IN THE
SUPREME COURT OF PENNSYLVANIA

No. 270 MAP 2003

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401 FOURTH STREET, INC.,

Plaintiff/Appellee,

v.

INVESTORS INSURANCE GROUP,

Defendant/Appellant.

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF/APPELLEE, 401 FOURTH STREET, INC.

Appeal from the Order of the Superior Court of Pennsylvania,
Dated April 22, 2003, at No. 2197 EDA 2001,
which Reversed the Order of the Court of Common Pleas of Montgomery County,
Civil Division, Entered July 12, 2001, at No. 97-18887

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumer rights. The organization is tax-exempt under Internal Revenue Code §501(c)(3). United Policyholders is funded by donations and grants from individuals, businesses, and foundations.

In addition to serving as a resource on insurance claims for disaster victims and commercial policyholders, United Policyholders actively monitors legal and marketplace developments affecting the interests of all policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

A diverse range of policyholders throughout the United States communicate on a regular basis with United Policyholders, which allows us to provide important and topical information to courts throughout the country via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public.

United Policyholders' *amicus* brief was cited in the United States Supreme Court's opinion in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999), and our arguments were adopted by the California Supreme Court in Vandenberg v. Superior Court, 984 P.2d 299 (Cal. 1999). United Policyholders has filed *amicus* briefs on behalf of policyholders in over one hundred cases throughout the United States.

II. COUNTER-STATEMENT OF QUESTIONS INVOLVED

Whether Pennsylvania will join the majority of states to construe "collapse" coverage as including coverage for any substantial impairment of the structural integrity of the insured property, including imminent collapse?

III. SUMMARY OF ARGUMENT

This case can be decided and affirmed on the narrow holding of the Superior Court, which distinguishes the language of the insurance policy purchased by 401 Fourth Street from other policy language at issue in prior Pennsylvania Supreme Court and Superior Court cases involving collapse. Indeed, the policy language at issue insures not only collapse, but "risks of direct physical loss involving collapse." Clearly, in this case, there was a risk of direct physical loss involving collapse.

This case also presents, however, an opportunity to clarify Pennsylvania law regarding collapse coverage generally. United Policyholders urges this Court to adopt the majority and modern view of collapse coverage, which defines collapse to include any substantial impairment of the structural integrity of the insured property, including imminent collapse. Strong public policies support ensuring that Pennsylvania policyholders receive no less coverage than their counterparts in other states.

IV. LEGAL ARGUMENT

A. The Majority And Modern View Of Collapse Coverage Supports Finding Coverage For Collapse Whenever There Is A Substantial Impairment Of The Structural Integrity Of Any Part Of The Insured Property.

The majority of states, following the modern trend, have held that "collapse" should be interpreted to include any substantial impairment of the structural integrity of a building or any part of a building. See Fantis Foods, Inc. v. North River Ins. Co., 753 A.2d 176, 182 (N.J. Super. App. Div.), certif. denied, 762 A.2d 658 (N.J. 2000) (citing cases). As explained by one court,

> When considering both the traditional and modern views as to whether a "collapse" of a building has occurred, we think the modern view is compelling and should be adopted here. Although nine jurisdictions have followed the traditional definition – which

> none have adopted since 1970 – at least fifteen jurisdictions have adopted the broader rule. *See* Annotation, *What Constitutes "Collapse" Of a Building Within Coverage of Property Insurance Policy*, 71 A.L.R.3d 1072 § 3 (1976 & Supp. 2002). Moreover, seven of those jurisdictions have adopted this view since 1995 and the most recent adoption of the modern definition occurred in 2002. *Id.* § 4. As one case noted, "the clear modern trend is to hold that collapse coverage 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. *American Concept*, 935 F. Supp. at 1227.

Monroe Guar. Ins. Co. v. Magwerks Corp., 796 N.E.2d 326, 333 (Ind. App. 2003). In 1970, the DeJames decision from the high court in Maryland found the word collapse to be susceptible of differing definitions and interpretations, ushering in the modern era of construing collapse coverage broadly in favor of the policyholder. Government Employees Ins. Co. v. DeJames, 261 A.2d 747 (Md. 1970).

This Court has not considered collapse coverage since 1964. Since that time, numerous states have clearly adopted the majority and modern view, including, among others, Alaska,[1] Colorado,[2] Connecticut,[3] Delaware,[4] Florida,[5] Georgia,[6] Iowa,[7] Illinois,[8] Indiana,[9]

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[1] Whispering Creek Condominium Owner Ass'n v. Alaska Nat'l Ins. Co., 774 P.2d 176 (Alaska 1989) (addressing imminent collapse).

[2] Sherman v. Safeco Ins. Co. of Am., Inc., 716 P.2d 475 (Colo. Ct. App. 1986).

[3] Beach v. Middlesex Mut. Assurance Co., 532 A.2d 1297 (Conn. 1987).

