recognized, “many ... cases that find coverage [using substantial impairment of structural integrity], but do not use the term ‘imminent,’ are decided on facts that indicate imminent danger and a degree of damage

⁵Other cases adopting substantial impairment of structural integrity with imminency, regardless of policy language, include *KAAPA Ethanol, LLC v. Affiliated FM Ins. Co.*, 660 F.3d 299, 306 (8th Cir. 2011); *Whispering Creek Condo. Owners Ass'n v. Alaska Nat'l Ins. Co.*, 774 P.2d 176 (Alaska 1989); *Weiner v. Selective Way Ins. Co.*, 793 A.2d 434 (Del. Super. Ct. 2002); *Fantis Foods, Inc. v. North River Ins. Co.*, 332 N.J. Super. 250, 753 A.2d 176 (2000). See also *W. Pac. Mut. Ins. Co. v. Davies*, 267 Ga. App. 675, 601 S.E.2d 363 (2004).

that indicates that the building will not stand.” 70 Cal. Rptr. 2d at 265. Indeed, the substantial impairment cases involve either significant structural deformation short of “rubble-on-the-ground” *or* imminent threat of collapse.

For example, five months after the 1959 *Royal* decision discussed above at page 16, *Travelers Fire Ins. Co. v. Whaley*, 272 F.2d 288 (10th Cir. 1959), described what would become known as “substantial impairment of structural integrity.” In *Whaley*, the insured residence’s basement walls had cracked and separated. The foundation wall had sunk and pulled away from plates supporting the superstructure, and the foundation walls had separated. While nothing had fallen in a heap, “*a portion of the residence had fallen*” so its “substantial integrity ... had been impaired” and it was “*unsuitable for use as a home.*” *Id.* at 289 (emphasis added). Unlike here, *the house had to be propped up. Id.*

The carrier there took a hard line—that there was no collapse because no part of the building had fallen in a heap, i.e., the rubble-on-the-ground standard. The court ruled the collapse coverage applied, since the walls’ function of supporting superstructure had been impaired and the house’s “efficiency as a habitation” had been destroyed. *Id.* at 290-91.

Whaley did **not** say “collapse” means “substantial impairment of structural integrity.” Yet many courts recognize *Whaley* as instrumental in that term’s development.⁶

Not every substantial impairment of structural integrity case has involved damage as bad as *Whaley*’s. But the cases the HOA relies upon demonstrate that substantial impairment of structural integrity is not nearly as broad as the HOA suggests it is:

Gov’t Employees Ins. Co. v. DeJames, 256 Md. 717, 261 A.2d 747, 748-49, 750 (1970), *cited at* Opening Brief 8: The floor joists ***had to be supported*** and the walls ***shored up***. The house was ***unsafe***.

Bradish v. British Am. Assur. Co., 9 Wis. 2d 601, 101 N.W.2d 814 (1960), *cited at* Opening Brief 8: The roof ***had to be supported***; the occupants ***had to evacuate***.

Chafin v. Farmers & Mechs. Mut. Ins. Co., 232 W. Va. 245, 751 S.E.2d 765, 768 (2013), *cited at* Opening Brief 8: A sinking floor was held up only by its linoleum covering and was allegedly ***unsafe***.

⁶ See, e.g., *Rogers v. Md. Cas. Co.*, 252 Iowa 1096, 109 N.W.2d 435, 438-39 (1961); *Morton v. Travelers Indem. Co.*, 171 Neb. 433, 106 N.W.2d 710, 720 (1960); *Olmstead v. Lumbermens Mut. Ins. Co.*, 22 Ohio St. 2d 212, 259 N.E.2d 123, 126 (1970); *Thornwell v. Ind. Lumbermens Mut. Ins. Co.*, 33 Wis. 2d 344, 147 N.W.2d 317, 320 (1967); *Anderson v. Ind. Lumbermens Mut. Ins. Co.*, 127 So. 2d 304, 307 (La. Ct. App. 1961).

Am. Concept Ins. Co. v. Jones, 935 F. Supp. 1220, 1224 (D. Utah 1996), *cited at* Opening Brief 8: Repairs were required to “**render [the house] habitable and safe** for occupancy” (emphasis added).

Beach v. Middlesex Mut. Assur. Co., 205 Conn. 246, 532 A.2d 1297, 1298-99 (1987), *cited at* Opening Brief 7, 8, 12: Support beams atop a foundation wall pulled apart, a concrete patio floor cracked and **fell in**, and the foundation wall **tipped** into the basement so it **could no longer support the structure**. The house **would have caved in** absent repairs.

Royal Indem. Co. v. Grunberg, 155 A.D.2d 187, 553 N.Y.S.2d 527, 528, 529 (1990), *cited at* Opening Brief 8. Repairs were made to a **tilting** house whose foundation wall had **dropped** to “**arrest ... inevitable collapse**,” which would have otherwise occurred (emphasis added).

Monroe Guar. Ins. Co. v. Magwerks Corp., 796 N.E.2d 326, 328 (Ind. Ct. App. 2003), *aff'd*, 829 N.E.2d 968 (Ind. 2005), *cited at* Opening Brief 7: Several roof sections **fell** after heavy rain and snow.

Auto Owners Ins. Co. v. Allen, 362 So. 2d 176, 177 (Fla. Dist. Ct. App. 1978), *cited at* Opening Brief 8: A roof was in **imminent danger of falling** and did not do so **only** because it was resting on the walls, and the total building was in imminent danger of falling.

