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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Plaintiff-Appellant,

v.

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

Defendant-Appellee

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

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AMENDED BRIEF OF *AMICUS CURIAE*  
BAYVIEW HEIGHTS OWNERS ASSOCIATION  
[PROPOSED]

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ORIGINAL

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## I. IDENTITY AND INTEREST OF AMICUS

*Amicus* Bayview Heights Owners Association (“Bayview”) is the association of unit owners for the Bayview Condominium building, a five-story structure in Seattle, Washington. After Bayview discovered advanced decay in the condominium’s wood structure due to long-term water intrusion amounting to substantial impairment of structural integrity (“SSI”) – also identified as “collapse” by engineering standards – Bayview tendered a claim to its insurer, Travelers Indemnity Company (“Travelers”), which Travelers denied. Bayview filed suit against Travelers in King County Superior Court, Case No. 11-2-35232-3-SEA (King Cty. Sup.Ct. Oct. 11, 2011). Through a series of motions for summary judgment, Bayview sought a ruling that “collapse” as used in Travelers’ policies meant SSI, and not “actual failure” or “imminent collapse” as Travelers asserted.<sup>1</sup> Bayview’s motions were denied, and Bayview appealed. Travelers filed a motion for direct review with this Court, which Bayview joined (No. 89218-1). After initial consideration,

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<sup>1</sup> The “collapse” provisions in the *Bayview* case are worded differently than the “collapse” provisions in the State Farm policies at issue in this case. To provide the Court context, the “collapse” provisions at issue in *Bayview* read:

- We will pay for direct physical loss or damage to Covered property, caused by collapse of a building or any part of a building insured under this policy, if the collapse is caused by one or more of the following: ... hidden decay....
- We will pay for loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building caused only by one or more of the following: ...hidden decay....

Department 1 ordered an en banc conference on the joint motion for direct review. At the en banc conference on July 10, 2014, this Court ordered Bayview's case transferred to Division One of the Court of Appeals.

Bayview's case is pending appeal in Division One of the Court of Appeals. The single issue in Bayview's appeal is the meaning of the term "collapse" where it is otherwise undefined in Travelers' policies. Bayview submits this brief to assist this Court in understanding the context in which this Court's seminal opinion will apply.

## **II. STATEMENT OF THE CASE**

The existing parties to this appeal have already briefed the factual issues adequately, and Bayview will not repeat them here.

## **III. ARGUMENT**

The sole issue in this appeal is the meaning of the term "collapse" in insurance policies, where the policies themselves do not define the term. The interpretation of an insurance policy is a question of law, which appellate courts review de novo. *Vision One, LLC v. Phila. Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012).

In this case, there are at least four independent reasons that the undefined term "collapse" in insurance policies should be interpreted to mean SSI: (1) the term "collapse" is ambiguous, and therefore must be construed in favor of insureds as SSI; (2) courts applying Washington law

consistently define “collapse” as SSI; (3) public policy supports interpreting “collapse” as SSI; and (4) State Farm’s alternative proposed standards create more ambiguity than they would solve, and do not make sense from a structural engineering perspective when applied to real-world situations. The first point is addressed in Queen Anne’s brief, and so Bayview’s brief will focus on points (2) through (4).

**A. For Nearly 20 Years, Courts Applying Washington Law Accepted That “Collapse” Meant SSI.**

Neither Queen Anne nor State Farm address the long history of “collapse” jurisprudence in Washington. This history is important because it informs insureds and their attorneys as to how courts interpreting “collapse” in the future will decide. Washington has a long history of interpreting “collapse” as SSI.

1. The Overwhelming History Of “Collapse” Jurisprudence Under Washington Law Shows A Strong Preference For Interpreting “Collapse” As SSI.

In 1995, federal Judge Barbara Rothstein was asked to predict how the Washington Supreme Court would interpret the term “collapse” in an insurance policy, where “collapse” is undefined. *See Allstate Ins. Co. v. Forest Lynn Homeowners Ass’n*, 892 F. Supp. 1310 (W.D. Wash. 1995). In a reasoned opinion, Judge Rothstein concluded that Washington would follow “the majority of modern courts” and interpret “collapse” to include SSI. *Id.* at 1314.

