DOCKET NO. CV-16-6010979-S	: SUPERIOR COURT
JOSEPH DINARDO, ET AL	: JUDICIAL DISTRICT
VS.	: OF TOLLAND
PACIFIC INDEMNITY COMPANY, ET AL	: APRIL 30, 2019

MEMORANDUM OF DECISION

The plaintiff, Joseph Dinardo, has brought this action against four insurance companies that insured his home from April 1996 through the commencement of this action in July 2016, Pacific Indemnity Company ("Pacific"), Great Northern Insurance Company ("Great Northern"), The Standard Fire Insurance Company ("Standard") and Merrimack Mutual Fire Insurance Company ("Merrimack"). His claim arises out of the deteriorating condition of his basement walls caused by the presence of pyrrhotite in the aggregate material used in the concrete, which causes the oxidization of the material and expansion of the concrete, with resultant cracking and deterioration of the basement walls. The plaintiff alleges that this process is irreversible and will ultimately reduce the concrete to rubble with the result that the entire home will fall into the basement. The court has before it the defendant insurers' motions for summary judgment.

FACTS

The plaintiff's home in Manchester was built in 1984 and he has owned and occupied it from that time to the present. Shortly after moving into the home, the plaintiff noticed some small cracks on the exterior side of the basement walls and consulted with the builder about them. The builder assured him the cracks were not a matter of concern and applied some sealant to them. Thereafter, the plaintiff observed no issues with the basement walls. In the mid-to-late1990's, the plaintiff completely finished the basement such that the interior walls were

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concealed behind internal walls, with the exception of a utility closet, the furnace area and a storage room. Some portions of the basement walls are also visible on the exterior of the house.

In August 2015, a contractor making unrelated repairs at the plaintiff's home brought to the plaintiff's attention the presence of cracks in the exterior concrete. Upon further inspection, the plaintiff observed significant cracking in the basement walls. He consulted with some contractors, who advised him that the basement walls needed to be replaced. He notified his insurance agent, who recommended that he make a claim to his current insurer, Merrimack, as well as all the prior insurers of the home.

On November 10, 2015, the plaintiff's home was inspected by Dr. Leonard Morse-Fortier, an engineer retained by Standard. Dr. Morse-Fortier observed extensive cracking throughout the visible portions of the plaintiff's basement walls caused by the presence of an iron sulfide (pyrrhotite) in the aggregate material used in the concrete. The expansive reaction associated with the oxidation of the iron sulfide caused the concrete to crack and deteriorate. He commented that, having examined other homes affected by this condition, "the degree of cracking here is among the most extensive that we have examined." He reported that the process of deterioration would continue "so long as there is unreacted aggregate remaining, and wherever water and air can reach the reactive aggregate... [T]he foundation walls may eventually become unsafe." At the time of his inspection, however, "the walls continue[d] to support the house above and they continue[d] to retain the soil that surrounds the basement."

Between January 4, 2016 and April 28, 2016, each of the insurers denied the plaintiff's claim for coverage. On April 13, 2016 the property was inspected by David Grandpré, an engineer retained on behalf of the plaintiff. Mr. Grandpré confirmed much of what Dr. Morse-

Fortier found with respect to the condition of the plaintiff's home. In addition to the extensive cracking, he also identified areas where he saw bulging and bowing of the walls. He opined that the condition of the home when he inspected it was such that there was a substantial impairment of the structural integrity of the home. He further opined, based on his experience inspecting a large number of homes of different ages that are afflicted with this condition, that the progressive damage and deterioration of the concrete walls would have been visible at least ten years prior to his inspection. The damage would have been extensive enough that, in his opinion, the structural integrity of the home would have been substantially impaired as many as ten years prior to his inspection. Mr. Grandpré asserts that the deterioration of the concrete will continue and that the complete degradation and destruction of the basement walls is inevitable.

The periods during which the defendants provided coverage to the plaintiff are as follows: Pacific (April 1996 to April 2000); Great Northern (April 2000 to April 2003); Standard (May 2003 to May 2014); and Merrimack (May 2014 to the present). The provisions of the defendants' policies differ in material respects on some of the terms and conditions that are relevant to the plaintiff's claims for coverage.

