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No. 63933-1-I

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

MAX B. SPRAGUE and KRISTA SPRAGUE,

Appellants,

v.

SAFECO INSURANCE COMPANY OF AMERICA,

Respondent.

APPELLANTS' REPLY BRIEF

John P. Zahner, WSBA No. 24505

Attorneys for Appellants
Max B. Sprague and Krista Sprague

FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-2886
Facsimile No.: (206) 749-1936

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I. SUMMARY OF REPLY

Safeco's Brief of Respondent puts forward three main arguments, none of which withstands scrutiny.

Safeco asserts that there is no coverage under the ensuing loss clause to the construction defect exclusion because "ensuing loss clauses do not create coverage." Like a mantra, Safeco repeats this phrase as if it means there can *never* be coverage under an ensuing loss clause. But ensuing loss clauses function as exceptions to exclusions, and coverage turns on whether the resulting loss itself is covered or excluded by the policy. The resulting loss here can be fairly characterized as collapse, and collapse is not excluded. Collapse is a covered ensuing loss.

Safeco also argues that without its 2003 collapse endorsement, its policies do not provide coverage for collapse.¹ But Safeco does not address the Spragues' explanation of how the 2003 collapse endorsement drastically narrows the collapse coverage. Safeco fails to address the fact that the 2003 collapse endorsement supplied a general exclusion for collapse, while the policies before 2003 do not contain such a general exclusion.

Finally, Safeco struggles with the fact that its policies before 2003 specifically list "collapse" as a covered peril in the personal property

coverage (like fire, lightning and explosion) while not excluding collapse from the all-risk building coverage. The best that Safeco can do is to flatly deny that any inferences should be drawn here and to urge the Court to interpret the undefined term “collapse” to mean actually fallen-down-to-the-ground collapse. But Safeco’s “fall-down” interpretation of collapse is contrary to the majority interpretation across the country and has been rejected by the Ninth Circuit Court of Appeals, applying Washington law.²

None of Safeco’s arguments have merit. Safeco recognized in its policies that collapse was a distinct peril, just like fire, lightning and explosion, and Safeco chose not to exclude collapse from its all-risk building coverage. As a non-excluded peril, collapse is a covered ensuing loss resulting from construction defects. When a covered loss results from construction defects, the covered loss remains covered. Summary judgment should have been granted to the Spragues. This Court should reverse.

¹ Respondent’s Brief at p. 26.

² *Assurance Co. of America v. Wall & Associates LLC of Olympia*, 379 F.3d 557, 561 (9th Cir. 2004).

II. REPLY

A. The Proper Interpretation of the Ensuing Loss Clause.

The last line of Safeco's construction defect exclusion states: "However, any ensuing loss not excluded or excepted in this policy is covered."³ The proper interpretation of an ensuing loss clause turns on whether the resulting loss itself is covered or excluded by the policy. If the resulting loss is otherwise covered (i.e., not excluded under an all-risk policy), then it "will remain" covered.⁴ The mere fact that an excluded cause leads to the otherwise covered ensuing loss does not defeat coverage.

Attempting to distinguish authority cited by the Spragues, Safeco argues that "*Collapse was what happened, not what caused the loss.*"⁵ But Safeco's argument actually illustrates the Spragues' point. The word "ensue" means: "To follow as a result."⁶ In the Spragues' case, collapse

³ CP 52. For policies between 1999 and 2003, *see* CP 76, where the policy provides: "However, any ensuing loss not excluded is covered."

⁴ "Reasonably interpreted, the ensuing loss clause says that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered." *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992).

⁵ Respondent's Brief at p. 30.

⁶ American Heritage College Dictionary, Third Edition (1997). *See also*, *Websters Third New International Dictionary* 756 (1969) (2.a. "to follow as a chance, likely, or necessary consequence: RESULT."); *State Farm*

was the end result of construction defects. Defects in the design and construction of the EIFS-stucco cladding on the exterior of the fin walls allowed water to enter and to rot the structural deck piers so severely that they entered a state of imminent collapse. Collapse therefore is the end result for which coverage is sought.