[4] Weiner v. Selective Way Ins. Co., 793 A.2d 434 (Del. Super. Ct. 2002).

[5] Island Breakers v. Highlands Underwriters Ins. Co., 665 So.2d 1084, 1085-86 (Fla. Dist. Ct. App. 1995).

[6] Nationwide Mut. Fire Ins. Co. v. Tomlin, 352 S.E.2d 612, 615 (Ga. Ct. App. 1986) (collapse is "deemed as having occurred when there is a reasonably detectable serious impairment of structural integrity"); see also Lipsitz v. Fireman's Fund Ins. Co. of Ga., 358 S.E.2d 624 (Ga. Ct. App. 1987) (applying the rule established in Tomlin).

[7] Rogers v. Maryland Cas. Co., 109 N.W.2d 435 (Iowa 1961).

[8] Indiana Ins. Co. v. Liaskos, 697 N.E.2d 398, 404-05 (Ill. App. Ct. 1998).

[9] Monroe Guar. Ins. Co. v. Magwerks Corp., 796 N.E.2d 326, 333 (Ind. Ct. App. 2003).

Maryland,[10] New Mexico,[11] New Jersey,[12] New York,[13] North Carolina,[14] Rhode Island,[15] South Carolina,[16] and Tennessee.[17] See generally Annotation, What Constitutes "Collapse" of a Building Within Coverage of Property Insurance Policy, 71 A.L.R.3d 1072, § 4 (1976). Other states adhered historically to the minority view.[18] Many states that had followed the antiquated

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10 Government Employees Ins. Co. v. DeJames, 261 A.2d 747 (Md. 1970).

11 United Nuclear Corp. v. Allendale Mut. Ins. Co., 709 P.2d 649, 652 (N.M. 1985); Morton v. Great American Ins. Co., 419 P.2d 239, 242 (N.M. 1966).

12 Fantis Foods, Inc. v. North River Ins. Co., 753 A.2d 176 (N.J. Super. App. Div.), certif. denied, 762 A.2d 658 (N.J. 2000); see also, Ercolani v. Excelsior Ins. Co., 830 F.2d 31, 34 (3d Cir. 1987) (broadly interpreting collapse to extend to "a serious impairment of structural integrity," finding coverage for a foundation wall that had cracked and bulged inward).

13 Royal Indem. Co. v. Grunberg, 553 N.Y.S.2d 527 (App. Div. 3d Dep't 1990).

14 Erie Ins. Exchange v. Bledsoe, 540 S.E.2d 57, 61 (N.C. Ct. App. 2000) (citing other North Carolina cases finding the term "collapse" to be ambiguous and construing the ambiguity against insurance companies), review denied, 547 S.E. 2d 442 (N.C. 2001). The Court in Bledsoe found collapse coverage when settling that was so severe that it suddenly and materially impaired the structure or integrity of the building. Id. See also Thomasson v. Grain Dealers Mut. Ins. Co., 405 S.E.2d 808 (N.C. Ct. App. 1991) (finding that judicial disagreement over the meaning of collapse showed that the term was ambiguous).

15 Campbell v. Norfolk & Dedham Mut. Fire Ins. Co., 682 A.2d 933 (R.I. 1996).

16 Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner Ins. Co., 565 S.E.2d 306 (S.C. 2002) (addressing imminent collapse).

17 Rankin v. Generali-U.S. Branch, 986 S.W.2d 237, 239 (Tenn. Ct. App. 1998).

18 See Central Mutual Ins. Co. v. Royal, 113 So.2d 680 (Ala. 1959); Higgins v. Connecticut Fire Ins. Co., 430 P.2d 479 (Colo. 1967) (finding only "small cracks" in the walls); Williams v. State Farm Fire & Cas. Co., 514 S.W.2d 856 (Mo. Ct. App. 1974); Gage v. Union Mut. Fire Ins. Co., 169 A.2d 29 (Vt. 1961).

restrictive interpretation, however, have reversed direction.[19] Federal courts have regularly adopted the majority rule in predicting state law.[20]

Even if the results of the state-by-state survey were not so lopsided in favor of the majority view, the disagreement itself indicates that the term "collapse" is ambiguous. The "divergence of judicial authority" on the meaning of insurance policy language evidences the ambiguity of such language:

> [I]t is clear that if we adopted such an approach, and chose one line of case decisions as opposed to the other, we would be engaged in a procedure yielding a result contrary to the prevailing Pennsylvania precedent noted earlier concerning the manner in which insurance contracts must be construed in our Commonwealth. The mere fact that several appellate courts have ruled in favor of a construction denying coverage, and several others have reached directly contrary conclusions, viewing almost identical policy provisions, itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation . . . . The very existence of two contrary schools of thought . . . is convincing in the conclusion that the clause in issue is ambiguous as to whether coverage is to be afforded under the fact situation presented. Such ambiguity, by itself, requires that we resolve the issue in favor of . . . the insured driver.