Merrimack's policies covered the plaintiff's home at the time he actually discovered the damage to the basement walls in 2015. The plaintiff claims coverage under the Merrimack policies pursuant to the "Additional Coverage" for "Collapse." The collapse coverage provides as follows:

> **8. Collapse.** We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:

a. Perils Insured Against in COVERAGE C—PERSONAL PROPERTY. These perils apply to covered buildings and personal property for loss insured by this additional coverage:

b. Hidden decay;

c. Hidden insect or vermin damage;

d. Weight of contents, equipment, animals or people;

e. Weight of rain which collects on a roof; or

f. Use of defective material or methods in construction, remodeling or renovation;

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b., c., d., e., and f. unless the loss is a direct result of the collapse of a building.

Collapse does not include settling, cracking, shrinking, bulging or expansion.

. . . .

The plaintiff claims the damage to his basement walls constitutes a "collapse" under this language, whereas Merrimack maintains the damage is outside this coverage, which "does not include settling, cracking, shrinking, bulging or expansion." Merrimack also maintains that, applying a manifestation trigger of coverage theory, the loss did not occur during its policy periods based on Mr. Grandpré's opinion that, as many as ten years prior to his inspection, the damage was visible and sufficient to constitute a substantial impairment to the structural integrity of the home. Merrimack also argues that the plaintiffs are claiming a loss to a "foundation," which is excluded from the collapse coverage, and that the alleged loss is not fortuitous.[1]

[1] Merrimack also relies upon an exclusion for water damage, but the plaintiff only seeks coverage under the additional coverage for collapse and the water damage exclusion does not apply to the additional coverages. See *Sirois* v. *USAA Casualty Insurance Co.*, United States District Court, Docket No. 3:16-cv-1172 (MPS) (D. Conn. Dec. 15, 2017).

Standard's policies, which preceded the Merrimack policies and were in effect ten years prior to Mr. Grandpré's inspection, also provide additional coverage for collapse, but under different terms. The collapse coverage under Standard's policies provides:

> We insure for direct physical loss to covered property involving collapse of a building or any part of a building if such collapse was caused only by... (2) Decay that is hidden from view, unless the presence of such decay is known to an 'insured' prior to collapse;... or (6) Use of defective material or methods in construction, remodeling or renovation."

The policies include a definition of "collapse" with respect to this coverage.

> (1) Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its current intended purpose.
>
> (2) A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse.
>
> (3) A part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the building.
>
> (4) A building or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

The plaintiff maintains that the terms of Standard's collapse coverage are ambiguous and that questions of fact impacting some of those ambiguous terms preclude the entry of summary judgment in favor of Standard. Standard argues that the definition of "collapse" in its policies is clear and unambiguous as applied to the undisputed facts of the case and that it is entitled to summary judgment. Further, counter to the position taken by Middlesex that the plaintiff's loss triggers one of the Standard policies under a manifestation theory, Standard argues that, as a matter of law, the plaintiff's loss manifested in 2015 while the Middlesex policies were in effect and when the deteriorating concrete problem actually came to the plaintiff's attention, Alternatively, Standard argues that, even if the loss might have manifested during its policy

periods, the plaintiff's claim is nevertheless barred by the policies' suit limitation provision, which provides:

> **Suit Against Us.** No action can be brought against us unless there has been full compliance with all of the terms under Section I of this policy and the action is started within two years after the date of loss.

The last Standard policy expired on May 22, 2014 and the plaintiff commenced this action against Standard on July 13, 2016, more than two years after that policy expired.

Pacific and Great Northern issued policies to the plaintiff between April 1996 and April 2003 that do not include any additional coverage for collapse. Instead, any coverage for the plaintiff's loss under their policies must fall within the scope of the all-risk coverage provided by those policies. The policies provided the plaintiff with "coverage against all risk of physical loss to your house unless stated otherwise or an exclusion applies." Pacific and Great Northern assert that several exclusions apply to the plaintiff's loss. In particular, in support of their motion for summary judgment Pacific and Great Northern rely upon two exclusions:

> **Structural movement.** We do not cover any loss caused by the settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings... But we do insure ensuing covered loss unless another exclusion applies.
>
> **Faulty, inadequate, or defective planning, construction or maintenance.** We do not cover any loss caused by faulty, inadequate, or defective planning, construction or maintenance by you or any other person... But we do insure ensuing covered loss unless another exclusion applies. "Planning" includes zoning, placing, surveying, designing, compacting, setting specifications, developing property, and establishing building codes or construction standards. "Construction" includes material, workmanship, and parts or equipment used for construction or repair.