Nationwide Mut. Fire Ins. Co. v. Tomlin, 181 Ga. App. 413, 352 S.E.2d 612, 614 (1986), *cited at* Opening Brief 8: **Supports were needed**

to prevent the falling of cracked walls that had *pulled away from the building*. *Tomlin* is “physical precedent” anyway, i.e., not binding in Georgia. *Stagl v. Assur. Co. of Am.*, 245 Ga. App. 8, 539 S.E.2d 173, 176 (2000); see *BDI Laguna Holdings, Inc. v. Marsh*, 301 Ga. App. 656, 689 S.E.2d 39, 44 & n.7 (2009). Georgia courts have more recently required actual collapse, *Stagl*, 539 S.E.2d at 176, or imminency or uninhabitability, *W. Pac. Mut. Ins. Co. v. Davies*, 267 Ga. App. 675, 601 S.E.2d 363, 367 (2004).

Ercolani v. Excelsior Ins. Co., 830 F.2d 31, 34 (3d Cir. 1987), cited at Opening Brief 8: Applying New Jersey law, the court required “substantial impairment of structural integrity” to mean the damaged portion was “*no longer capable of supporting the house’s superstructure*” (emphasis added). *Ercolani* was clarified in *Fantis Foods, Inc. v. N. River Ins. Co.*, 332 N.J. Super. 250, 753 A.2d 176, 183 (2000), which said “collapse” requires substantial impairment of structural integrity “cannot[ing] *imminent collapse threatening the preservation of the building ... or ... health and safety*” (emphasis added).

Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Co., 350 S.C. 268, 565 S.E.2d 306, 308 (2002), cited at Opening Brief 7. *Ocean Winds* adopted the *imminent collapse standard* for a policy covering “risk of direct physical loss involving collapse.”

Allstate Ins. Co. v. Forest Lynn Homeowners Ass'n, 892 F. Supp. 1310, 1311-12, 1314 (1995), *withdrawn*, 914 F. Supp. 408 (W.D. Wash. 1996), *cited at* Opening Brief 10-11: Elevated walkways' load-bearing capacity was so diminished by rotting support posts that temporary *shoring was necessary* to maintain the walkways in a *safe* condition pending permanent repairs.

Schray v. Fireman's Fund Ins. Co., 402 F. Supp. 2d 1212, 1215 (D. Or. 2005), *cited at* Opening Brief 8: There was *imminent and actual collapse*. Moreover, *Schray*, decided under Oregon law, has been superseded by *Hennessy*, 206 P.3d at 1187-88, where the Oregon court held that *although complete falling down is not required, falling a distance is*.

Rankin ex rel. Rankin v. Generali-U.S. Branch, 986 S.W.2d 237 (Tenn. Ct. App. 1998), *cited at* Opening Brief 8: A basement wall *rotated*, causing an upper floor to *twist*.

Although not cited by the HOA, some cases require that substantial impairment of structural integrity occur suddenly,⁷ which is not the case

⁷ *Bailey v. Hartford Fire Ins. Co.*, 565 F.2d 826, 830 (2d Cir. 1977); *Erle Ins. Exch. v. Bledsoe*, 141 N.C. App. 331, 540 S.E.2d 57, 61 (2000), *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 428 S.E.2d 238, 242 (1993).

here. Other substantial impairment of structural integrity cases also require damage far more egregious than in this case:

Shields v. Pa. Gen'l Ins. Co., 488 So. 2d 1252-53, 1256 (La. Ct. App. 1986): Overnight a house's corner **dropped**, a window casement **separated** from the wall, and bricks **separated** from the window frame.

Dagen v. Hastings Mut. Ins. Co., 166 Mich. App. 225, 420 N.W.2d 111, 112-14 (1987): Rotted floor joists caused floors to **sag** and the house to **buckle**. In some places, the joists were being held up by subflooring. The court ruled that for collapse to have occurred, the supporting superstructure had to be **so impaired as to destroy habitability**.

Morton v. Great Am. Ins. Co., 77 N.M. 35, 419 P.2d 239, 240 (1966): Supporting piers **tilted** as much as 10 degrees, the floor settled 1.5 inches, there were wide cracks. The home was considered **unsafe**.

Hudson 500, LLC v. Tower Ins. Co., 22 Misc. 3rd 878, 875 N.Y.S.2d 429, 431 (2008): The damage was so bad the **building had to be evacuated and shored up**.

Campbell v. Norfolk & Dedham Mut. Fire Ins. Co., 682 A.2d 933, 934 (R.I. 1996): A 19-foot section of 32-foot foundation wall **crumbled into rubble**, leaving the home **uninhabitable**.

Dalton v. Harleysville Worcester Mut. Ins. Co., 557 F.3d 88, 89-90 (2d Cir. 2009): The damage was so bad, the city gave **notice to vacate**.

Jenkins v. U.S. Fire Ins. Co., 185 Kan. 665, 347 P.2d 417, 419 (1959); The foundation and walls bulged, cracked, broke, and **collapsed**.

Anderson v. Ind. Lumbermens Ins. Co., 127 So. 2d 304, 305 (La. Ct. App. 1961): A concrete slab and two rear exterior corners **fell**.

Royal Indem. Co. v. Grunberg, 155 A.2d 187, 553 N.Y.S.2d 527, 528 (1990): The foundation wall **dropped** and bowed out.