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[19] See Fidelity & Cas. Co. of NY v. Mitchell, 503 So.2d 870, 871 (Ala. Civ. App. 1987) (distinguishing Royal and finding that when the floor fell eight inches toward the middle of the house, there was "a sufficient and actual collapse of some parts of the house, thereby destroying the structural integrity of the building"); Indiana Ins. Co. v. Liaskos, 697 N.E.2d 398, 403 (Ill. App. Ct. 1998) (rejecting prior Illinois precedent in favor of "the newer majority view which finds the term 'collapse' is 'sufficiently ambiguous to include coverage for any substantial impairment of the structural integrity of a building.'"); Rankin v. Generali-U.S. Branch, 986 S.W.2d 237, 239 (Tenn. Ct. App. 1998) (adopting modern view and rejecting Tennessee precedent from a decade earlier in light of "the compelling policy reasons underlying the majority view").

[20] See John Akridge Co. v. Travelers Cos., 876 F. Supp. 1 (D.D.C. 1995) (predicting District of Columbia law and adopting the majority rule); Allstate Ins. Co. v. Forest Lynn Homeowners Ass'n, 892 F. Supp. 1310 (W.D. Wash. 1995) (predicting Washington law and adopting majority rule), withdrawn from publication by different judge, 914 F. Supp. 408 (W.D. Wash. 1996); Egan v. American & Foreign Ins. Co., Civ. A. No. 95-4193, 1995 WL 734105 (E.D. Pa. Dec. 5, 1995) (finding "collapse" to be ambiguous, distinguishing Kattelman and Skelly); Battisto v. Employers Mut. Cas. Co., Civ. A. No. 84-5591, 1986 WL 13542 (E.D. Pa. Dec. 1, 1986) (finding coverage under Pennsylvania law for imminent collapse).

Cohen v. Erie Indem. Co., 298 Pa. Super. 445, 451-52, 432 A.2d 596, 599 (1981); see also Thomasson v. Grain Dealers Mut. Ins. Co., 405 S.E.2d 808, 810 (N.C. Ct. App. 1991) ("We think that the fact that courts in various jurisdictions have not agreed on what constitutes a collapse is some evidence that the term is ambiguous.").

Indeed, reference to divergent court authority to evidence ambiguity is based squarely on a fundamental tenet of insurance policy interpretation: "A provision of a contract of insurance is ambiguous if reasonably intelligent persons, considering it in the context of the whole policy, would differ regarding its meaning." Musisko v. Equitable Life Assur. Soc'y, 344 Pa. Super. 101, 106, 496 A.2d 28, 31 (1985); see also DiFabio v. Centaur Ins. Co., 366 Pa. Super. 590, 594, 531 A.2d 1141, 1143 (1987) (same); Celley v. Mutual Benefit Health and Acc. Ass'n, 229 Pa. Super. 475, 481-82, 324 A.2d 430, 434 (1974) (policy provision is ambiguous, "if reasonably intelligent men . . . would honestly differ as to its meaning"). State and federal judges are, to say the least, reasonably intelligent persons.[21] When a court interprets an insurance policy by choosing one line of cases over another, or by reference to its own subjective understanding, it effectively ignores the objective proof of ambiguity present when reasonably intelligent persons disagree. Ambiguous insurance policy language must be construed against insurance companies and in favor of coverage. Bateman v. Motorists Mut. Ins. Co., 527 Pa. 241, 244, 590 A.2d 281, 283 (1991); Erie Ins. Exchange v. Transamerica Ins. Co., 516 Pa. 574, 578, 533 A.2d 1363, 1366-67 (1987).

[21] "[O]ne cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance." Charles C. Marvel, "Division of Opinion Among Judges on Same Court or Among Courts of Other Jurisdictions Considering Same Question, As Evidence That Particular Clause of Insurance Policy Is Ambiguous", 4 A.L.R. 4th 1253 (1995).

Courts finding collapse coverage to be ambiguous, and adopting the majority view, have taken varying approaches. Maryland, in DeJames, turned to the dictionary and found alternative meanings. Other states, identified below, have determined that the insurance company could have included an unambiguous restrictive definition of collapse, but chose not to do so. The district court in Utah identified numerous rationales, including the common sense notion that requiring a policyholder to wait for a falling down, when the structural integrity of the building had been compromised, would be economically unsound and against public policy. See American Concept Ins. Co. v. Jones, 935 F. Supp. 1220, 1228 (D. Utah 1996). Whatever the rationale, the vast majority of courts over the past 35 years have found the term "collapse" to be ambiguous and have interpreted it to include any serious impairment of structural stability. This Court should follow this well established precedent and protect the rights of Pennsylvania policyholders to receive the same scope of coverage that policyholders in other states are routinely afforded.

B. If Insurance Companies Desire A Restrictive Definition of Collapse, They Must Include A Restrictive Definition In Their Insurance Policies.