The plaintiff disputes the applicability of the structural movement exclusion and maintains there is coverage under the ensuing loss provisions of both exclusions. Pacific and Great Northern also argue, in any event, that the plaintiff's loss did not occur during their policy periods and,

even if it had, the plaintiff's suit would be barred by the suit limitation provisions in their policies, which require that suit be commenced "within one year after a loss occurs."

The plaintiff has asserted breach of contract claims against each of the defendants based upon their denials of coverage. He also seeks a declaratory judgment against Great Northern in the event that the denial of coverage received from Chubb Group of Insurance Companies was to be construed only as a denial on behalf of Pacific and not as a denial by Great Northern.[2] The defendants have moved for summary judgment on each of these counts on the grounds summarized above.

As to each defendant the plaintiff has also asserted a claim that their denial of coverage constitutes an unfair insurance practice under the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes §38a-815 et seq., because the defendants are engaged in a general business practice and a conspiracy orchestrated through the Insurance Services Office (ISO) to unreasonably refuse to provide coverage for claims involving crumbling concrete basement walls. These causes of action are asserted under the Connecticut Unfair Trade Practices Act, General Statues §42-110a, et seq. The defendants have moved for summary judgment on the CUTPA/CUIPA claims, arguing primarily that those claims are legally insufficient in the absence of a determination of coverage under the other counts. They also argue there is insufficient evidence of a general business practice to satisfy that element of a CUTPA/CUIPA claim based on unfair settlement practices, and also that there can be no CUTPA/CUIPA liability in this case because their liability for coverage was not reasonably clear when they denied coverage.

[2] Pacific and Great Northern are both members of the Chubb Group of Insurance Companies.

DISCUSSION

I. SUMMARY JUDGMENT STANDARDS

"[S]ummary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 820-21, 116 A.3d 1195 (2015). "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) Id., 821.

"To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015).

II. INSURANCE POLICY INTERPRETATION

An insurance contract is interpreted by the court according to "the same general rules that govern the construction of any written contract." (Internal quotation marks omitted.) *Johnson* v. *Connecticut Ins. Guaranty Assn.*, 302 Conn. 639, 643, 31 A.3d 1004 (2011). Thus, "[t]he determinative question is the intent of the parties, that is, what coverage the . . . insured expected to receive and what the insurer was to provide, as disclosed by the provisions of the policy." (Internal quotation marks omitted.) Id. If the policy's terms are "clear and unambiguous," then that language "must be accorded its natural and ordinary meaning." (Internal quotation marks omitted.) Id. If the terms of the insurance policy are "ambiguous," however, meaning "reasonably susceptible to more than one reading," then ambiguity "must be construed in favor of the insured because the insurance company drafted the policy." (Internal quotation marks omitted.) Id. "The court must conclude that the language should be construed in favor of the insured unless it has 'a high degree of certainty' that the policy language clearly and unambiguously excludes the claim." *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 796, 967 A.2d 1 (2009), citing *Kelly* v. *Figueiredo*, 223 Conn. 31, 37, 610 A.2d 1296 (1992). When interpreting an insurance policy, the court "must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Internal quotation marks omitted.) *National Grange Mutual Ins. Co.* v. *Santaniello*, 290 Conn. 81, 88–89, 961 A.2d 387 (2009).