Since then, Washington courts have routinely accepted the conclusion that “collapse” means SSI. *Mercer Place Condo. Ass’n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602-06, 17 P.3d 626 (2000) (citing *Forest Lynn*, court accepted parties’ – including State Farm’s – stipulation that “collapse” in insurance policy meant SSI); *Panorama Village Condo. Owners Ass’n v. Allstate Ins. Co.*, 144 Wn.2d 130, 149, 26 P.3d 910 (2001) (a structure need not fall down for collapse coverage to apply); *id.* (Madsen, J. dissenting on other grounds) (explaining “collapse” occurs when the structure reaches a point of SSI); *Ellis Ct. Apts. v. State Farm*, 117 Wn. App. 807, 812-18, 72 P.3d 1086 (2003) (“collapse” due to hidden decay occurred when SSI was no longer hidden).

Federal courts have also accepted SSI as the definition of “collapse” under Washington law, and in 2006 Judge Lasnik of the Western District of Washington confirmed what Judge Rothstein concluded more than ten years earlier: “the Washington Supreme Court would adopt the majority view of ‘substantial impairment of structural integrity’ as the definition of collapse in this policy.” *Dally Props., LLC v. Truck Ins. Exch.*, No. C05-0254L, 2006 U.S. Dist. LEXIS 30524 at \*8

(W.D. Wash. May 5, 2006)<sup>2</sup>; *see also Assurance Co. of America v. Wall & Assoc. LLC of Olympia*, 379 F.3d 557 (9th Cir. 2004).<sup>3</sup>

It is true that not all of these cases distinguish between imminent collapse and SSI, sometimes conflating the two. This is because the facts of those cases did not require a distinction. Moreover, *Forest Lynn* and its progeny confirm there is no need to make this distinction, since under those cases, “any” SSI qualifies as collapse. *See Forest Lynn*, 892 F. Supp. at 1314.

In May 2012, the Washington State Supreme Court was just one justice shy of fulfilling the long-standing “collapse” prophecy when it issued its opinion in *Sprague v. Safeco Insurance Company of America*, 174 Wn.2d 524, 276 P.3d 1270 (2012). Although the majority opinion declined to address the definition of “collapse,” the concurring and

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<sup>2</sup> Pursuant to GR 14.1(b), citation to an unpublished opinion issued “by any court from a jurisdiction other than Washington state...is permitted if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.” Judge Pechman’s Order, issued in 2013 by the Western District of Washington, is not prohibited or limited by local federal court rules. Moreover, 9TH CIR. R. 36.3(b) permits citation to unpublished dispositions issued after January 1, 2007.

<sup>3</sup> It is true that the court in *Wall* held that “collapse” meant “imminent collapse.” However:

Correctly interpreted, *Wall* stands for the proposition that Washington law does not limit collapse to actual collapse. The *Wall* opinion includes a discussion of imminent collapse not to the exclusion of collapse coverage for structures with substantially impaired structural integrity, but rather because the factual circumstances of *Wall* are limited to structures facing imminent collapse.

*Daily Props.*, No. C05-0254L, 2006 U.S. Dist. LEXIS 30524 at \*7; *see also Wall*, 379 F.3d at 558-59 (the building “created a serious risk to passersby as the [cladding] was in danger of completely falling off the building” and “with the slightest touch, the brick facades simply fell off the building”).

dissenting opinions debated this question intensely. On one hand, a two-justice concurrence argued that “collapse” should mean “to break down” or “fall apart” or “crumble.” *Id.* at 531-32. On the other hand, a four-justice dissent argued strenuously that “collapse” meant SSI. *Id.* at 534-35. *Sprague’s* four-justice dissent recognized that the Washington State Supreme Court “implicitly adopted” SSI as the definition of “collapse” in *Panorama Village*, 144 Wn.2d at 134-35; 144-45. *Sprague*, 174 Wn.2d at 534.

Given this long history, Washington jurisprudence – although not binding – supports defining “collapse” as SSI, and State Farm’s argument otherwise effectively seeks to remove coverage that Queen Anne, as the insured, and other insureds similarly situated like Bayview, reasonably believed they had. Washington courts construe insurance policies as the average person purchasing insurance would, giving the language a fair, reasonable, and sensible construction. *Vision One*, 174 Wn.2d at 512. Here, the long history of “collapse” jurisprudence from courts applying Washington law provided insureds such as Queen Anne good reason to understand that coverage for “collapse” would provide coverage for SSI.