The resulting loss here can and should be, as a matter of law, characterized as collapse. Safeco's adjuster Deborah Lee, Safeco's engineering experts at PET, and the Spragues themselves all characterized the loss here as one involving collapse.⁷ While Safeco accuses the Spragues of playing a characterization game, everyone aside from Safeco's coverage lawyers characterized this loss as one involving collapse.

In Respondent's Brief, Safeco repeats the mantra that "ensuing loss clauses do not create coverage" at least a half dozen times, hoping that this Court will conclude that there can never be coverage under an ensuing loss clause. The origins of Safeco's mantra are found in *Capelouto v. Valley*

Fire & Cas. Co. v. English Cove Ass'n, Inc., 121 Wn. App. 358, 364, 88 P.3d 986 (2004) (using the dictionary definition in insurance context).

⁷ CP 168, CP 171 (Deborah Lee's claim file notes repeatedly refer to collapse coverage); CP 106 (Safeco's structural engineers concluded that the decayed wood posts cause a state of imminent collapse); CP 15 at ¶3 (Krista Sprague requested that Safeco consider the pre-2003 policies' coverage for collapse).

Forge Ins. Co., 98 Wn. App. 7, 990 P.2d 414 (1999), where the Court of Appeals cited to *McDonald v. State Farm* for the proposition that: “Ensuing loss provisions are exceptions to policy exclusions and thus should not be interpreted to create coverage.”⁸ But what the Courts held in *Capelouto* and in *McDonald* is that an ensuing loss clause does not automatically create coverage when the resulting loss itself is excluded by the policy, as it was in both cases.⁹ The Supreme Court in *McDonald* meant only that, as an exception to an exclusion, the ensuing loss clause is

⁸ 98 Wn. App. at 16, citing to *McDonald*, 119 Wn.2d at 734.

⁹ In *Capelouto*, an inadequate pump used in a sewer replacement project caused water and sewage to back up into the policyholder’s basement. 98 Wn. App. at 10. The policyholder argued, in part, that there should be coverage under the ensuing loss clause to the inadequate construction exclusion because sewage was a covered resulting loss. *Id.* at 16. Noting that the policy specifically excluded water that backs up from a sewer or drain, this Court concluded that this sewer back-up exclusion necessarily excluded sewage backing up through a sewer or drain. *Id.* at 17 - 18.

In *McDonald*, the policyholder sought coverage for a cracked foundation which resulted from a slide caused by an improperly designed and constructed fill area near the foundation. 119 Wn.2d at 729. The policy contained exclusions for losses caused by earth movement, foundation cracking, and faulty workmanship and materials. *Id.* at 728 at fn. 1, 2, and 3. The policyholder argued that the ensuing loss clause to the faulty construction exclusion created coverage. But because the result of faulty construction was earth movement and a cracked foundation, both excluded under the policy, the Supreme Court concluded that there was no coverage under the ensuing loss clause. “The trial court properly determined that the ‘ensuing losses’ of foundation cracking and earth movement were not covered perils.” *Id.* at 735.

not itself a coverage grant operating independently of the policy's exclusions.¹⁰

Similarly to *McDonald* and *Capelouto*, this Court in *Wright v. Safeco* denied coverage for mold under the ensuing loss clause to the construction defect exclusion, because the end result for which coverage was sought, mold, was also excluded by the policy. *Wright v. Safeco Ins. Co. of America*, 124 Wn. App. 263, 274-275, 109 P.3d 1 (2004). In so holding, this Court noted: "if an ensuing loss that is not specifically excluded occurred ... coverage would be available under the ensuing loss provision." *Id.* at 275, fn. 16. No Washington court has ever suggested that there can never be coverage under an ensuing loss clause.

¹⁰The following passage from *McDonald* illustrates this point:

Because the structure of an all-risk homeowners' insurance policy consists of a grant of coverage counterbalanced by coverage exclusions, an interpretation of provisions contained in such a policy must acknowledge this structure, which is an important objective source of meaning and intent. *Given the placement of the ensuing loss clause in a policy exclusion, it is difficult to reasonably interpret the ensuing loss clause contained in the defective construction and materials exclusion to be a grant of coverage.*

* * *

Reasonably interpreted, the ensuing loss clause says that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered.