The **only** substantial impairment of structural integrity cases the HOA cites not mentioned above are *Dally Props., LLC v. Truck Ins. Exch.*, 2006 U.S. Dist. LEXIS 30524, 2006 WL 1041985 (W.D. Wash., Apr. 5, 2006); *Sandalwood Condo. Ass'n v. Allstate Ins. Co.*, 294 F. Supp. 2d 1315 (M.D. Fla. 2003); and *Ind. Ins. Co. v. Liaskos*, 297 Ill. App. 3d 569, 697 N.E.2d 398 (1998). Neither *Dally*⁸ nor *Sandalwood* describes the damage. *Liaskos* is not helpful to the HOA because it said uninhabitability was a factor and found **no** coverage for cracking, despite a factual dispute whether structural movement had occurred. 697 N.E.2d at 406.

In short, almost all substantial impairment of structural integrity cases have involved some type of falling down or caving in or tipping or

⁸ *Dally*, an unpublished federal district court opinion decided before January 1, 2007, is not "citable." FED. R. APP. 32.1.

leaning, or a dangerous condition indicating that such a structural deformation was imminent. There is no evidence of these conditions here.

4. The HOA's Public Policy Argument Is Meritless.

The HOA argues courts not adopting substantial impairment of structural integrity have “typically done so based on unfounded public policy concerns,” specifically, the reasonable expectations doctrine and the fear of turning property policies into maintenance agreements. (Opening Brief 12) As the HOA correctly states, “Washington courts do not ‘invoke public policy to override an otherwise proper insurance contract in the absence of an expression of public policy from either the Legislature or a precedential court decision.’” *Id.* (quoting *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 17, 977 P.2d 617 (1999)); accord *N.H. Indem. Co. v. Budget Rent-A-Car Sys.*, 148 Wn.2d 929, 935, 64 P.3d 1239 (2003). There is no relevant statute or precedential court decision.

Besides, if any collapse coverage cases have improperly invoked public policy, it is substantial impairment of structural integrity cases. The one reported case that applied Washington law to adopt substantial impairment of structural integrity, *Forest Lynn*, used public policy, claiming that requiring an insured to wait until actual collapse would be

economic waste.⁹ 892 F. Supp. at 1313 (citing *Beach*, 532 A.2d at 1301). Other substantial impairment of structural integrity decisions have made the same argument. *See, e.g., Campbell*, 682 A.2d at 936; *Allen*, 362 So. 2d at 177-78; *Tomlin*, 352 S.E.2d at 615; *DeJames*, 261 A.2d at 751; *Guyther*, 428 S.E.2d at 241-42. This is improper under Washington law. In any event, even if the economic waste doctrine applied, the imminence test would alleviate its concerns. *See, e.g., Weiner v. Selective Way Ins. Co.*, 793 A.2d 434, 444 (Del. Super. Ct. 2002).

The HOA also claims courts have employed public policy by using the reasonable expectations doctrine to reject using substantial impairment of structural integrity. The version of the reasonable expectations doctrine that implicates public policy allows extrinsic evidence to justify an insured's reasonable expectations, despite clear policy language to the contrary. *See State Farm Gen'l Ins. Co. v. Emerson*, 102 Wn.2d 477, 485, 687 P.2d 1139, 1144 (1984); J. Parker, *The Wacky World of Collision & Comprehensive Coverages: Intentional Injury & Illegal Activity Exclusions*, 79 NEB. L. REV. 75, 111 (2000). Like most courts, Washington courts have rejected this version. *Findlay v. United Pac. Ins. Co.*, 129

⁹ In this case, it has been 16 years since the State Farm policy expired, yet nothing has fallen, caved in, or distorted enough to be dangerous. There is no evidence the buildings will, during their normal useful lives, actually collapse. Hence, the claim the HOA would have to wait until the buildings fall makes no sense.

Wn.2d 368, 380, 917 P.2d 116 (1996); *Emerson*, 102 Wn.2d at 481; see J. Parker, *supra*, at 110.

In contrast, the version of the doctrine used by most courts, including Washington, does not invoke public policy, but instead is “a corollary to the rule of ambiguity.” Parker, *supra*, at 110; see *Moeller v. Farmers Ins. Co.*, 173 Wn.2d 264, 275, 267 P.3d 998 (2011) (reasonable expectations doctrine treated as corollary to average purchaser of insurance test). For example, in the case the HOA cites, *KAAPA Ethanol, LLC v. Affiliated FM Ins. Co.*, 660 F.3d 299 (8th Cir. 2011), the court cited California’s *Doheny* case in (1) finding the imminency test “consistent with the policy language,” (2) citing the reasonable expectations doctrine, and (3) saying imminency avoided turning the policy into a maintenance agreement. *Id.* at 306. But in California, the reasonable expectations doctrine does not invoke public policy:

If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ***ambiguities are generally construed against*** the party who caused the uncertainty to exist (i.e., the insurer) ***in order to protect the insured’s reasonable expectation of coverage.***

La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co., 9 Cal. 4th 27, 36 Cal. Rptr. 2d 100, 884 P.2d 1048, 1053 (1994) (emphasis added).

Further, not only did *Doheny* find imminent collapse “consistent with the policy language,” 70 Cal. Rptr. 2d at 264, the court reached its decision using “the fundamental rule of construing insurance policies”—that policies be viewed in “light of their general objects and purposes.” 70 Cal. Rptr. 2d at 264. Washington also follows this rule. *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 209 P.3d 859, 862 (2009). Any reluctance to convert an insurance policy into a maintenance agreement is not public policy, but a reading of the policy in light of its general objects and purposes.