2. Recent Dicta Does Not Change This Long History of Collapse Jurisprudence.

There are two cases in which courts applying Washington law required something more than SSI to trigger collapse coverage, where collapse was undefined. *Bayview v. Travelers Indemnity Co.*, King County Superior Court, Case No. 11-2-35232-3-SEA (King Cty. Sup.Ct. Oct. 11, 2011), is the second, and relied heavily on the trial court's flawed reasoning in the first case: *Queen Anne*.

In holding that "collapse" in State Farm's policies meant SSI, the *Queen Anne* trial court began its analysis with two potential collapse standards: (1) rubble on the ground (sometimes referred to as abrupt collapse); and (2) imminent collapse. ER 9-14. SSI is lumped into the latter category, and in the first eight pages of the 10-page opinion, there is no distinction between imminent collapse and SSI. ER 5-12. In this confusion, the court inaccurately claims that the courts in *Dally Properties* and *Forest Lynn* applied an "imminent collapse" standard, when both of those courts actually adopted the SSI standard. *See Dally Properties*, No. C05-0254L, 2006 U.S. Dist. LEXIS 30524 at \*8; *Forest Lynn*, 892 F. Supp. at 1314.

When the trial court finally recognized a distinction between imminent collapse and SSI, the court decided between the two by

inexplicably leaping across the country to rely on *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner Insurance Co.*, 350 S.C. 268, 271, 565 S.E.2d 306 (2002). There, a South Carolina court determined that “imminent collapse,” not SSI, should apply. *Id.* The *Queen Anne* trial court decision followed this reasoning.

The anomalous trial court opinion provided no justification for its reliance on geographically or chronologically remote authority, in defiance of nearly 20 years of jurisprudence at home, including numerous cases issued under Washington law after the *Ocean Winds* decision.

3. Chief Justice Pechman Directly Addressed the Shortcomings in *Queen Anne* To Hold That “Collapse” Means SSI.

The most recent decision interpreting “collapse” under Washington law, like the *Queen Anne* decision, is also out of the Western District of Washington, and comes from Chief Judge Pechman. In *Houston General Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, C11-2093MJP (W.D. Wash. March 19, 2013) (currently pending before the Ninth Circuit), Judge Pechman held:

The correct definition of “collapse”... is “substantial impairment of structural integrity,” or SSI.

Order at 3, *Houston General Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, C11-2093MJP (W.D. Wash. March 19, 2013). To reach

this conclusion, Judge Pechman began her analysis by recognizing the long history of collapse as SSI under Washington law:

The clearest evidence of how the Washington Supreme Court would decide this issue is its landmark 2001 case of Panorama Village Condo. Owners Ass'n Bd. Of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130. In Panorama Village, the Court construed an insurance contract covering "collapse," and held that loss could occur either when the building actually collapsed or when decay posed a risk of collapse. *Id.* at 133-34. The Court implied that a collapse provision in an insurance contract does not limit coverage solely to damages resulting from actual collapse. *Id.*

*Id.* at 3-4. Then, going on to cite *Mercer Place* and *Forest Lynn*, Judge Pechman held:

Together, these cases strongly indicate that the parties would have understood Washington law in 2010 to define "collapse" as SSI.

*Id.* at 4. Finally, in response to Judge Zilly's opinion in *Queen Anne* and its reliance on the two-justice dissent in *Sprague*, Judge Pechman stated:

But two justices do not a majority make. In fact, twice as many justices joined the dissenting opinion in *Sprague*, which reiterated the consistent holding of Washington Courts that collapse means SSI. *Id.* at 534-35.... Additionally, the *Queen Anne* decision is unpersuasive because it relies on the two-justice concurrence in *Sprague*, rather than the four-justice dissent. These cases [*Sprague* and *Queen Anne*] are insufficient to show that Washington law has adopted a new definition of collapse.

*Id.* at 5. As recently as 2013, when applying Washington law, the Western District of Washington continues to hold that "collapse" means SSI.

4. The Majority of Jurisdictions Define Collapse as SSI, And There Is No “Trend” To The Contrary.

The last misconception to address regarding Washington’s long history of SSI jurisprudence is State Farm’s assertion that there is a trend toward holding that “collapse” means something other than SSI. It is true that South Carolina, applying South Carolina law, chose an imminent collapse standard over SSI. *Ocean Winds*, 350 S.C. at 271. However, in doing so, South Carolina recognized:

The modern trend is to find the word “collapse” ambiguous and construe it to mean a “substantial impairment” of the building’s structural integrity.