"In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts

generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading." (Internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group,* 311 Conn. 29, 37-38, 84 A.3d 1167 (2014), quoting *Johnson* v. *Connecticut Ins. Guaranty Assn.*, supra, 302 Conn. 643. "[T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, supra, 290 Conn. 796. Nevertheless, "[c]ontext is often central to the way in which policy language is applied; the same language may be found both ambiguous and unambiguous as applied to different facts. . . . Language in an insurance contract, therefore, must be construed in the circumstances of a particular case, and cannot be found to be ambiguous or unambiguous in the abstract. . . . In sum, the same policy provision may shift between clarity and ambiguity with changes in the event at hand . . . and one court's determination that a term . . . was unambiguous, in the specific context of the case that was before it, is not dispositive of whether the term is clear in the context of a wholly different matter." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, supra, 41-42.

III. TRIGGER OF COVERAGE

Addressing the time a progressive loss occurs under first party property insurance, this court has previously held that a manifestation trigger of coverage theory applies such that the "loss" occurs at the time it is discovered by the insured or reasonably should have been discovered by the insured, whichever is earlier. *Dino* v. *Safeco Insurance Company of America*, Superior Court, judicial district of Tolland, Docket No. TTD-CV-16-6010428 (June 28, 2018) (66 Conn. L. Rptr. 652). Further, each loss triggers only one policy – the one in effect at the time of the loss. Id.; *Roy* v. *Covenant Insurance Company*, Superior Court, judicial district of

Tolland, Docket No. TTD-CV-16-6011084-S (2018 WL 2293048). As discussed at length in *Dino*, the application of a manifestation trigger of coverage theory is based upon both policy language and public policy considerations.

In this case the relevant policy language contained in the Standard and Merrimack policies is the same as that included in the policies at issue in *Dino*. Each policy covers only first party property losses that occur during the policy period.[3] Thus, for the reasons set forth in *Dino*, a manifestation trigger of coverage theory applies to those policies.

Standard and Merrimack each argue that the manifestation trigger implicates the other's policy period. Ordinarily the date of manifestation, when the loss was discovered by the insured or reasonably should have been discovered, is a question of fact. *Dino* v. *Safeco Insurance Company of America*, supra. While Merrimack appropriately references Mr. Grandpré's opinion that the damage would have been severe and visible as early as 2005, his opinion is not dispositive of this jury question. The plaintiff testified that he was unaware of the issue until it was pointed out to him in 2015. Whether he reasonably should have recognized the problem sooner is an issue for the jury. In the case of Standard, the evidence supporting the proposition that manifestation occurred during its policy periods, as highlighted by Merrimack, consists of the opinion offered by Mr. Grandpré that the damage was likely severe and visible as far back as 2005. Whether this should have led the plaintiff to discover it is a question for the jury, just as it is in the context of the claim against Merrimack. While Standard has questioned the admissibility of this opinion from Mr. Grandpré Standard has not directly sought to exclude the

[3] Merrimack's policies provide, "This policy applies only to loss under Section I, or bodily injury or property damage under Section II, which occurs during the policy period." (Italics in original.) Section I contains the first party coverage. The Standard policies include a substantially equivalent provision within Section I of the policy, which covers first party property losses: "This policy applies only to loss which occurs during the policy period."

opinion from consideration in the context of its motion for summary judgment. Consequently, summary judgment cannot be granted on this basis to either Merrimack or Standard.

The policies issued by Pacific and Great Northern differ from the Merrimack and Standard policies, and those at issue in *Dino*, with respect to the language that bears upon the trigger issue. Unlike these other policies, the Pacific and Great Northern policies explicitly link the word "occurrence" and the policies' definition of that term to the first party property coverage. The policies state that "*[a]ll coverages* on this policy apply only to occurrences that take place while this policy is in effect." (emphasis added) The policies define "occurrence" as "a *loss* or accident to which this insurance applies occurring within the policy period. *Continuous or repeated exposure to substantially the same general conditions unless excluded is considered to be one occurrence.*" (emphasis added) The emphasized language unravels much of the linguistic analysis underlying this court's determination in *Dino* that a manifestation trigger applies to progressive first party losses. See *Dino* v. *Safeco Insurance Company of America*, supra. The policies use the defined term "occurrence" and the undefined term "loss" interchangeably. The definition of "occurrence" in the policies suggests that a progressive loss causing damage over multiple policy periods may render applicable the coverages on any policy in effect while such damage was taking place. The same language employed by Pacific and Great Northern compelled one of the few courts that have applied a continuous trigger theory to progressive first party losses to do so. *Strauss* v. *Chubb Indemnity Insurance Company*, 771 F.3d 1026 (7th Cir. 2014). The use of the progressive loss language does not necessarily mean that more than one policy may be called upon to respond – an insured might simply have the option to choose which policy applies. But the court does not reach that question, or whether a manifestation trigger would apply for other reasons notwithstanding the policy language, because

it is unnecessary to do so in order to resolve the motions for summary judgment filed by Pacific and Great Northern.

