



When Loss Ensues: Washington State Supreme Court Issues Mixed Messages on Ensuing Loss Provisions in All-Risk Policies

Craig H. Bennion • 206.224.1243 • cbennion@cozen.com

All-risk property insurance policies generally provide coverage for any peril that causes property damage, except when the damage is caused by a risk specifically excluded in the policy. All-risk policies describe the scope of coverage by a list of exclusions. Because many loss events are not simple and may involve overlapping or related causes, some exclusions include a clause that preserves coverage for resulting loss, so long as the resulting loss is not otherwise excluded. These clauses are known as “ensuing loss” or “resulting loss” provisions. Thus, a policy may exclude any loss caused by faulty workmanship, unless loss ensuing from the faulty workmanship is caused by a covered peril, such as fire. The damage caused by fire would remain covered, although the faulty workmanship is excluded from coverage.

On May 17, 2012, the Washington State Supreme Court issued opinions in two property insurance coverage cases involving ensuing loss clauses. The two decisions illustrate the difficulties encountered by courts in dealing with these provisions.

Collapse as a Separate Peril: *Vision One, LLC v. Philadelphia Indemnity Ins. Co.*

Vision One, LLC, the owner of a condominium project under construction, purchased a builder’s risk insurance policy from Philadelphia Indemnity Insurance Company. The policy excluded losses caused by or resulting from deficient design or faulty workmanship, except “if loss or damage by a Covered Cause of Loss results, [Philadelphia] will pay for the loss or damage caused by that Covered Cause of Loss.” “Covered Cause of Loss” was defined as “Risks of Direct Physical ‘Loss’ to Covered Property unless the ‘loss’ is excluded.” The builder’s risk policy contained no exclusion for “collapse.”

A subcontractor installed shoring at the condominium building site that would temporarily support poured concrete floor slabs. After the shoring installation, concrete was poured for the first floor. The shoring gave way and framing, rebar, and newly poured concrete crashed down onto the lower level. It took weeks to clean up, repair the damage, and reconstruct the collapsed floor.

Vision submitted a claim to Philadelphia. Philadelphia’s experts determined that the collapse likely resulted from a “marginal shoring design” and “problems with the shoring installation.” Philadelphia denied the claim, relying on the policy exclusion for deficient design and faulty workmanship. While admitting in the denial letter that coverage would exist for any resulting loss caused by another non-excluded peril, the letter pointed out that the only peril in operation was defective design and faulty workmanship. Therefore, the damage was excluded from coverage. After Vision sued Philadelphia for breach of contract and bad faith, the trial court held that the collapse of wet concrete, rebar, and framing was “separate” from the faulty shoring, and therefore, the damage to the concrete, rebar and framing constituted covered resulting loss, collapse being a peril not excluded by the policy. On appeal, the Washington Court of Appeals reversed, finding that the ensuing loss clause required a secondary covered peril to trigger coverage for any resulting loss. The Court of Appeals found no secondary covered peril at work, and, therefore, reversed the trial court’s coverage determination.

In its May 17, 2012, decision, the Washington Supreme Court pointed out that the all-risk policy did not exclude the “peril of collapse.” It also decided that the policy affirmatively intended coverage for collapse, referring to an exclusion for losses caused by the perils of rain, snow, sleet, or ice, except for loss caused by collapse of a building or structure resulting

directly from the weight of snow, sleet, or ice. Concluding that Vision's coverage included loss "caused by collapse of the building," the court held that the collapse damage was a covered event, separate from the deficient design or faulty shoring from which the collapse ensued. The court agreed with the trial court's original coverage determination, and reversed the Court of Appeals.

Collapse Not a Separate Peril: *Sprague v. Safeco Insurance Company of America*

Max and Krista Sprague owned a home insured by Safeco. In 1996, they installed a multilevel deck system supported by structures known as "fin walls" that were encased in a foam and stucco coating. In 2008, it was determined that the fin walls were in an advanced state of decay due to inadequate flashing and other construction defects. Although the decks had not fallen down, engineers advised that collapse was imminent due to impairment of the system's structural integrity.

The Spragues presented a claim to Safeco for the deck repair. The policies excluded coverage for losses caused by mold, wet or dry rot, or defective design, construction or materials. The exclusions stated that "any ensuing loss not excluded is covered." The relevant policies did not exclude "collapse."

Safeco denied coverage and the Spragues sued. The trial court granted summary judgment to Safeco, finding no coverage for loss caused by construction defects and rot. The Washington State Supreme Court granted review.

The Supreme Court framed the issue before it in *Sprague* as whether the decay of the fin walls was a separate, ensuing loss covered by the policy despite the exclusions for rot and construction defects. The court determined that it was not. The court reasoned that in a wooden structure exposed to rot, the natural process of deterioration will inevitably result in eventual collapse. The court explained:

Advanced deterioration does not transmute the rotting process in some sort of alchemical fashion to a new and separate state of "collapse." A "collapse," whether consisting of a loss of structural integrity or a plunge to the earth, is the end result of the deterioration that constitutes "rot". It is not a new and different peril.

Because collapse was not a separate peril, the only perils in operation at the Spragues' deck were the perils of construction defects and rot, both of which were excluded. The ensuing loss provision did not apply because there was no ensuing loss caused by a separate peril.

Ensuing Loss: Separate or Apart?

The *Vision One* and *Sprague* decisions starkly illustrate the difficulty of applying the ensuing loss clause that frequently appears in all-risk insurance policy exclusions. The law is well-settled that, for purposes of the ensuing loss provision, an ensuing loss must be a separate operative force, distinct from the excluded peril from which it ensues. This is easy to understand where the perils are not necessarily related, such as where defective electrical wiring (excluded) results in damage by fire (covered). The court in *Sprague* correctly determined that collapse of a rotten structure is no different from the process of wood decay, the exact peril that the policy excluded. Because collapse cannot be separated from rot, the ensuing loss provision preserves no coverage; the entire loss, being rot, is excluded.

In *Vision One*, the court reached the opposite result. Whereas one might reasonably conclude that the improper installation of defective shoring that was supposed to support tons of concrete as it was being poured was the only operative force at play when the poured concrete came crashing down, that is not how the *Vision One* court saw it. In that case, the court decided that the collapse was an event separate from the faulty installation of shoring, not a natural and inevitable result of the defect. (It should be noted that the *Sprague* and *Vision One* decisions were authored by different justices of the Washington Supreme Court. In fact, the author of *Vision One* dissented in *Sprague*.)

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact Craig H. Bennion at 206.224.1243 or cbennion@cozen.com.

Atlanta • Charlotte • Cherry Hill • Chicago • Dallas • Denver • Harrisburg • Houston • London • Los Angeles • Miami
New York • Philadelphia • San Diego • Seattle • Toronto • Washington, D.C. • West Conshohocken • Wilkes-Barre • Wilmington