*Id.* at 270. Indeed, the “trend” is to define “collapse” as SSI, and not imminent collapse.<sup>4</sup>

5. “Collapse” Means SSI.

Given the long judicial history of interpreting “collapse” as SSI under Washington law, the policy reasons cited in that history for doing

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<sup>4</sup> See e.g., *Macheca Transp Co. v. Phila. Indem. Ins. Co.*, 649 F.3d 661 (8th Cir. 2011); *American Concept Ins. Co. v. Jones*, 935 F. Supp. 1220, 1227 (D. Utah 1996) (“The court concludes that Utah would likely follow the modern trend”); *John Akridge Co. v. Travelers Companies*, 876 F. Supp. 1, 2 (D. D.C. 1995); See *Island Breakers v. Highlands Underwriters Ins. Co.*, 665 So. 2d 1084 (Fla. App. 1995); *Beach v. Middlesex Mut. Assur. Co.*, 205 Conn. 246, 252, 532 A.2d 1297 (1987) (“the more persuasive authorities hold that the term ‘collapse’ is sufficiently ambiguous to include coverage for any substantial impairment of the structural integrity of a building.”); *Auto Owners Ins. Co. v. Allen*, 362 So. 2d 176, 177-78 (Fla. App. 1978); *Indiana Ins. Co. v. Lilaskos*, 297 Ill. App. 3d 569, 577, 697 N.E.2d 398 (1998); *Rogers v. Maryland Cas. Co.*, 252 Iowa 1096, 1102, 109 N.W.2d 435 (1961); *Gov’t Employees Ins. Co. v. DeJames*, 256 Md. 717, 724, 261 A.2d 747 (1970); *Morton v. Travelers Indem. Co.*, 171 Neb. 433, 449, 106 N.W.2d 710 (1960); See *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985); *Morton v. Great American Ins. Co.*, 77 N.M. 35, 38-39, 419 P.2d 239 (1966); See *Rankin v. Generali-U.S. Branch*, 986 S.W.2d 237 (Tenn. 1998).

so, and the national trend, the only “fair, reasonable, and sensible” construction of the term “collapse” in insurance policies that do not define “collapse” is to define it as SSI. Although the historical treatment of “collapse,” and even the currently trending treatment, is not binding on this Court, the history sheds an important light on the local and national understanding of “collapse” over the last 20 years, and highlights the wide acceptance, reasonableness, and expectation of “collapse” as SSI.

**B. Public Policy Favors Defining “Collapse” As SSI.**

Both Queen Anne and State Farm argue that public policy does not affect the interpretation of “collapse” in insurance policies. Bayview disagrees, as numerous courts, including those applying Washington law, have recognized important policy considerations that support defining “collapse” as SSI. Additionally, the public policy reasons often cited against SSI are simply unfounded.

1. Washington and Other Courts Adopting An SSI Standard for “Collapse” Have Done So Based On Important Public Policy Considerations.

During Washington’s long history of SSI jurisprudence, numerous courts – and courts of other jurisdictions – have recognized that public policy considerations support defining “collapse” as SSI. As explained in *Beach v. Middlesex Mutual Assurance Co.*, 205 Conn. 246, 532 A.2d 1297 (1987), and adopted in *Forest Lynn*, and the plurality dissent in *Sprague*:

Requiring the insured to await an actual collapse would not only be economically wasteful...but would also conflict with the insured's contractual and common law duty to mitigate damages.

*Beach*, 532 A.2d at n.2; *Forest Lynn*, 892 F. Supp. at 1311; *Sprague*, 174 Wn.2d at 533 (Stephens, J. dissenting). Although insurers claim this reasoning could transform insurance policies into maintenance agreements, this is merely a straw argument. Contrary to insurers' cries, defining "collapse" as SSI still requires the insured to meet a measurable threshold of engineer-defined collapse in order to obtain coverage for collapse. Instead, defining "collapse" as SSI fulfills widely accepted public policies that favor a broader definition of "collapse."