The Superior Court in this action rightly stated that "it is not the trial court's responsibility to rewrite the policy to protect the insurer." 401 Fourth Street, Inc. v. Investors Ins. Group, 823 A.2d 177, 179 (Pa. Super. Ct. 2003). If Investors Insurance Group "wanted to limit its risk to actual and complete collapse to the ground, it could easily have done so." Id. Insurance companies have long been aware of the uncertainty in the construction of the word "collapse" – and of the majority interpretation of that term. A national article in 1996, for example, opens by stating that the law with respect to what constitutes a collapse "has been sharply divided for many years." Stephen J. Paris & Cynthia R. Koehler, Traditional Meaning of

Collapse Is Undetermined: Insurers Should Heed the Trend Among Courts to Adopt a Broad Definition in Coverage Disputes, Nat'l L.J., Aug. 26, 1996.

Some insurance companies have included a restrictive definition of collapse within their insurance policies, in an effort to resolve the ambiguity. See Rosen v. State Farm Gen. Ins. Co., 70 P.3d 351 (Cal. 2003) (insurance policy defined "collapse" as "actually fallen down or fallen into pieces"). Other insurance companies, like the insurance company defendant here, have chosen not to include a restrictive definition of collapse. An article drafted by attorneys who represent insurance companies noted that a standard-form insurance policy, which included a restrictive definition of collapse, was available for use by insurance companies. Allan R. Miller, et al., What Constitutes a Collapse Under a Property Insurance Policy, Brief, Winter 2000.[22] The article quotes an Insurance Services Office standard-form policy defining collapse as "an abrupt falling down or caving in of a building or any part of any building with the result that the building cannot be occupied for its intended purpose." Id. at * 24-25. As part of its definition, the standard-form provision provides numerous examples of what is not a collapse. Id. at * 24-25. This Court should not give Investors Insurance Group the benefit of insurance policy language that it chose not to include in its insurance policy.

Insurance companies have been warned by courts for decades that, if they want a restrictive definition of collapse, they should include a restrictive definition in their insurance policies. Travelers Fire Ins. Co. v. Whaley, 272 F.2d 288, 290 (10th Cir. 1959) ("If the [insurance company] intended that the word 'collapse' should be ascribed the abstract dictionary definition it now contends for, it should have so stated."); American Concept Ins. Co. v. Jones, 935 F. Supp. 1220, 1227 (D. Utah 1996) ("although American argues that collapse should be

[22] This article is available on the Westlaw service under the citation "29-WTR Brief 20."

defined as being reduced to a flattened form or rubble, American did not include this definition in its policy even though it certainly could have done so"); Beach v. Middlesex Mut. Assur. Co., 532 A.2d 1297, 1300 (Conn. 1987) ("If the [insurance company] 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 claims to have intended."); Auto Owners Ins. Co. v. Allen, 362 So.2d 176, 177 (Fla. Dist. Ct. App. 1978) ("If [the insurance company] had intended to limit its liability as it argues, it would have been a simple matter to include in the policy a restriction of coverage to a flattened form or rubble."). Investors Insurance Group did not heed this persistent judicial warning.

Although courts will undoubtedly be called upon to determine whether the standard-form restrictive definition violates public policy or undermines the reasonable expectations of policyholders, it is certainly clear that insurance companies should not be permitted to obtain the benefit of the standard-form language if they do not include it in their insurance policies. The purpose of insurance is to insure. Unless a limitation in the insurance policy clearly applies, the insurance policy should be permitted to achieve its purpose.

C. Pennsylvania Precedent Does Not Compel This Court To Adhere To The Antiquated Minority Rule.

Two Pennsylvania Supreme Court cases are often cited in collapse cases: Kattleman v. National Union Fire Ins. Co. of Pittsburgh, Pa., 415 Pa. 61, 202 A.2d 66 (1964) and Skelly v. Fidelity & Cas. Co. of N.Y., 313 Pa. 202, 169 A.78 (1933). The Third Circuit and the Superior Court have interpreted this Court's aged precedents as ascribing to the discredited, narrow, anti-policyholder interpretation of "collapse" coverage. See Meritcare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999); Dominick v. Statesman Ins. Co., 692 A.2d 188

(Pa. Super. Ct. 1997), alloc. denied, 555 Pa. 701, 723 A.2d 671 (1998). In truth, this Court has never considered whether to adopt the majority view, given the advancements in policy forms and the growing body of precedent in other states. Indeed, the Superior Court in Dominick did not identify or address the doctrinal developments since 1970. Given the changes in the law and insurance policy forms that have occurred since this Court last addressed collapse coverage in 1964, Pennsylvania should not adhere to the minority rule.

1. This Court's Decisions In Kattelman and Skelly Relied Upon One Dictionary Definition of "Collapse" When There Are Numerous Definitions of That Term.