Thus, *Doheny* and *KAAPA* did not use public policy to justify the imminence test, or if they did, no more so than substantial impairment of structural integrity cases. This Court should not use public policy.

C. THE *SPRAGUE* DISSENT DOES NOT SUPPORT THE HOA.

In *Sprague*, three members of the current Court, in dissent, favored substantial impairment of structural integrity, arguing 1) *Panorama Vill. Condo. Owners Ass’n Bd. of Dir. v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910, 912, 917 (2001), *rev’g*, 99 Wn. App. 271, 992 P.2d 1047, 1049 (2000), implicitly adopted it; (2) the dictionary defines “collapse” to include “a breakdown of vital energy, strength, or stamina”; 3) the majority and modern rule is substantial impairment of structural integrity; and 4) to hold otherwise would conflict with the insured’s duty to

mitigate. 174 Wn.2d at 534-35. If the dissent meant to adopt the HOA's version of substantial impairment of structural integrity (i.e., with no imminency requirement), its reasons for doing so are flawed.

1. *Panorama Village* Could Not Have Adopted Substantial Impairment of Structural Integrity Absent Imminency.

Panorama Village could not have implicitly adopted substantial impairment of structural integrity absent an imminency requirement. Like the *Doheny* policy, the policy there covered “risk of direct physical loss involving collapse,” 144 Wn.2d at 135, which the carrier did not dispute meant imminency. The buildings suffered from “*imminent risk of collapse.*” 99 Wn. App. at 274 (emphasis added). The trial court ordered the insurer “to replace or repair all structural members ... in *imminent danger of collapse.*” *Id.* at 276 (emphasis added).

Hence, the standard of collapse was not in dispute in *Panorama Village* and could not have been decided, implicitly or explicitly, by the appellate courts. Even if this Court implicitly accepted a standard, it would have had to have been the imminent collapse standard, the only standard addressed in the case. *Panorama Village* cannot be read to have implicitly adopted substantial impairment of structural integrity without an imminency requirement.

2. Buildings Do Not Have a Breakdown of Vital Energy, Strength, or Stamina.

Some dictionaries define “collapse” to include “a breakdown of vital energy, strength, or stamina.” That does not make the word ambiguous. *See State Farm Fire & Cas. Co. v. Piazza*, 132 Wn. App. 329, 332, 131 P.3d 337 (2006) (“occasional rental” unambiguous despite two dictionary definitions of “occasional”); *see also Cole v. Auto Owners Ins. Co.*, 272 Mich. App. 50, 723 N.W.2d 922, 924 (2006); *Auto Owners Mut. Ins. Co. v. Sugar Creek Mem’l Post No. 3976*, 123 S.W.3d 183, 190 (Mo. Ct. App. 2003). Otherwise most words would be ambiguous since most have multiple meanings. *Cnty. Renewal Team, Inc. v. U.S. Liab. Ins. Co.*, 128 Conn. App. 174, 17 A.3d 88, 92 (2011); *Sullivan v. S. Life Ins. Co.*, 67 Mass. App. 439, 854 N.E.2d 138, 142 (2006).

Rather, a court “must view dictionary definitions in context.” *Black v. Nat’l Merit Ins. Co.*, 154 Wn. App. 674, 683, 226 P.3d 175 (2010); *see MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 3 Cal. Rptr. 3d 228, 73 P.3d 1205, 1214 (2003). A building cannot suffer a breakdown of vital energy, strength, or stamina. People, not buildings, have such breakdowns, as the following dictionary definition of “collapse” shows:

1.a : a breakdown in vital energy; strength, or stamina : complete sudden enervation : sudden loss of accustomed abilities <the daughter’s mental [collapse] through mounting frustration—Leslie Rees> **b** : a state of extreme

prostration and physical depression resulting from circulatory failure, great loss of body fluids, or heart disease and occurring terminally in diseases such as cholera, typhoid fever, pneumonia —compare SHOCK **c** : an airless state of a lung in whole or in part of spontaneous origin or induced surgically ...

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 443 (1993); *see* www.merriamwebster.com/dictionary/collapse; www.learnersdictionary.com/search/collapse. As the *Sprague* concurrence noted, this definition refers to “collapse” “experienced by an individual.” 276 P.3d at 1276. The dictionary definition of the verb “collapse” confirms this:

: to break down in vital energy, stamina, or self-control ***through exhaustion or disease***; *especially* : to fall helpless or unconscious

www.merriam-webster.com/dictionary/collapse (first emphasis added; second emphasis in original).

Other dictionaries also show the *Sprague* concurrence was right. The Oxford English Dictionary twice uses “vital strength” as an example in defining “vital” to mean “[c]onsisting in, constituted by, that immaterial force or principle which is present in living beings or organisms” XIX OXFORD ENGLISH DICTIONARY 701 (2nd ed. 1989). The American Heritage Dictionary definition of “vital” includes “[o]f, relating to, or

characteristic of life: *vital* strength.”¹⁰
ahdictionary.com/word/search.html?q=vital (emphasis added). Another
dictionary defines “vigorous” to mean “living or growing with full *vital*
strength; strong; robust.” www.yourdictionary.com/vigorous (emphasis
added).