IV. SUIT LIMITATION PROVISIONS

Standard, Pacific and Great Northern all argue that, even assuming their policies are triggered, the plaintiff's claim is barred by the suit limitation provisions in their policies recited above. The court agrees that the Standard suit limitation operates to bar the plaintiff's claim. Without a resolution of the trigger of coverage issue under the Pacific and Great Northern policies, however, the applicability of the suit limitation in those policies cannot be determined.

If, pursuant to a manifestation theory, the plaintiff discovered or should have discovered his loss while the Standard policies were in effect, then he also should have commenced this action within two years thereafter. *Soderburg* v. *Unitrin Preferred Insurance Company*, Superior Court, judicial district of Tolland, Docket No. TTD-CV-16-6010893-S (July 24, 2018) (66 Conn. L. Rptr. 734). There is no difference between the date of loss and the commencement of the suit limitation period under a manifestation trigger of coverage. *Roy* v. *Covenant Insurance Company*, Superior Court, judicial district of Tolland, Docket No. TTD-CV-16-6011084-S (April 27, 2018). The plaintiff did not commence suit until more than two years after the last Standard policy expired and, therefore, the two year suit limitation in the policies precludes the plaintiff's claim for coverage.

With respect to Pacific and Great Northern, the policies' use of the word "loss" to include ongoing, progressive damage, as it does in the definition of "occurrence," at least gives rise to an ambiguity as to how the term "loss" is to be construed in the context of the suit limitation provision, which requires the commencement of suit "within one year after a loss occurs." As discussed in *Dino*, the idea that an insured might be required to bring suit on a loss he or she is

reasonably unaware of presents an incongruity that undermines the practical and meaningful operation of an insurance policy. It raises a question, outside the context of the trigger of coverage issue, whether the actual or reasonable discovery of a loss is an implicit prerequisite to the initiation of a prescribed period of time within which an insured is required to commence suit seeking coverage for the loss under the policy. See *Parker* v. *Worcester Ins. Co.*, 247 F.3d 1 (2001); *Strauss* v. *Chubb Indemnity Insurance Company*, supra, 771 F.3d 1034-35. Again, the court does not reach this question because it resolves Pacific and Great Northern's motion for summary judgment on other grounds.

V. ADDITIONAL COVERAGE FOR COLLAPSE

As described above, both the Merrimack and Standard policies include additional coverage for collapse and the plaintiff seeks coverage under the collapse provisions of these policies. The court has previously construed the language employed in the collapse provisions of each of these insurers. In *Dino*, the court determined that "collapse" is an undefined term as used in Merrimack's policy and is consequently to be construed in accordance with the default definition of "collapse" adopted by the court in *Beach* v. *Middlesex Mutual Assurance Company*, 205 Conn. 246, 252, 532 A.2d 1297 (1987)("collapse" means "any substantial impairment of the structural integrity of a building.") Since the decision in *Dino*, the Connecticut Supreme Court has accepted certification from the United States District Court on whether the *Beach* definition applies to the policy language employed by Merrimack and, if so, how it is to be applied to the circumstances presented by the numerous cases involving deteriorating concrete in basement walls across northeast Connecticut. *Karas v. Liberty Insurance Corp.,* Connecticut Supreme Court, Docket No. S.C. 20149 and *Vera v. Liberty Mutual Ins. Co.,* Connecticut Supreme Court, Docket No. S.C. 20178. These cases, which have been fully briefed and argued before the court,

have led this court, since *Dino*, to defer consideration of the issues raised by Merrimack's collapse coverage until the Connecticut Supreme Court addresses them in *Karas* and *Vera*. The court will do the same in this case and deny Merrimack's motion for summary judgment, without prejudice, to the extent that it depends upon a ruling that the additional coverage for collapse is not applicable to the facts and circumstances of this case.[4] [5]