This Commonwealth's collapse jurisprudence is built upon a shaky foundation – a dictionary definition from early in the last century and discredited precedent from other jurisdictions. There is no discussion of the meaning of the term "collapse" in Kattelman other than the citation of the dictionary definitions of "collapse" quoted in the Skelly decision in 1933. See Kattelman, 415 Pa. at 64, 202 A.2d at 67. As will be shown below, the dictionary definitions quoted in Skelly are not the only definitions of term "collapse." Accordingly, Kattelman and Skelly are based upon a false premise.

In addition to citing the dictionary definitions quoted in Skelly, the Court in Kattelman cited, without discussion, three cases decided in the 1950's under the now-minority view of collapse coverage. See Central Mut. Ins. Co. v. Royal, 113 So.2d 680 (Ala. 1959); Rubenstein v. Fireman's Fund Ins. Co., 90 N.E.2d 289 (Ill. App. Ct. 1950); Nugent v. General Ins. Co. of Am., 253 F.2d 800 (8th Cir. 1958). Two of those three decisions have been limited or overruled. See Indiana Ins. Co. v. Liaskos, 697 N.E.2d 398, 403-05 (Ill. App. Ct. 1998) (adopting majority view in Illinois, explicitly rejecting Rubenstein); Fidelity & Cas. Co. of NY v. Mitchell, 503 So.2d 870, 871 (Ala. Civ. App. 1987) (distinguishing Royal, finding that when the

floor fell eight inches toward the middle of the house, there was "a sufficient and actual collapse of some parts of the house, thereby destroying the structural integrity of the building"). The third case, Nugent, is of questionable precedential value. In Nugent, the Eighth Circuit simply gave deference to the trial judge's prediction of a "doubtful question" of Missouri law.[23] Accordingly, the Kattelman decision is not well founded in logic or precedent.

Similarly, the Skelly case is not a model of modern jurisprudence on collapse coverage in property insurance policies. It should be limited to its peculiar facts, Skelly was a life insurance case, not a property insurance case. Double indemnity was provided if the bodily injury sustained was "in consequence of the collapse of the outer walls of a building while the assured is therein." Skelly v. Fidelity & Cas. Co. of N.Y., 313 Pa. 202, 203, 169 A. 78 (1933). A runaway coal car broke through the wall of a small three-story brick addition to a large three-story hotel building. Id. In finding no collapse, the Court cited "Words and Phrases," which in turn cited the Webster's and Century Dictionary. Id. at 204-05, 169 A. at 79. Likewise, in Dominick, the Superior Court cited the dictionary definitions quoted in Skelly, and cited Webster's Ninth New Collegiate Dictionary.

Accordingly, this Court's antiquated jurisprudence regarding collapse is based upon the dictionary and distinguishable and discredited precedent, not upon any analysis of the substantial precedent over the past several decades that has addressed the collapse issue, or upon the public policies underlying property insurance, or upon the reasonable expectations of policyholders who purchase coverage for collapse. Many years ago, Judge Learned Hand

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[23] The Nugent case has been cited only twice since 1972. See Heintz v. United States Fid. & Guar. Co., 730 S.W.2d 268 (Mo. Ct. App. 1987); Campbell v. Norfolk & Dedham Mut. Fire Ins. Co., K.C. No. 93-428, 1995 WL 941409 (R.I. Super. Mar. 6, 1995). One of those two cases was reversed and remanded. See Campbell v. Norfolk & Dedham Mut. Fire Ins. Co., 682 A.2d 933 (R.I. 1996).

warned that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff'd, 326, U.S. 404 (1945). Relying solely upon a particular dictionary definition is often misleading because different dictionaries often have different definitions. More importantly in the insurance context, if the insurance company chooses not to include a definition in its policy, it should not be permitted to adopt a particular dictionary definition as if it were included in the insurance policy. There is no more telling example of the injustice that can result from the slavish adherence to a dictionary than the Pennsylvania precedent regarding "collapse."

Even the dictionary cannot support a restrictive view of collapse coverage. Six years after Kattelman, the Court of Appeals of Maryland delved more deeply into the dictionary definition, including the historical uses and development of the word "collapse." DeJames, 261 A.2d at 722. The court noted that there are numerous dictionary definitions of "collapse" and that the definition of the noun "collapse" is actually quite broad and includes a breakdown of strength. Id. Given the ambiguity presented by the alternative dictionary definitions, the court adopted what was then the minority view, ruling that "the ambiguity is resolved in favor of the insured by holding that any serious impairment of structural integrity is a collapse within the policy coverage." Id. at 724. Similarly, the Connecticut Supreme Court noted that while the dictionary supports a narrow reading of collapse that encompasses a catastrophic breakdown, "it also includes a breakdown or loss of structural strength." Beach, 532 A.2d at 1299-1300.