The average purchaser of insurance understands the distinction
between a person suffering a breakdown in vital energy, strength, or
stamina versus a building breaking apart and falling. If the average
purchaser were shown the HOA buildings and asked whether they had
collapsed, the answer would be “no.” The answer would be no different if
the average purchaser looked up “collapse” in the dictionary. In short, the
average purchaser would not think the State Farm policy is ambiguous nor
believe the HOA’s buildings or any part collapsed 16 years ago.

Even if “breakdown in vital energy, strength, or stamina” applied
to structures, the HOA would not be aided. Like the vast majority of
courts that have purported to adopt substantial impairment of structural
integrity, the decisions that relied on the “breakdown in vital energy,
strength, or stamina” definition all involved a falling or caving in or

¹⁰ The definition of “vital” includes “of, concerned with, or manifesting life→*vital*
energy.” www.collinsdictionary.com/dictionary/american/vital;
www.yourdictionary.com/vital (emphasis added). “Stamina”, of course, refers only to
animate beings. www.merriam-webster.com/dictionary/stamina.

imminent collapse. *See* discussion at pp. 32-33. There is no evidence of such damage here.

3. Substantial Impairment of Structural Integrity Is Not the Majority, Trending, or Modern View.

Far from being “modern” or “trending,” use of “substantial impairment of structural integrity” dates back almost as far as the rubble-on-the-ground test. *See, e.g., Whaley*, 272 F.2d at 290-91; *Jenkins*, 347 P.2d at 422-23. The modern or “trending” “collapse” standard is the imminent collapse test, which has been adopted by six, possibly seven, different jurisdictions in this century. *See* pp. 18-19, 20-21 & nn. 4-5.

There is also no “majority” rule. Courts in at least nine states—perhaps as many as 13—agree “collapse” means collapse, i.e., falling down.¹¹ At least four states, as well as the Ninth Circuit in *Wall* expressly

¹¹*See Higgins v. Conn. Fire Ins. Co.*, 163 Colo. 292, 430 P.2d 479 (1967); *Olmstead v. Lumbermens Mut. Ins. Co.*, 22 Ohio St. 2d 212, 259 N.E.2d 123 (1970); *Gage v. Union Mut. Fire Ins. Co.*, 122 Vt. 246, 169 A.2d 29 (1961); *Lower Chesapeake Assocs., Inc. v. Valley Forge Ins. Co.*, 260 Va. 77, 532 S.E.2d 325 (2000); *Niagara Fire Ins. Co. v. Curtsinger*, 361 S.W.2d 762 (Ky. Ct. App. 1962); *Clendenning v. Worcester Ins. Co.*, 45 Mass. App. 658, 700 N.E.2d 846 (1998); *Heintz v. U.S. Fid. & Guar. Co.*, 730 S.W.2d 268 (Mo. Ct. App. 1987); *Hennessy v. Mut. of Enumclaw Ins. Co.*, 228 Or. App. 186, 206 P.3d 1184 (2009). *See generally* *Curley v. Old Reliable Cas. Co.*, 155 S.W.3d 711 (Ark. 2004). *Compare Cent. Mut. Ins. Co. v. Royal*, 269 Ala. 372, 113 So. 2d 680 (1959) (actual), with *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293 (Ala. 1999) (uninhabitable); *compare Stagl v. Assur. Co. of Am.*, 245 Ga. App. 8, 539 S.E.2d 173 (2000) (actual) with *W. Pac. Mut. Ins. Co. v. Davies*, 267 Ga. App. 675, 601 S.E.2d 363 (2004) (substantial impairment of structural integrity with imminence); *compare Weiss v. Home Ins. Co.*, 9 A.D.2d 598, 189 N.Y.S.2d 355 (1959) (actual), with *Royal Indem. Co. v. Grunberg*, 155 A.D.2d 187, 553 N.Y.S.2d 527 (1990) (substantial impairment of structural integrity).

require imminency, based on policy language. *See* pp. 18-19 & n. 4.

Of the 20 or so states that use substantial impairment of structural integrity or its variations, four or five require imminency (*see* pp. 18-19 & n. 4); perhaps as many as five require uninhabitability¹²; and one or two require suddenness (*see* p. 26 & n. 7). Of the remainder, as discussed at pp. 23-29, most, if not all, found substantial impairment of structural integrity when there was falling, caving, or dropping, or distortion so bad that the premises were unsafe.

In short, there is no true majority rule.

4. The Collapse Standard Is Irrelevant to Mitigation.

Adopting the actual collapse or imminent collapse tests would *not* conflict with the insured's duty to mitigate. Contractual and common law mitigation duties do not apply *until after* a covered loss—here, collapse by hidden decay—occurs.

The State Farm policy requires the insured to “take all reasonable steps to protect the covered property from *further* damage by an *insured loss*.” (ER 150) (emphasis added). The common law duty also applies only *after* a covered peril has begun damaging the property. 1 INSURING REAL

¹² *See Whaley*, 272 F.2d at 290-91; *Dagen*, 420 N.W.2d at 114; *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 326 (Ala. 1999); *Western Pac.*, 601 S.E.2d at 367; *Liaskos*, 697 N.E.2d at 406.

PROPERTY § 2:07[4], at 2-110.4 (S. Cozen ed. 2012). Actual or imminent collapse does not conflict with any mitigation duty.