Id. at 734 (emphasis added).

As mentioned above, everyone, including Safeco's experts and adjuster, considered the loss here to be one involving "collapse." Because collapse was the resulting loss from construction defects and rot, the remaining coverage question is whether collapse itself is covered or excluded by Safeco's policies before September 2003.

B. Collapse Is Covered Under the Pre-2003 Policies.

Safeco does not address head-on the fact that its policies before 2003 do not contain an exclusion for collapse. Nor does Safeco acknowledge the structure of its all-risk building coverage: a broad coverage grant covering all accidental losses except as limited by specific exclusions.¹¹ Instead, Safeco argues, somewhat cryptically:

The pre-2003 Safeco policies do not provide coverage for collapse. In 2003, a collapse endorsement was added to the Spragues' homeowner's policy. Without that endorsement, there is no exception to the exclusion for construction defects that would provide coverage for the Spragues' loss.

Respondent's Brief at 26. But Safeco's argument makes no sense. The 2003 endorsement creates no exception to the exclusion for construction defects, contrary to what Safeco suggests. In fact, the exception to the

¹¹ The broad coverage grant is the agreement to cover: "accidental direct physical loss to property described in Building Property We Cover except as limited or excluded." CP 51 and CP 74.

construction defect exclusion is the ensuing loss clause itself, as explained in Section A. above.¹²

The 2003 endorsement added for the very first time a general collapse exclusion to the all-risk building coverage.¹³ The 2003 endorsement's "additional coverage" for collapse – coupled with the general collapse exclusion – operates to *narrow* collapse coverage from what existed before September 2003.¹⁴ Safeco tries to dispose of the Spragues' four and a half pages of briefing by flatly calling the argument irrelevant,¹⁵ but the insurer offers no substantive response to the Spragues' analysis of the history of collapse coverage and the meaning of the 2003 endorsement.

In summary, Safeco's pre-2003 policies do not exclude collapse from the all-risk coverage. And the pre-2003 policies specifically recognize "collapse" as a type of covered peril in the personal property

¹² The construction defect exclusion ends with this exception: "However, any ensuing loss not excluded or excepted in this policy is covered." CP 52. (For policies between 1999 and 2003, *see* CP 76, where the policy provides: "However, any ensuing loss not excluded is covered.")

¹³ See Appellants' Opening Brief at pp. 7-8 (quoting the endorsement) and argument at pp. 18-22.

¹⁴ *Id.*

¹⁵ "That discussion [history of collapse coverage] is not relevant to the issues before this Court." Respondent's Brief at p. 26.

coverage.¹⁶ Consequently, collapse is covered by the all-risk building coverage.

C. This Court Should Reject the “Fall-Down” Interpretation of Collapse.

Near the end of its brief, Safeco finally acknowledges that its pre-2003 policies explicitly recognize “collapse” as a type of covered peril in the personal property coverage. But Safeco argues that the undefined term “collapse” in its policies must be interpreted to mean an actual falling-down to the ground collapse, and Safeco argues there is no coverage for imminent collapse or substantial impairment of structural integrity.

But federal courts, predicting how the Washington Supreme Court would rule on the issue, have already rejected the “fall-down” interpretation of collapse. See *Forest Lynn, 17 Assurance Company of America v. Wall & Associates, 18 Dally Properties, LLC v. Truck Ins.*

¹⁶ CP 54, CP 79.

¹⁷ *Allstate Ins. Co. v. Forest Lynn Homeowners Assoc.*, 892 F. Supp. 1310, 1315 (W.D. Wash. 1995), *publication withdrawn on settlement*, 914 F.Supp. 408 (W.D. Wash. 1996) (holding that undefined term “collapse” was ambiguous and would be interpreted to mean any substantial impairment of structural integrity.)

¹⁸ *Assurance Co. of America v. Wall & Associates LLC of Olympia*, 379 F.3d 557, 561 (9th Cir. 2004) (holding that implicit in the Supreme Court’s *Panorama* decision was the recognition that Washington law does not require actual collapse. Citing, *Panorama Village Condominium Owners Ass’n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001).