This court has also previously construed the policy language employed by Standard in its coverage for collapse. Although the proper interpretation and application of this language to the crumbling concrete phenomenon is also currently pending before the Connecticut Supreme Court, numerous courts including this one have come to the conclusion that claims such as that presented by the plaintiff in this case unambiguously fall outside the scope of the collapse coverage included in the Standard policies. *Perracchio* v. *Homesite Insurance Company*, Superior Court, judicial district of Tolland, Docket No. CV-16-6010324-S (March 6, 2018).[6] The collapse coverage is not applicable because the house has not fallen down or caved in "with the result that the building or part of the building cannot be occupied for its current intended

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[4] Merrimack also argues that the collapse coverage is inapplicable because the plaintiff claims a collapse of his "foundation." In *Dino*, this court found the term "foundation" ambiguous as applied in this context, but this issue is also before the Connecticut Supreme Court in *Karas* and the court defers consideration of the "foundation" issue as well.

[5] Merrimack also argues that the plaintiff's loss is not covered because it is not fortuitous. Its inevitability, as claimed by the plaintiff, precludes coverage according to Merrimack because insurance policies only apply to fortuitous events. See *City of Burlington* v. *Indemnity Insurance Co. of North America*, 332 F.3d 38 (2nd Cir. 2003). The fortuity doctrine, however, typically arises in the context of an "all-risk" policy and the Merrimack policy is not an all-risk policy. Id.; *Liston-Smith* v. *CSAA Fire & Casualty Insurance Co.*, United States District Court, Docket No. 3:16CV00510 (JCH) (D. Conn. Dec. 15, 2017); *Kowalyshyn* v. *Excelsior Insurance Co.*, United States District Court, Docket No. 3:16CV00148 (JCH) (D. Conn. Dec. 15, 2017). Moreover, "fortuity must be determined by standing in the shoes of the parties at the time the contract of insurance was made." *Yale University* v. *Cigna Insurance Co.*, 224 F. Supp. 2d 402, 414 (D. Conn. 2002), quoting *Standard Structural Steel Co.* v. *Bethlehem Steel Corp.*, 597 F.Supp. 164 (D. Conn. 1984). Under the circumstances of this case, that issue at least presents a question of fact, precluding summary judgment.

[6] See also *Jemiola* v. *Hartford Casualty Insurance Company*, Superior Court, judicial district of Tolland, Docket No. CV-15-6008837 (*Cobb, J.* March 2, 2017) (appeal pending); *Willenborg* v. *Unitrin Preferred Insurance Co.*, Superior Court, judicial district of Tolland, Docket No. CV-16-6010936-S (*Sicilian, J.* December 14, 2018).

purpose." The plaintiff has continued to occupy the house from the time he became aware of this problem in 2015 to the present. While the continued and complete degradation and destruction of the basement walls may eventually occur at some undetermined future date, as Mr. Grandpré suggests, under the definition of "collapse," a building in that condition "is not considered to be in a state of collapse." The building is still standing and the definition of "collapse" states a building that is still standing "is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion." Moreover, aside from the plaintiff's continued occupancy of the home, the coverage for collapse covers only "abrupt collapse." This court has previously held that the word "abrupt" as used in the defendants' policies and applied to these circumstances has a temporal meaning. *Fortin* v. *Insurance Company of the State of Pennsylvania*, Superior Court, judicial district of Tolland, Docket No. CV-17-6011987-S (April 19, 2018). It is undisputed that the deterioration taking place in the plaintiff's basement walls is a gradual, progressive process that will take many years before it might result in a complete falling down of the building. Whatever meaning one ascribes to "falling down or caving in" in this context, there is no evidence of an "abrupt" event. For these reasons, Standard is entitled to summary judgment on the basis that the collapse coverage is inapplicable to the undisputed facts of the case, in addition to the preclusive effect of the suit limitation provision.