2. Defining "Collapse" As SSI Does Not Convert Insurance Policies Into Maintenance Agreements.

Under an SSI standard, mere impairment does not trigger collapse coverage. Instead, collapse coverage under an SSI standard is triggered when the impairment is both: (1) structural; and (2) substantial. Therefore, the insurance industry's cries that an SSI standard sets the bar too low is unfounded, as the "structural" and "substantial" elements must be met. Both these elements require scientific expert engineering analysis to determine the extent to which the structure is capable of meeting objective standards set forth in the building code. *See, e.g.*, ER 119-122.

In addition to the “substantial” and “structural” elements of a collapse loss, an insurance policy’s fortuity requirement (which in Washington is called the “known risk principle,” see *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 878, 998 P.2d 856 (2000) (“*ALCOA*”)) also prevents an insurance policy from becoming a maintenance policy.

“Implicit in the concept of insurance is that the loss occur as a result of a fortuitous event[,] not one planned, intended, or anticipated.” *ALCOA*, 140 Wn.2d at 879. The SSI in *Queen Anne* was not “allowed to happen,” nor was it “planned, intended, or anticipated.” *ALCOA*, 140 Wn.2d at 879. Queen Anne only discovered decay in the buildings’ sheathing after it inspected the building’s otherwise hidden exterior wall cavities using a professional engineer. ER 120-21. In other words, Queen Anne is not engaging in deferred maintenance, and the fortuity concept in Washington law ensures genuine SSI is covered, while protecting against an interpretation that would turn insurance policies into maintenance policies.

**C. The Alternative Standards State Farm Proposes – A Structurally Significant Falling/Caving In or Imminent Collapse – Ignore Realities of Structural Engineering And Create Further Ambiguity.**

State Farm’s proposed definition of “collapse” as “a structurally significant falling or caving in” is extremely similar to a SSI standard, but it will be difficult to apply in other “collapse” situations, raising more questions than it answers. What degree of falling or caving in will be required to qualify as “collapse?” Must a building component move ten feet? One foot? One inch? Also, how much falling or caving in will qualify as “collapse?” One member? A certain percentage of a roof or wall? An entire deck or floor? What if there is a clear “collapse,” but the impact on the rest of the structure is negligible, and the “collapse” is therefore not “structurally significant”? Finally, what would qualify as a “falling or caving in” that is not “structurally significant”?

Similar questions arise where the standard is “imminent” collapse, which is a self-referential definition modified only by the purely subjective standard of “imminence.” How imminent must imminent be? Moreover, “imminence” focuses on constant gravity loads, and fails to account for important structural considerations that lateral forces have in the “collapse” analysis from an engineer’s standpoint, such as an earthquake that could happen any time without prediction, which may or

may not be “imminent.” *See* ER 120-22. From a practical engineering standpoint, these additional forces cannot be ignored, *see id.*, yet State Farm would have this Court do just that – ignore professional engineers’ structural evaluations in favor of a standard that relies on some unclear degree and extent of “falling or caving in.”

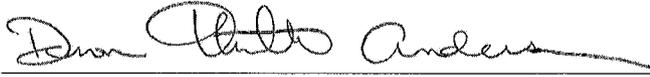
On the other hand, defining “collapse” as SSI is a clear, engineering-based standard taking into account all the various structural loads – both gravitational and lateral – required by existing law.

#### IV. CONCLUSION

Based on an established history where Washington courts have adopted SSI as the meaning of collapse, when “collapse” is otherwise undefined in insurance policies, SSI is an appropriate standard that can be applied fairly and evenly to all kinds of “collapse” cases. In addition, contrary to State Farm’s assertions, defining “collapse” as SSI will not convert insurance policies to maintenance agreements because of the independent factors involved that require SSI to be “structural”, “substantial” and “fortuitous”.

Respectfully submitted this 16th day of December, 2014.

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**Subject:** RE: Queen Anne Park HOA v. State Farm Fire and Casualty Company - Case No. 90651-3

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**Subject:** Queen Anne Park HOA v. State Farm Fire and Casualty Company - Case No. 90651-3

Queen Anne Park Homeowners Association, Appellant, v. State Farm Fire and Casualty Company, Appellee – Case No. 90651-3

I am attaching for filing:

1. Amended Brief of Amicus Curiae Bayview Heights Owners Association [Proposed]; and
2. Certificate of Service.

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