*Exch.*¹⁹ See also, *Mercer Place*.²⁰ According to the Ninth Circuit in *Wall & Associates*, the Washington Supreme Court impliedly rejected the fall-down interpretation of collapse in *Panorama Village*.²¹ These decisions all hold that the undefined term “collapse” in an insurance policy is ambiguous and will be interpreted to mean any substantial impairment of structural integrity or imminent collapse.

Moreover, a fall-down interpretation of collapse is unreasonable, as explained by the Court in *Forest Lynn*:

The court finds that the term “collapse” is ambiguous in the policy. If the court were to adopt Allstate’s reasoning that the building or parts of the building must actually “fall down” or “fall to pieces” before collapse will be found, insureds would have the incentive to allow the structure to progress to the point of falling down. For example, the policy covers collapse from hidden decay. Were the insured to discover the decay prior to the structure falling down, Allstate’s argument would lead to the conclusion

¹⁹ *Dally Properties, LLC v. Truck Ins. Exchange*, 2006 WL 1041985, 3 (W.D. Wash. 2006) (“The Court hereby concludes that the Washington Supreme Court would adopt the majority view of ‘substantial impairment of structural integrity’ as the definition of collapse in this policy.”).

²⁰ *Mercer Place Condo Ass’n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 604, 17 P.3d 626 (2000) (Favorably citing *Forest Lynn* and noting that “[a] growing majority of jurisdictions have assigned the more liberal standard, “substantial impairment of structural integrity,” to the use of “collapse” in insurance policies, as opposed to the minority view, which requires that the structure actually fall down.”)

²¹ *Wall & Associates*, 379 F.3d at 561, discussing *Panorama Village Condominium Owners Ass’n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001).

that there was no coverage until the structure fell, irrespective of whether repairs could have prevented the fall. This result defies common sense. As the court in *Beach v. Middlesex Mut. Assur. Co.*, 205 Conn. 246, 532 A.2d 1297 (1987), stated:

[r]equiring 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.

Id. at nt. 2, p. 1301 (Conn.1987).

The court finds persuasive the reasoning of the numerous courts which have interpreted the term “collapse” in property insurance policies. For example, in *Beach* the Supreme Court of Connecticut considered a provision with nearly the same language and considered the same argument that Allstate advances here about the standard definition of “collapse.” However, as that court noted, “Although ‘collapse’ encompasses a catastrophic breakdown ... it also includes a breakdown or loss of structural strength ...” *Id.* at 1299-1300. The *Beach* court also noted that “if the [insurer] wished to rely on a single facial meaning of the term ‘collapse’ as used in its policy, it had the opportunity expressly to define the term to provide for the limited usage it now claims to have intended.” *Id.* at 1300.

Forest Lynn, 892 F. Supp. at 1313. Here too, Safeco could have defined the term “collapse” in the Spragues’ pre-2003 policies had it wanted to.

Safeco urges that a fall-down interpretation for collapse is required due to the policies’ qualification that collapse does not include settling, cracking, shrinking, bulging or expansion.²² But that same argument has

²² Respondent’s Brief at p. 36.

been rejected by *Forest Lynn*²³ and most courts interpreting the same settling and cracking qualifying language.²⁴ Safeco's argument has been rejected because it is "virtually impossible to imagine" a collapse loss that does not involve some elements of settling, cracking, bulging or expansion.

[A]lthough [the insurer's] policy states that "[c]ollapse does not include settling, cracking, shrinking, bulging or expansion," it is virtually impossible to imagine a collapse (even defined as being reduced to a flattened form or rubble) that would not involve some of these attributes; thus, [the insurer's] use of the term "collapse" is "fairly susceptible" to being interpreted as not including *mere*

²³ *Forest Lynn*, 892 F.Supp. at 1313.