D. STATE FARM'S CONDUCT IS IRRELEVANT, BUT CONSISTENT.

The HOA argues State Farm has used “substantial impairment of structural integrity” in the past. What State Farm may have done in the past is irrelevant to the certified question, which asks only for the definition of “collapse” as used in the policy’s collapse coverage. But even if State Farm’s past conduct were relevant, the result would be the same.

The HOA’s reliance on a State Farm letter about another collapse claim, ER 91-93, is misplaced. That letter shows that (1) State Farm used substantial impairment of structural integrity only for vertical (i.e., gravity) load, not lateral load, -resisting components, defining substantial impairment of structural integrity in this context to mean inability to meet code-required vertical loads¹³; (2) State Farm did not evaluate lateral load-resisting components for substantial impairment of structural integrity because “[f]ailure of one part of the [lateral load-resisting] system to meet

¹³ The HOA’s expert evaluated gravity load-resisting components to determine whether any decay was “substantially impairing the framing member’s ability to carry gravity loads.” (ER 120-21) He did not define what “substantially impairing” meant.

a code required lateral load does not mean that part involves collapse,”¹⁴ demonstrated by the fact that several earthquakes and significant windstorms occurred after 1992, yet none had caused the building to collapse; and (3) collapse of a building part required imminent collapse.

Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co., 104 Wn. App. 597, 17 P.3d 626 (2000), bears no resemblance to this case. First, what “collapse” means was not at issue. Second, the “collapse” in that case was to wood framing, i.e., the gravity load-resisting system. Third, the claim was made during the policy period, not 12 years after expiration, as here. 104 Wn. App. at 599-600. Thus, there was no building standing straight and true more than a decade after allegedly collapsing.

Hence, *Toulouse v. N. Y. Life Ins Co.*, 40 Wn.2d 538, 245 P.2d 205 (1952), does not apply: State Farm treated the lateral load-resisting components in ER 91-93 just as it has here (ER 219); *Mercer Place* did not involve a lateral load-resisting system or a claim made years after the policy expired. Moreover, *Toulouse* says the parties’ interpretations are relevant only *after* a policy provision is found ambiguous. *Id.* at 541.

¹⁴ The HOA’s expert did not state how he evaluated the buildings’ lateral load-resisting components but said he found substantial impairment of structural integrity at some places where the sheathing had “less strength and less ability to withstand or transfer forces.” (ER 121) He did not specify how much less or what he meant by “substantial impairment” in this context.

“Collapse” is not ambiguous where buildings that allegedly “collapsed” by 1998 were still standing straight and true more than a decade later.

Citing *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 871 P.2d 146 (1994), the HOA says State Farm modified its policy to define “collapse” in 1998 and could have done so earlier. But the *Lynott* insurer *already had available* a policy form that would have solved the problem at issue. *Id.* at 688. There is no showing that on the HOA policy renewal dates State Farm had available an endorsement defining “collapse.”

Furthermore, in 1992, when the first policy here incepted, no court in Washington had yet decided what “collapse” meant. This state’s first collapse case was not decided until 1995. *Forest Lynn*, 892 F. Supp. at 1311-12. And, as explained above, substantial impairment of structural integrity cases involved conditions not present here: falling down, caving in, or imminent collapse. No reported case has involved buildings like these: Where the collapse claim was made 12 years after the policy expired, and the buildings still stand straight and true years thereafter.

VI. CONCLUSION

Even knowing of the decayed gypsum/plywood sheathing, the average insurance purchaser would never think the HOA’s buildings have collapsed, let alone 16 years ago. The HOA’s use of “substantial impairment of structural integrity,” without imminency, suddenness, or

distortion to the point of uninhabitability, makes no sense in this case. Because the vague term “substantial impairment of structural integrity” is unreasonable under the facts of this case, there can be no ambiguity.

This Court should rule that the undefined word “collapse” as used in “direct physical loss . . . involving collapse” means a structurally significant falling or caving in, although not necessarily all the way to the ground. Alternatively, an imminent collapse standard, whether part of substantial impairment of structural integrity or not, should be adopted.

Dated this 20th day of October 2014.

REED McCLURE

By *Pamela A. Okano*
Pamela A. Okano **WSBA #7718**
Attorneys for Appellee

BULLIVANT HOUSER BAILEY, PC
By *Pamela A. Okano per 10/17/14*
Jerret E. Sale **WSBA#14101**
Attorneys for Appellee
subscribed

**SECTION I
PROPERTY
COVERAGES (cont.)**

- 8. to hot water boilers or other water heating equipment, air conditioning units or refrigerating units caused by any condition or event inside such boilers or equipment, other than an explosion;
- 9. to personal property in the open caused by rain, snow, sleet or ice;
- 10. to gutters and downspouts caused by weight of snow, sleet or ice.

by the applicable Inflation Coverage Index shown in the Declarations.

To determine the limits of insurance on a particular date, the Index level available on that date will be divided by the Index level as of the effective date of this inflation coverage provision and the resulting factor multiplied by the limits of insurance for Coverage A and Coverage B separately. In no event will the limits of insurance be reduced to less than those shown in the Declarations or most recent renewal notice, whichever is greater.

**INFLATION
COVERAGE**

The limits of insurance specified in the Declarations of this policy for Coverage A - Buildings and Coverage B - Business Personal Property will automatically increase

If during the term of this policy the limit of insurance for Coverage A or Coverage B is changed at your request, the effective date of this inflation coverage provision is amended to coincide with the effective date of such change.

