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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN ECONOMY INSURANCE COMPANY, Plaintiff-Appellee, v. CHL, LLC, Defendant-Appellant.	No. 16-35606 D.C. No. 2:15-cv-00899-RSM MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, Chief Judge, Presiding

Submitted May 7, 2018**
Seattle, Washington

Before: GOULD and IKUTA, Circuit Judges, and FREUDENTHAL,*** Chief District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Nancy Freudenthal, Chief United States District Judge for the District of Wyoming, sitting by designation.

CHL, LLC appeals the district court's order granting summary judgment in favor of American Economy Insurance Company (AEIC) on AEIC's claim for declaratory relief that it properly denied CHL's insurance claim and on CHL's counterclaims that AEIC's coverage decision was unreasonable. We have jurisdiction under 28 U.S.C. § 1291.

We reject CHL's argument that a building's "collapse" in the relevant policies includes all violations of the structural safety portions of the state building code, because the Washington Supreme Court has defined "collapse" in a materially identical insurance policy to require "an impairment so severe as to materially impair a building's ability to remain upright," *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 352 P.3d 790, 794 (Wash. 2015). Contrary to CHL's assertion, *Queen Anne*'s statement that this impairment must *also* be one that "renders all or part of a building unfit for its function or unsafe," does not alter the first requirement that the damage materially impair a building's (or part of a building's) ability to remain upright. *Id.*

Here, AEIC's engineer's report concluded that the damaged framing for which CHL sought coverage was interspersed with less decayed or non-decayed framing in a manner that allowed the framing as a whole to "support the weight and loads imposed on the buildings at these locations," and CHL produced no

evidence to the contrary. The district court therefore did not err in concluding that CHL failed to raise a genuine issue of material fact whether the damage "materially impair[ed] [all or part of the Masters Apartments'] ability to remain upright." *Id.* Nor was it unreasonable for the district court to consider the fact that the Masters Apartments had "remain[ed] upright" for 12 years and had remained in continuous use (i.e., had not been "render[ed] . . . unfit for its function or unsafe").[1] *Id.*

AFFIRMED.

[1] Because AEIC was reasonable in its denial of coverage, we also affirm the district court's grant of summary judgment to AEIC on CHL's counterclaims.

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No 'Collapse' Coverage For Apt. Complex, 9th Circ. Affirms

By **Jeff Sistrunk**

Law360 (May 9, 2018, 6:35 PM EDT) -- The Ninth Circuit on Wednesday refused to revive a Seattle apartment complex owner's bid to force its insurer to cover repair costs, saying a lower court properly applied Washington Supreme Court precedent in ruling that the building did not suffer a "collapse" as required for coverage.

In a brief decision, a panel of the federal appellate court said Chief U.S. District Judge Ricardo S. Martinez properly ruled in July 2016 that American Economy Insurance Co. had no obligation to cover CHL LLC's costs to fix damage to the Masters Apartments building in Seattle.

The district judge concluded that while parts of the structure suffered from decay during the relevant policy periods, the building was not in a state of collapse, which the Washington Supreme Court defined in the case of Queen Anne Park Homeowner's Association v. State Farm as "substantial impairment of structural integrity."

On appeal, CHL told the Ninth Circuit that its building had in fact suffered a collapse because, before repairs were made, it did not meet safety standards set forth in the applicable building code.

In Wednesday's unpublished opinion, though, the Ninth Circuit panel said CHL's arguments ignored a crucial part of the Queen Anne Park decision's collapse definition requiring that the damage to a structure be so severe that it impairs the building's "ability to remain upright." Here, the evidence shows that the framing of CHL's building was still capable of supporting weight prior to the repairs, the panel found.

"The district court therefore did not err in concluding that CHL failed to raise a genuine issue of material fact whether the damage 'materially impair[ed] [all or part of the Masters Apartments'] ability to remain upright,'" the panel wrote.

CHL carried six consecutive policies with American Economy from 1999 to 2005. The first three policies didn't define "collapse," but each policy from 2002 onward defined the term as an "actual falling down" of at least part of the apartment building.

In 2014, CHL had renovation work done on the Masters Apartments and discovered significant decay in several structural components. An engineer retained by American Economy found that the components had reached a point of "substantial structural impairment" sometime between 1999 and 2002, and concluded that a building inspector could potentially classify the apartment building as dangerous unless it was repaired.

But American Economy denied coverage for CHL's repair costs in May 2015 and filed a declaratory judgment action the following month, saying its expert had determined that CHL's damages were caused by faulty construction in 1988, outside of the earliest policy period. Likewise, to the extent any structural damage began between 1999 and

2001, that damage isn't covered because it didn't constitute an imminent threat of collapse, the insurer contended.

While American Economy's case against CHL was pending, the Washington Supreme Court took up the question of what constitutes a collapse in the context of property insurance in the Queen Anne Park case.

In June 2015, ruling on certified questions from the Ninth Circuit, the Washington high court largely agreed with a homeowners association that the term "collapse" refers to a substantial impairment of structural integrity and not the actual falling down of a structure. At the same time, the court emphasized that collapse means more than just settling, cracking or expansion.

Before the lower court, CHL pointed to the statements of American Economy's engineer as evidence that its apartment building was in a state of collapse beginning in 1999.

Judge Martinez disagreed in his July 2016 order, noting that the building remained standing without renovation until 2014. The district judge held that the use of the word "unsafe" in the Queen Anne Park decision was merely a "gloss on the first definition it had given for a building in a state of collapse: a building suffering from a 'severe impairment' of its 'ability to remain upright.'"

An attorney for CHL declined comment, while counsel for American Economy did not immediately respond to a request for comment.

Circuit Judges Ronald M. Gould and Sandra Segal Ikuta and Senior District Judge Nancy Freudenthal sat on the Ninth Circuit panel.

CHL is represented by Seth H. Row of Miller Nash Graham & Dunn LLP.

American Economy is represented by Michael McCormack of Bullivant Houser Bailey PC.

The case is American Economy Insurance Co. v. CHL LLC, case number 16-35606, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Aaron Pelc.