Other courts in this Commonwealth have condemned insurance company efforts to employ overly restrictive definitions of collapse, and have recognized the broad definition of the noun "collapse." See Aluminum Co. of Am. v. Kemper Int'l Ins. Co., 27 Pa. D. & C. 3d 398, 400-01 (C.P. Allegh. Cty. 1981) (rejecting insurance companies' insistence on a "special

meaning" for the undefined term "collapse" noting that it is "both a noun and a verb, and in each of its roles has a variety of applications."), aff'd, 520 Pa. 150, 465 A.2d 634 (1983). There are numerous definitions of "collapse" not only in the dictionary, but also in the vernacular of those who are expert in the insurance industry. See Zielinski v. Penn Mutual Ins. Co., 23 Phila. Co. Rptr. 26, 31 (C.P. Phila. Cty. 1991) (citing expert testimony defining collapse in numerous ways).

Accordingly, when not otherwise defined in the insurance policy, collapse should be interpreted to mean "any serious impairment of structural integrity," including but not limited to "imminent collapse." See e.g. Nationwide Mut. Fire Ins. Co. v. Tomlin, 352 S.E.2d 612, 615 (Ga. Ct. App. 1987) ("[I]n this state, when 'collapse' is not otherwise defined in an insurance policy, it shall be deemed as having occurred when there is a reasonably detectable serious impairment of structural integrity."). This definition accords with the majority view across the nation, and even with the dictionary. Surely, insurance companies read court decisions as often as they read the dictionary. Insurance companies are well aware of the broad definition of collapse, which has been in common use at least since the DeJames decision in 1970.

D. The Policyholder's "Reasonable Expectations" Of Coverage Are The Focal Point Of Insurance Policy Interpretation.

In any event, the dictionary is not the polestar of insurance policy interpretation in Pennsylvania. Rather, a policyholder's "reasonable expectations" of coverage is the "focal point" of insurance policy interpretation under Pennsylvania law.[24] The reasonable expectations

[24] Tonkovic v. State Farm Mut. Auto. Ins. Co., 513 Pa. 445, 456-57, 521 A.2d 920, 926 (1987); Collister v. Nationwide Life Ins. Co., 479 Pa. 579, 593-94, 388 A.2d 1346, 1353 (1978), cert. denied, 439 U.S. 1089 (1979); see also, O'Brien Energy Sys., Inc. v. American Employers Ins. Co., 427 Pa. Super. 456, 461-62, 629 A.2d 957, 960 (1993), alloc. denied, 537 Pa. 633, 642 A.2d 487 (1994); Dibble v. Security of Am. Life Ins. Co., 404 Pa. Super. 205, 211, 590 A.2d 352, 354-55 (1991); J.H. France Refractories Co. v. Allstate Ins. Co., 396 Pa. Super. 185, 194-95, 578 A.2d 468, 472-73 (1990), aff'd in

doctrine has been called the "touchstone of any inquiry into an insurance policy."[25] Policyholders reasonably expect insurance coverage when the insured property suffers any serious impairment of structural integrity.

Professor, now Judge, Robert Keeton drafted the seminal work on the reasonable expectations doctrine more than thirty years ago.[26] Professor Keeton defined and advocated the doctrine as follows: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[27] The doctrine protects "the policyholder's expectations as long as they are objectively reasonable from the layman's point of view, in spite of the fact that he had made a painstaking study of the contract, he would have understood the limitation that defeats the expectations at issue."[28] Insurance companies may not apply exclusions to coverage that are contrary to the expectations of the policyholder unless the insurance company calls the exclusion to the attention of the policyholder at the time of sale:

> An important corollary of the expectations principle is that insurers ought not to be allowed to use qualifications and exceptions from coverage that are inconsistent with the reasonable expectations of a policyholder having an ordinary degree of familiarity with the type of coverage involved. This ought not to be allowed even though the insurer's form is very explicit and unambiguous, because insurers know that ordinary policyholders will not in fact read their policies. Policy forms are long and complicated and cannot be fully understood without detailed study;

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part, rev'd in part on other grounds, 534 Pa. 29, 626 A.2d 502 (1993); Winters v. Erie Ins. Group, 367 Pa. Super. 253, 257-58, 532 A.2d 885, 887 (1987); State Auto. Ins. Ass'n v. Anderson, 365 Pa. Super. 85, 89-95, 528 A.2d 1374, 1377-79 (1987).

25 Bensalem Twp. v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1309 (3d Cir. 1994).

26 See Robert E. Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961 (1970).

27 Id. at 967.

28 Id.

> few policyholders ever read their policies as carefully as would be required for moderately detailed understanding. Moreover, the normal processes for marketing most kinds of insurance do not ordinarily place the detailed policy terms in the hands of the policyholder until the contract has already been made. . . . Thus, not only should a policyholder's reasonable expectations be honored in the face of difficult and technical language, but those expectations should prevail as well when the language of an unusual provision is clearly understandable, unless the insurer can show that the policyholder's failure to read such language was unreasonable.
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> It is important to note, however, that the principle of honoring reasonable expectations does not deny the insurer the opportunity to make an explicit qualification effective by calling it to the attention of a policyholder at the time of contracting, thereby negating surprise to him.[29]