**SECTION I
LOSSES INSURED AND
LOSSES NOT INSURED**

**LOSSES
INSURED**

We insure for accidental direct physical loss to property covered under this policy unless the loss is:

- 1. limited in the **PROPERTY SUBJECT TO LIMITATIONS** section; or
- 2. excluded in the **LOSSES NOT INSURED** section that follows.

whether combined with water or not. Earth movement includes but is not limited to earthquake, landslide, erosion, and subsidence but does not include sinkhole collapse.

But if accidental direct physical loss by fire, explosion other than explosion of a volcano, theft or building glass breakage results, we will pay for that resulting loss;

- c. volcanic eruption, explosion or effusion. But if accidental direct physical loss by fire, explosion other than explosion of a volcano, theft, building glass breakage or "volcanic action" results, we will pay for that resulting loss.

**LOSSES
NOT INSURED**

- 1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss:

the enforcement of any ordinance or law:

- (1) regulating the construction, use or repair of any property; or
- (2) requiring the tearing down of any property, including the cost of removing its debris;

- b. earth movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all

"Volcanic action" means accidental direct physical loss to covered property resulting from the eruption of a volcano when the loss is caused by:

- (1) airborne volcanic blast or airborne shock waves;
- (2) ash, dust or particulate matter; or
- (3) lava flow.

All volcanic eruptions that occur within any 72-hour period will constitute a single occurrence.

We will not pay for the cost of removing ash, dust or particulate matter resulting from the

SECTION I
LOSSES INSURED AND
LOSSES NOT INSURED (cont.)

eruption of a volcano that does not cause accidental direct physical loss to covered property;

d. water, such as:

(1) flood, surface water, waves, tides, tidal waves, overflow of any body of water or their spray, all whether driven by wind or not;

(2) mudslide or mudflow;

(3) natural water below the surface of the ground, including water which exerts pressure on, or seeps or leaks through:

(a) foundations, walls, floors or paved surfaces;

(b) basements, whether paved or not; or

(c) doors, windows or other openings.

But if accidental direct physical loss by fire, explosion, theft, building glass breakage or leakage of water from a fire protective system results, we will pay for that resulting loss;

e. seizure or destruction of property by order of governmental authority.

But we will pay for acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this policy;

f. nuclear hazard, meaning any nuclear reaction, radiation or radioactive contamination, all whether controlled or uncontrolled or however caused, or any consequence of any of these. Loss caused by the nuclear hazard will not be considered loss caused by fire, explosion or smoke.

But if accidental direct physical loss by fire results, we will pay for that resulting loss;

g. the failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises.

But if accidental direct physical loss by an insured loss results, we will pay for that resulting loss;

h. war and military action, including:

(1) undeclared or civil war;

(2) warlike action by a military force, including action in hindering or defending against an actual or expected attack by any government, sovereign or other authority using military personnel or other agents; or

(3) insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

2. We do not insure for loss either consisting of, or directly and immediately caused by, one or more of the following:

a. artificially generated electric current, including electric arcing, that disturbs electrical devices, appliances or wires.

But if accidental direct physical loss by fire results, we will pay for that resulting loss;

b. delay, loss of use or loss of market;

c. smoke, vapor or gas from agricultural smudging or industrial operations;

d. smog, wear, tear, rust, corrosion, fungus, mold, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself.

But if accidental direct physical loss by any of the "Specified Causes of Loss" or by building glass breakage results, we will pay for that resulting loss;

e. the presence, release, discharge or dispersal of pollutants, meaning any solid, liquid, gaseous or thermal irritant or contaminant, including vapor, soot, fumes, acids, alkalis, chemicals and waste, except as provided in the Pollutant Clean Up and Removal Extension of Coverage.

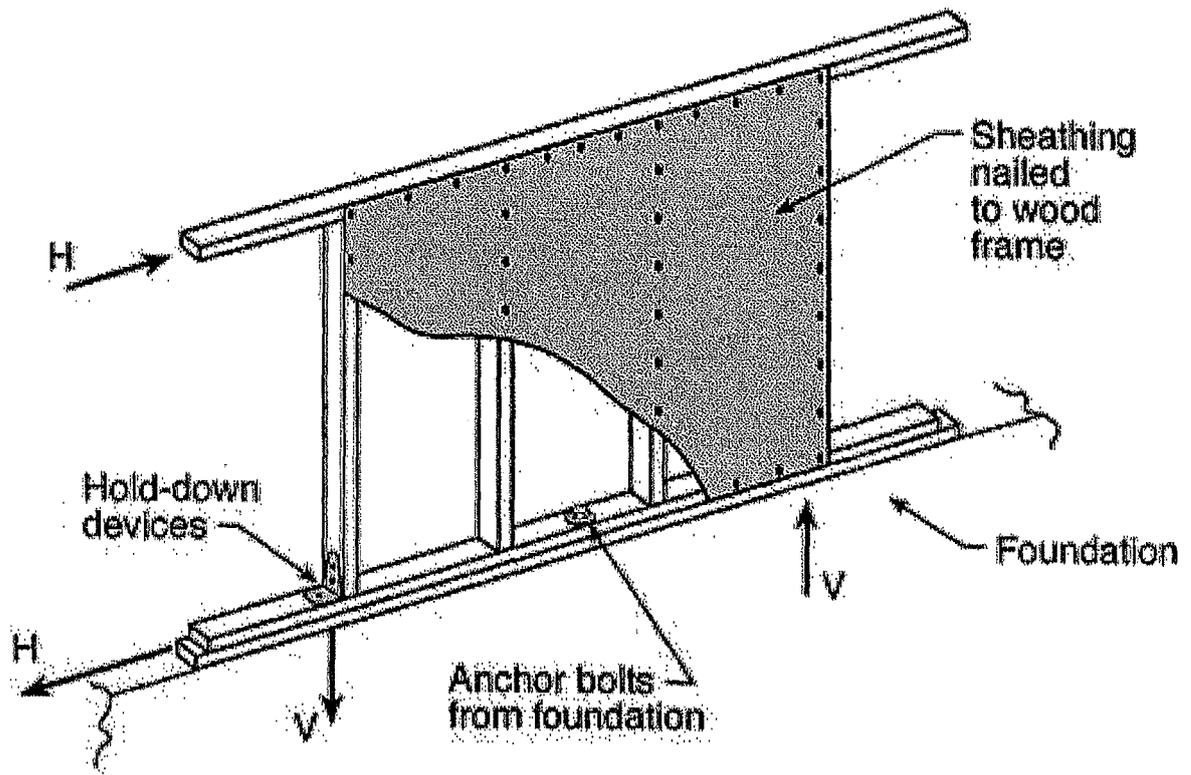
But if accidental direct physical loss by any of the "Specified Causes of Loss" or by building glass breakage results, we will pay for that resulting loss;