VI. ALL-RISK COVERAGE

Unlike the Merrimack and Standard policies, the Pacific and Great Northern policies contain no additional coverage specifically addressed to collapse. Instead, they cover "all risk of physical loss to your house unless stated otherwise or an exclusion applies." Here Pacific and Great Northern rely upon an exclusion for "loss caused by... settling, cracking, shrinking,

bulging, or expansion" (the "structural movement" exclusion) and another exclusion precluding coverage for "loss caused by... defective planning [or] construction." The policies define "planning" to include "designing... [and] setting specifications" and define "construction" to include "materials." "[C]aused by" means "any loss that is contributed to, made worse by, or in any way results from that peril." The parties disagree over the proper interpretation of these exclusions and whether the "ensuing loss" exception contained in each of the exclusions is applicable.

Several courts have held that the two exclusions cited by Pacific and Great Northern, or very similar exclusions, preclude coverage for losses involving deteriorating concrete basement walls. *Willenborg* v. *Unitrin Preferred Insurance Co.*, Superior Court, judicial district of Tolland, Docket No. CV-16-6010936-S (*Sicilian, J.*, December 14, 2018) (67 Conn. L. Rptr. 551); *Musgrave* v. *State Farm Fire & Casualty Co.*, Superior Court, judicial district of Tolland, Docket No. CV-15-6009840-S (*Cobb, J.*, August 10, 2017); *Huschle* v. *Allstate Insurance Co.*, United States District Court, Docket No. 3:18-cv-00248 (JAM) (D. Conn. March 29, 2019); *Corteau* v. *Teachers Insurance Co.*, 338 F. Supp. 3d 88 (D. Conn 2018); *Kim* v. *State Farm Fire and Casualty Co.*, 262 F. Supp. 3d 1 (D. Conn. 2017), *aff'd* United States Court of Appeals, Docket No. 17-2304-cv (2nd Cir. 2018) (751 Fed. Appx. 127). These courts have concluded that losses due to deteriorating concrete basement walls are caused by cracking and defective construction materials, and there is no "ensuing loss" that would trigger an exception to the exclusions. The plaintiff seeks to distinguish these cases and avoid the application of these exclusions in several ways.

The plaintiff first notes a distinction between the language at issue in *Kim* and that employed by Pacific and Great Northern. Specifically the exclusions at issue in *Kim* apply to

loss that "consists of, or is directly and immediately caused" either by cracking or expansion or by defective materials used in construction. The Pacific and Great Northern policies do not include the "consist of" language. The plaintiff does not elaborate upon the significance of this distinction, but his argument suggests that the results reached in *Kim* and *Musgrave*, at least as to the structural movement exclusion, are properly understood to conclude that the loss "consisted of" cracking and expansion; whereas here the loss must be "caused by" cracking or expansion in order to apply the exclusion. That conclusion is not based upon anything either of those courts said.[7] Moreover, while the distinction drawn is plausible, it does not avoid the clear applicability of the structural movement exclusion as set forth in the policies of Pacific and Great Northern.

First, the "loss" is what must be caused by cracking or expansion of the concrete. In an insurance policy, "loss" is not synonymous with "damage." The term "combines the element of physical damage to the property with that of corresponding reduction in patrimony from the subjective standpoint of the insured... It is the financial detriment caused by damage that constitutes the loss..." (Internal quotation marks and citation omitted.) *Dino* v. *Safeco Insurance Company of America*, supra, citing *Mangerchine* v. *Reaves*, 63 So.3d 1049 (La. App. 2011). Here, understood in this context, the plaintiff's "loss" is caused by the cracking or expansion of the concrete. Moreover, even if one considers the loss as "consisting" of cracking, the plaintiff acknowledges that the cracking itself is caused by the expansion of the concrete and thus the exclusion applies.

Next the plaintiff argues that the structural movement exclusion only applies to losses caused by "normal, gradual re-adjustment of the building materials" in a house and the

[7] Other courts have found no significance to this distinction in the policy language. See *Willenborg* v. *Unitrin Preferred Insurance Co.*, supra; *Huschle* v. *Allstate Insurance Co.*, supra; *Corteau* v. *Teachers Insurance Co.*, supra 338 F. Supp. 3d 95-96.

deterioration of the concrete in the plaintiff's house is not normal. The language of the exclusion does not expressly include such a limitation and the plaintiff makes no attempt to suggest otherwise. He does, however, cite two cases in support of his position. *Winters* v. *Charter Oak Fire Insurance Co.*, 4 F.Supp.2d 1288 (1998); *West* v. *Umialik Insurance Co.*, 8 P.3d 1135 (Alaska 2000).