This Court has adopted the "reasonable expectations" doctrine and has explained it in the following way:

> The reasonable expectation of the insured is the focal point of the insurance transaction involved here. E.g. Beckham v. Travelers Insurance Co., 424 Pa. 107, 117-18, 225 A.2d 532, 537 (1967). Courts should be concerned with assuring that the insurance purchasing public's reasonable expectations are fulfilled. Thus, regardless of the ambiguity, or lack thereof, inherent in a given set of insurance documents (whether they be applications, conditional receipts, riders, policies, or whatever), the public has a right to expect that they will receive something of comparable value in return for the premium paid. Courts should also keep alert to the fact that the expectations of the insured are in large measure created by the insurance industry itself. Through the use of lengthy, complex, and cumbersomely written applications, conditional receipts, riders, and policies, to name just a few, the insurance industry forces the insurance consumer to rely upon the oral representations of the insurance agent. Such representations may or may not accurately reflect the contents of the written document and therefore the insurer is often in a position to reap the benefit of the insured's lack of understanding of the transaction.
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[29] Id. at 968 (emphasis added).

> Courts must examine the dynamics of the insurance transaction to ascertain what are the reasonable expectations of the consumer. See, e.g., Rempel v. Nationwide Ins. Co., 471 Pa. 404, 370 A.2d 366 (1977). Courts must also keep in mind the obvious advantages gained by the insurer when the premium is paid at the time of application. An insurer should not be permitted to enjoy such benefits without giving comparable benefit in return to the insured.[30]

Even the most clearly written exclusion will not foreclose coverage in circumstances in which the policyholder has a reasonable expectation of coverage.[31] As one Pennsylvania federal court has expressed the reasonable expectations principle adopted by this Court, "where unambiguous terms do not support the reasonable expectations of the insured, that expectation prevails over the language of the policy."[32] The Court of Appeals for the Third Circuit has repeatedly expressed this maxim of insurance law:

> "[T]he insurer is bound not only by the expectations that it creates, but also by any other reasonable expectations of the insured. The insured's reasonable expectations control, even if they are contrary to the explicit terms of the policy."[33]

As described by an en banc panel of the Superior Court, the "reasonable expectations" doctrine springs from the law's recognition that a contract, such as an insurance policy, inevitably fails to evince a true "meeting of the minds" as to all possible factual contexts which could arise:

> [T]here is an implicit recognition in law that even the most carefully drafted document and extensively bargained contract will

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30 Tonkovic, 513 Pa. at 456-57, 521 A.2d at 926 (quoting Collister, 479 Pa. at 594-95, 388 A.2d at 1353-54) (emphasis added).

31 See Bensalem Twp. v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1309, 1311 (3d Cir. 1994) (applying Pennsylvania law); see also Tonkovic, 513 Pa. at 456-57, 521 A.2d at 926 (citing Collister, 388 A.2d at 1353-54).

32 Island Assocs., Inc. v. Erie Group, Inc., 894 F. Supp. 200, 203 (W.D. Pa. 1995) (citing Bensalem Twp., 38 F.3d at 1311).

33 Medical Protective Co. v. Watkins, 198 F.3d 100, 106 (3d Cir. 1999) (quoting, West American Ins. Co. v. Park, 933 F.2d 1236, 1239 (3d Cir. 1991) (citing State Farm Mut. Auto. Ins. Co. v. Williams, 481 Pa. 130, 392 A.2d 281, 286-87 (1978))).

> not provide a true proverbial "meeting of the minds" as to all possible, or even likely, scenarios of application. In such cases, contract law requires that the reasonable expectation of the parties be, in essence, imputed as the intent of the parties and, perhaps as important, acquiesced to by the parties to the contract.[34]

As further explained by the Superior Court, an examination of the policyholder's "reasonable expectations" of coverage "should clearly incorporate an understanding of the general relationship between the parties, the purpose behind their entering a contractual relationship and the relative position of each."[35]

Importantly, examination of a policyholder's "reasonable expectations" of coverage is not predicated upon an initial finding of ambiguity in the policy language. As noted above, this Court has directed that an examination of the policyholder's "reasonable expectations" of coverage must be undertaken, "regardless of ambiguity, or lack thereof, inherent in a given set of insurance documents."[36]

An insurance policy must always be interpreted in light of the nature of the policyholder's business and the insurance purchased to protect that business:

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34 J.H. France, 396 Pa. Super. at 194, 578 A.2d at 472.

35 Id. at 195, 578 A.2d at 473. As such, the "reasonable expectation" doctrine is really an application of a long-established rule governing the interpretation of contracts in general: "[I]n construing a contract we seek to ascertain what the parties intended and, in so doing, we consider the circumstances, the situation of the parties, the objects they have in mind and the nature of the subject matter of the contract." United Refining Co. v. Jenkins, 410 Pa. 126, 138, 189 A.2d 574, 580 (1963); see also, In re Estate of Herr, 400 Pa. 90, 93, 161 A.2d 32, 34 (1960) ("The Court in interpreting a will or contract can always consider the surrounding circumstances in order to ascertain the intention and the meaning of the parties.").