LOSSES INSURED AND
LOSSES NOT INSURED (cont.)

- f. settling, cracking, shrinking, bulging or expansion. (except fire protective systems) caused by freezing, unless;
- But if accidental direct physical loss by any of the "Specified Causes of Loss" or by building glass breakage results, we will pay for that resulting loss;
- (1) you do your best to maintain heat in the building or structure; or
- (2) you drain the equipment and shut off the water supply if the heat is not maintained;
- g. insects, birds, rodents or other animals.
- But if accidental direct physical loss by any of the "Specified Causes of Loss" or by building glass breakage results, we will pay for that resulting loss;
- m. dishonest or criminal act occurring at any time by you, any of your partners, employees, directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose whether acting alone or in collusion with others.
- This exclusion does not apply to acts of destruction by your employees; but theft by employees is not covered;
- h. mechanical breakdown, including rupture or bursting caused by centrifugal force.
- But if accidental direct physical loss by any of the "Specified Causes of Loss" or by building glass breakage results, we will pay for that resulting loss;
- n. voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense;
- i. causes of loss to personal property:
- (1) dampness or dryness of atmosphere;
- (2) changes in or extremes of temperature; or
- (3) marring or scratching.
- But if accidental direct physical loss by any of the "Specified Causes of Loss" or by building glass breakage results, we will pay for that resulting loss;
- o. unexplained or mysterious disappearance of property, or shortage of property disclosed on taking inventory;
- p. collapse, except as provided in the Extensions of Coverage.
- But if accidental direct physical loss by an insured loss results at the described premises, we will pay for that resulting loss.
- j. explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control.
- But if accidental direct physical loss by fire or combustion explosion results, we will pay for that resulting loss. We will also pay for loss caused by the explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass;
3. We do not insure under any coverage for any loss consisting of one or more of the items below. Further, we do not insure for loss described in paragraphs 1. and 2. immediately above regardless of whether one or more of the following: (a) directly or indirectly cause, contribute to or aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss:
- a. conduct, acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body whether intentional, wrongful, negligent or without fault;
- k. continuous or repeated seepage or leakage of water that occurs over a period of time;
- b. faulty, inadequate, unsound or defective:
- (1) planning, zoning, development, surveying, siting;
- l. water that leaks or flows from plumbing, heating, air conditioning or other equipment



APPENDIX B





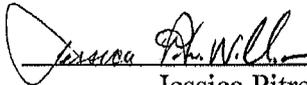
APPENDIX D

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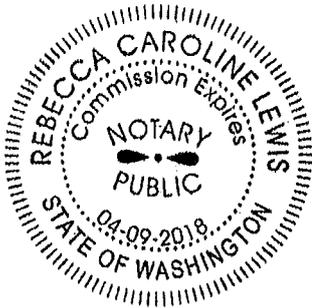
DATED this 20th day of October, 2014.

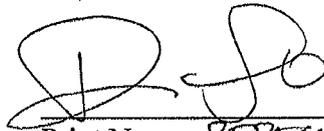


Jessica Pitre-Williams

SIGNED AND SWORN to before me on October 20, 2014, by

Jessica Pitre-Williams.





Print Name: REBECCA LEWIS
Notary Public Residing at LYNN WOOD, WA
My appointment expires 4-9-2018

OFFICE RECEPTIONIST, CLERK

To: Pitre-Williams, Jessica
Cc: Okano, Pamela; todd@harperhayes.com; jhampton@bpmlaw.com; dsyhre@bpmlaw.com; Jerret.Sale@Bullivant.com
Subject: RE: Case No. 90651-3, Queen Anne Park HOA v. State Farm

Received 10/20/14

From: Pitre-Williams, Jessica [mailto:jpitre-williams@rmlaw.com]
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Subject: Case No. 90651-3, Queen Anne Park HOA v. State Farm

Attached please find the following:

- Brief of Appellee
- Affidavit of Service

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