²⁴ See e.g. *American Concept Ins. Co. v. Jones*, 935 F.Supp. 1220, 1227 (D.Utah, 1996):

It appears that the clear modern trend is to hold that collapse coverage provisions similar to American's – that is **provisions which define collapse as not including cracking and settling** – provide coverage if there is substantial impairment of the structural integrity of the building or any part of a building. See, e.g., *Island Breakers v. Highlands Underwriters Ins. Co.*, 665 So.2d 1084, 1085-85 (Fla.Dist.Ct.App.1995) ...; *Thomasson v. Grain Dealers Mut. Ins. Co.*, 103 N.C.App. 475, 405 S.E.2d 808, 809 (1991) ...; *Royal Indem. Co. v. Grunberg*, 155 A.D.2d 187, 553 N.Y.S.2d 527, 528-29 (1990)...; *Beach v. Middlesex Mut. Assurance Co.*, 205 Conn. 246, 532 A.2d 1297, 1299-1300 (1987)...; *Ercolani v. Excelsior Ins. Co.*, 830 F.2d 31, 34 (3rd Cir.1987); ... *Nationwide Mut. Fire Ins. Co. v. Tomlin*, 181 Ga.App. 413, 352 S.E.2d 612, 615 (1986) ...; *Sherman v. Safeco Ins. Co.*, 716 P.2d 475, 476 (Colo.Ct.App.1986) ...; *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 483, 709 P.2d 649, 652 (1985) ...; *Government Employees Ins. Co. v. DeJames*, 256 Md. 717, 261 A.2d 747, 751-52 (1970)...

settling or cracking, but including settling or cracking that results in substantial impairment of a home's structural integrity.

American Concept Ins. Co. v. Jones, 935 F.Supp. 1220, 1227 (D.Utah, 1996) (emphasis original).

Safeco also asserts that a fall-down interpretation of collapse must be supplied by the Court, because “[p]ersonal property would not be damaged absent an actual falling down.”²⁵ But that is not true; one can conceive of any number of partial collapses – collapses not amounting to a flattening in rubble – that could damage personal property. If a structural support in a house gives way and results in a wall deflecting and dropping a foot or so, a number of personal property items – paintings, collectables, or furniture – could be physically damaged by the movement of walls or floors even though the house has not actually fallen down. Moreover, the Safeco policies here cover collapse of a building “or any part of a building,” suggesting that the house need not fall down to the ground.

Safeco concedes that courts construing Washington law have interpreted the undefined term “collapse” broadly but then Safeco attempts to distinguish those other collapse cases by arguing, without further elaboration or explanation, that the policies in those other cases contain

²⁵ Respondent's Brief at p. 36.

additional modifying terms.²⁶ But the policies in the aforementioned collapse cases are similar to Safeco's pre-2003 policies in one key respect: they all employed the undefined term "collapse." Faced with that undefined term, the federal courts have found that the term collapse is ambiguous and applying Washington law, have construed the term against the insurer and in favor of the policyholder.²⁷ While these decisions are not binding on this Court, they do provide persuasive authority. This Court should conclude that the undefined term "collapse" in Safeco's policies is ambiguous, and means any substantial impairment of structural integrity or imminent collapse.²⁸

D. Safeco's Remaining Arguments Lack Merit

Safeco's remaining minor arguments are also unavailing.

²⁶ Respondent's Brief at p. 37.

²⁷ *Forest Lynn*, 892 F. Supp. at 1313 (The Court finds that the term "collapse" is ambiguous in the policy.); *Dally Properties*, 2006 WL 1041985 at 3 ("The Court hereby concludes that the Washington Supreme Court would adopt the majority view of 'substantial impairment of structural integrity' as the definition of collapse in this policy."); *Wall & Associates* 379 F.3d at 561 (rejecting fall-down interpretation).

²⁸ Although policyholders have urged the more liberal "substantial impairment of structural integrity" standard and insurers have urged the more narrow "imminent collapse" standard, it is strictly unnecessary for this Court to decide which standard should be applied here because Safeco's engineers opined that the Spragues' deck piers met both standards.