36 Tonkovic, 513 Pa. at 456, 521 A.2d at 926 (quoting Collister, 479 Pa. at 595, 388 A.2d at 1353-54); see also Dibble, 404 Pa. Super. at 210-11, 590 A.2d at 354 (holding that the court must examine "the totality of the insurance transaction involved to ascertain the reasonable expectations of the insured.").

> We believe that any manufacturer who is operating with liability coverage has a reasonable expectation that any liability, reasonably encompassed within the policy, which is tied to that manufacturing and distributing process will be covered. After all, that is the primary reason the policy was purchased in the first place.[37]

Given the substantial precedent nationwide regarding collapse coverage, and the widespread understanding that the foremost purpose of property insurance is to protect against catastrophic loss to property, Pennsylvania policyholders would reasonably expect coverage for any serious impairment of the structural integrity of the insured property.

E. Insurance Companies Owe A Special Public Duty of Utmost Good Faith To Achieve The Public Good.

In determining the scope of collapse coverage, this Court should be mindful of the important role insurance plays in our Commonwealth and nation. Insurance companies hold a special place in the efficient operation of our society. The special public nature of insurance invests insurance companies with a unique position of trust with respect to their policyholders, as recognized by courts and commentators. For example, the California Supreme Court has stated that:

> The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary.

Egan v. Mutual of Omaha Ins. Co., 620 P.2d 141, 146 (Cal. 1979), cert. denied, 445 U.S. 912 (1980) (citations omitted); see also, Abramson v. Kenwood Labs., Inc., 223 N.Y.S.2d 1005, 1007

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[37] J.H. France Refractories Co. v. Allstate Insurance Co., 396 Pa. Super. 185, 200-01, 578 A.2d 468, 476 (1990), aff'd in part, rev'd in part on other grounds, 534 Pa. 29, 626 A.2d 502 (1993).

(Super. Ct. 1961) (insurance companies are "duty bound to be cognizant of the public interest"), rev'd on other grounds, 230 N.Y.S.2d 247 (App. Div. 2d Dep't 1962).

Roscoe Pound has stated the following about the public interest nature of insurance:

> [W]e have taken the law of insurance practically out of the category of contract, and we have listed that the duties of public service companies are not contractual, as the nineteenth century sought to make them but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public.

Roscoe Pound, The Spirit of Common Law 29 (1929).[38]

Pennsylvania has long recognized the public interest nature of insurance and the deep responsibility insurance companies owe to their policyholders. Since at least 1930, the courts of the Commonwealth of Pennsylvania have held that "utmost fair dealing should characterize the transactions between an insurance company and the insured." Fedas v. Insurance Co. of State of Pa., 300 Pa. 555, 559, 151 A. 285, 286 (1930). Insurance companies owe their policyholders a duty of good faith and fair dealing. Birth Center v. St. Paul Cos., 567 Pa. 386, 400, 787 A.2d 376, 385 (2001).[39]

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[38] Other prominent commentators have noted the important role of insurance for the public:

> With respect to the rule of liberal construction, the courts have kept in mind that the primary purpose of insurance is to insure or to provide for indemnity, and have so construed insurance contracts as not to defeat the dominant purpose by technical rules of interpretation.

13 Appleman § 7403, at 302-03 (1976) (footnote omitted) (emphasis added). See also James J. Markham, The Claims Environment, at 277 (1993) ("Insurance is a matter of public interest and deserves special attention by the courts to protect the public.").

[39] An insurance company is duty bound to conduct itself in accordance with the highest standards of good faith towards the policyholder.

> Insurance policies are contracts of the utmost good faith and must be administered and performed as such by the insurer. . . . [T]here is an

Whenever there are doubts about the scope of coverage of an insurance policy, it is critical that those doubts be resolved in favor of the policyholder, who relies on insurance to provide a saftey net when loss occurs. While exclusions and exceptions sometimes cut wholes in that saftey net, exclusions and exceptions are interpreted narrowly, while the scope of coverage is interpreted broadly, to ensure that policyholders are protected to the fullest extent possible. This encourages the spreading of risk and ensures that the reasonable expectations of policyholders are fulfilled.

V. CONCLUSION

For all of the foregoing reasons, the Superior Court should be affirmed.

Respectfully submitted,

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> implied covenant of good faith and fair dealing [in all insurance contracts] that the insurer will not do anything to injure the right of its policyholder to receive the benefits of his contract.

2A Couch § 23:11, at 785, citing Bowler v. Fidelity & Casualty Co., 53 N.J. 313, 250 A.2d 580, 587-88 (1969); see also 2A Couch at 787 ("[t]here is, . . . even after a loss, a relationship of trust and confidence between insurer and insured . . .").