In *Winters*, a broken water line led to the saturation and shifting of the soil beneath a building, which eventually resulted in structural damage to the building. The defendant's policy excluded losses caused by "settling, cracking, shrinking or expansion." The court held that the exclusion for "settling" refers to "a gradual, natural process that every building endures." Id., 1295. Applying New Mexico law, the court held that "the New Mexico Supreme Court approves the 'normal wear and tear' approach..." Id., 1296. For this proposition, the court cited the placement of the exclusion under the heading "wear and tear" in the policy[8] and also relied upon *United Nuclear Corporation* v. *Allendale Mutual Insurance Co.*, 709 P.2d 649 (N.M. 1985). In *United Nuclear*, the court held that an earth movement exclusion applied only to naturally occurring phenomenon. In reaching that conclusion the court applied the doctrine of ejusdem generis, which limits the scope of a general reference when it is expressly associated with more specific terms.[9] Thus, where the policy excluded loss "caused by or resulting from flood,

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[8] In *West* v. *Umialik Insurance Co.*, supra, the "normal" settling interpretation was also adopted based upon the proximity of the exclusion to the exclusion for "wear and tear."

[9] "The principle of ejusdem generis applies when '(1) the [clause] contains an enumeration by specific words; (2) the members of the enumeration suggest a specific class; (3) the class is not exhausted by the enumeration; (4) a general reference [supplements] the enumeration ... and (5) there is [no] clearly manifested intent that the general term be given a broader meaning than the doctrine requires.' 2A J. Sutherland, Statutory Construction (5th Ed. Singer 1992) § 47.18. Thus, '[t]he doctrine of ejusdem generis calls for more than ... an abstract exercise in semantics and formal logic. It rests on particular insights about everyday language usage. When people list a number of particulars and add a general reference like 'and so forth' they mean to include by use of the general reference not everything else but only others of like kind. The problem is to determine what unmentioned particulars are sufficiently like those mentioned to be made subject to the [clause's] provisions by force of general reference.'" *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, 239 Conn. 284, 297, 685 A.2d 305 (1996).

earthquake, landslide, subsidence or any other earth movement," only "naturally occurring phenomenon" were considered within the scope of "earth movement." The principle of ejusdem generis does not apply to the language of the structural movement exclusion at issue in this case. Nor does the exclusion fall under the heading of "wear and tear" in the Pacific and Great Northern policies. The cases cited by the plaintiff, therefore, do not support the plaintiff's interpretation of the structural movement exclusion.

Even if the structural movement exclusion were limited to "normal" cracking and expansion, it is undisputed that it is the defective material used in the concrete that has caused the concrete to expand and crack and thus the exclusion for loss caused by defective construction materials applies. The plaintiff concedes this in his brief and, therefore, even if the structural movement exclusion does not apply, the plaintiff must prevail on his other argument that the ensuing loss exception to these exclusions does apply.

Connecticut law on the proper interpretation and application of an ensuing loss exception is in a somewhat nebulous state. The most recent appellate authority on the subject follows prior appellate authority employing an efficient cause analysis, while pointedly suggesting there may be critical flaws in that analysis. *New London County Mutual Insurance Co.* v. *Zachem*, 145 Conn. App. 160, 169-73, 74 A.3d 525 (2013), following *Sansone v. Nationwide Mutual Fire Ins. Co.*, 62 Conn. App. 526, 771 A.2d 243 (2001). Under an efficient cause analysis, a loss with multiple causes qualifies as an ensuing loss when the efficient, or proximate, cause of the loss is a covered peril.

> In the determination whether a loss is within an exception in a policy, where there is a concurrence of two causes, the efficient cause-the one that sets the other in motion-is the cause to which the loss is to be attributed, though the other cause may follow it and operate more immediately in producing the disaster... What is meant by proximate cause is not that which is last in time or place, not merely that