1. Safeco's Other All-Risk Form

Safeco flatly denies the relevance of another all-risk policy form it wrote in the 1990s which contains a general collapse exclusion.²⁹ But our Supreme Court has stated that the existence of an insurer's other form containing an exclusion that could have been employed in the policy at issue is "highly significant."³⁰ By writing some all-risk policies that lack a general collapse exclusion while at the same time writing other all-risk policies that contain a general collapse exclusion, Safeco demonstrates an intention to either generally *cover* or generally *exclude* collapse.

Safeco also attempts to diminish the relevance of its other all-risk form by noting without further elaboration that the other form was in a "business" policy.³¹ But Safeco fails to cite a case that would support the proposition that Washington courts give differing interpretations to the language used in insurance policies depending on whether the policy is a business or homeowner policy.³² The fact remains that Safeco could have

²⁹ See CP 163 (exclusion k.) and argument in the Spragues' Opening Brief at p. 20-21.

³⁰ *Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 688, 871 P.2d 146 (1994).

³¹ Respondent's Brief at p. 27, fn. 82.

³² Where no authorities are cited in support of a proposition, the court may assume that counsel, after diligent search, has found none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

easily written a general collapse exclusion from its all-risk coverage had it wanted to.

2. Safeco's "No Washington Authority" Argument

Safeco declares that Washington's other collapse cases "involved policies that contained specific provisions covering collapse." But Safeco completely avoids discussion of what those "specific provisions" were in those other cases. All of Washington's other collapse cases involved policies that contain *a general collapse exclusion* from the all risk coverage, but then add back a limited additional coverage for collapse.³³ The distinguishing features of Safeco's pre-2003 policies are that they do not contain a general collapse exclusion while at the same time they specifically identify "collapse" as a type of covered peril.

Safeco urges that the other Washington collapse cases do "not resolve the issue of whether coverage for collapse should be read into a policy that does not specifically include collapse coverage."³⁴ But the issue is not whether collapse coverage should be "read into" the Safeco

Moreover, the Supreme Court has cited to cases involving homeowners coverage when interpreting commercial policies. *See e.g., American Nat. Fire Ins. Co. v. B & L Trucking and Const. Co., Inc.*, 134 Wn.2d 413, 951 P.2d 250 (1998) (discussing *Villella v. Public Employees Mut. Ins. Co.*, 106 Wn.2d 806, 725 P.2d 957 (1986)).

³³ See cases cited in Appellants' Opening Brief at p. 15, fn. 55.

³⁴ Respondent's Brief at p. 28.

policies. The issue is whether all-risk coverage that does not contain a general collapse exclusion covers collapse. Or, to adopt Safeco's phrasing, whether this Court will "read into" the pre-2003 policies a general collapse exclusion that Safeco chose not to write. Of course, it would violate every principle of Washington insurance law to "read into" a policy an exclusion that the insurer chose not to list in the exclusions.³⁵

Safeco's attempt to distinguish the *Forest Lynn* decision is also weak. Safeco seizes on one paragraph of the decision where the Court summarily dispenses with the Association's *non-collapse* claims for coverage under Coverage A, and Safeco argues:

The Coverage A language in the Allstate policy at issue in *Forest Lynn* is similar to the pre-2003 policy language at issue in this matter.³⁶

There are two problems with Safeco's argument. First, the Spragues are not asserting an undifferentiated claim for coverage under Coverage A. The Spragues are asserting coverage for collapse. Second, there is a

³⁵ "The industry knows how to protect itself and it knows how to write exclusions and conditions." *Boeing Co. v. Aetna Cas. and Sur. Co.*, 113 Wn.2d 869, 887, 784 P.2d 507 (1990). See also, *Panorama Village Condominium Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 137, 26 P.3d 910, 914 (2001) (It is elementary law, universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves.)

³⁶ Respondent's Brief at p. 29.

general collapse exclusion in the Coverage A in *Forest Lynn* while Safeco's Coverage A and B at issue here lacks a collapse exclusion.³⁷

3. Safeco's "Efficient Proximate Cause" Argument

Safeco's argument about the efficient proximate cause of the loss is hokum. The Spragues do not dispute that the efficient proximate cause of the loss here is design and construction defects. But the coverage analysis does not start and stop there, as Safeco suggests. Coverage here turns on the ensuing loss clause to the construction defect and rot exclusions, which is addressed extensively elsewhere in this brief and the Spragues' Opening Brief and will not be restated here. The issue in this case is not how the *cause of the loss* is characterized. The issue is how the *resulting loss* is properly characterized. And here everyone characterized the Spragues' loss as one involving collapse. Only Safeco's coverage lawyers are playing the characterization game.

4. Safeco's Recitation of Facts is Unavailing

Safeco's counterrecitation of "Facts" is an attempt to distract from the coverage issues and to suggest that the Spragues should have known about or prevented the deck pier collapse due to other problems in their

³⁷ Compare exclusion "m. Collapse" (generally excluding collapse except as provided in Allstate's additional coverage for collapse) in *Forest Lynn*, 892 F.Supp. at 1317, with Safeco's exclusions here, which do not generally exclude collapse. CP 51-52 and CP 74-76.

house, like a sewer back up in the basement or rot found in the original structure of the house. But none of Safeco's facts show that the Spragues were negligent in any way. And in any event, in first party property insurance, negligence is not a defense to coverage. See e.g., 10 Couch on Insurance § 148:66 (3d ed.); see also 7A J. Appleman, Insurance Law and Practice § 4492.03 n. 8, *quoted in, Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.*, 64 Wn. App. 838, 857, 827 P.2d 1024 (1992), *affirmed in material part*, 126 Wn.2d 50, 64-69, 882 P.2d 703, 891 P.2d 718 (1994).

III. CONCLUSION

Because Safeco's structural engineers concluded that the deck piers reached a state of imminent collapse and substantial structural impairment prior to 2003, the Spragues' claim turns on the legal question of whether the pre-2003 policies cover or exclude collapse. Safeco specifically recognized in these policies that "collapse" was a type of covered peril (like fire and explosion), and Safeco chose not to exclude collapse from the all-risk building coverage. The Spragues submit that the only reasonable interpretation of Safeco's policies before 2003 is that they cover collapse. Because collapse is a covered (non-excluded) ensuing loss, it remains covered when it results from construction defects or rot.

Safeco asserts that of course it would cover a fire caused by construction defects. But analytically under Safeco's policy, there is no

difference between the coverage analysis required for a fire, explosion, or collapse caused by construction defects.

Safeco denies that this case has implications beyond the coverage dispute between the two parties. However, there is a dearth of Washington authority where a court held the loss “remain[s] covered” because of the application of an ensuing loss clause. *McDonald*, 119 Wn.2d at 734. Without that authority, insurers like Safeco will continue to deny claims improperly by pointing to the construction defect exclusion and by repeating the mantra that Safeco has repeated in this case.

The Spragues respectfully request that this Court reverse the trial court and hold that the Safeco policies prior to 2003 cover collapse, award the Spragues’ their reasonable attorney’s fees on appeal, and remand this matter back to the trial court.

RESPECTFULLY SUBMITTED this 21st day of January, 2010.

FOSTER PEPPER PLLC

A handwritten signature in black ink, appearing to read 'JPZ', with a horizontal line extending to the right from the end of the signature.

John P. Zahner, WSBA No. 24505
Attorneys for Appellants
Max B. Sprague and Krista Sprague

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

MAX B. and KRISTA SPRAGUE,)
husband and wife, and Washington)
residents,) No. 63933-1-I
)
Appellants,) PROOF OF SERVICE
)
v.)
)
SAFECO INSURANCE)
COMPANY OF AMERICA, a)
Washington corporation and)
domestic insurer,)
)
Respondent.)
_____)

I, Colleen Hickman, declare that on January 21, 2010 I caused to be served in the manner noted copies of the following upon designated counsel:

1. Appellants' Reply Brief; and
2. This Declaration of Service.

M. Colleen Barrett
Barrett & Worden, P.S.
Fourth & Blanchard Building
2101 - 4th Avenue, Ste. 700
Seattle, WA 98121

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DATED this 21st day of January, 2010.



Colleen Hickman

PROOF OF SERVICE - 2