

Collapse Caused By Dry Rot Renders Homeowners Policy Exclusion Inapplicable

By Christopher W. Olmsted, Insurance Defense & Litigation Attorney

Are there any circumstances where a loss caused by dry rot would not fall under the exclusion for dry rot in a standard homeowners policy? Yes, according to Second District of the California Court of Appeal in its recent opinion, *Jordan v. Allstate*.

The plaintiff homeowner, Jordan, owned a home in Santa Monica that sustained damage caused by a water conducting fungus known as *Meruliporia Incrassata* (Poria). Because of the fungus, a window had fallen out of the wall of Jordan's living room and the floorboards in the corner of that room were "giving way."

Jordan had an "all-risk" homeowner's policy from Allstate. The policy contained the standard exclusion for a loss caused by "mold" or "wet or dry rot." The policy also excluded coverage for a loss to "caused by collapse." However, an exception to this "collapse" exclusion found in the "additional coverage" section. That section provided that the policy would cover: "a) the entire collapse of a covered building structure; b) the entire collapse of a part of a covered building structure; and c) direct physical loss to covered property caused by (a) or (b) above." Further, as pertinent to Jordan, the collapse had to be caused by "hidden decay of the building structure."

Allstate denied coverage, primarily on the ground that coverage was precluded under the dry rot exclusion. Jordan contended that the loss was covered under the additional coverage for collapse caused by "hidden decay." Jordan filed suit. The trial court granted Allstate's motion for summary judgment, finding that the dry rot exclusion applied.

The court of appeal reversed. The court first examined the policy language regarding the "wet or dry rot" exclusion. The court determined that a layperson's interpretation of the exclusionary phrase would include the damage caused by the Poria fungus in Jordan's home. This is what the trial court concluded; however, the appellate court determined that the trial court had stopped its analysis short.

The appellate court noted that there was evidence that the damage in Jordan's home caused by wet or dry rot was found in wood members in the concealed area of the wall. Accordingly, it appeared that this constituted "hidden decay." The court wrote: "Thus, the use of the term 'dry rot' in the exclusion and the use of the term 'hidden decay,' in the provision for 'additional coverage' lead to a confusing contradiction. Such contradiction creates an ambiguity with respect to coverage involving a claim of collapse."

The court considered two solutions: (1) it could conclude that a collapse due to "hidden decay" would be covered, but not if such decay was caused by "wet or dry rot"; or, (2) it could conclude that coverage for a collapse due to "hidden decay" was provided, but non-collapse damage caused by "wet or dry rot" was excluded.

The court chose the second option, which favored the insured. It applied the rule that ambiguities in insurance policies must be resolved by looking to the objectively reasonable expectations of the insured. The court determined that the dry rot exclusion will preclude coverage for damaged caused by fungus, unless the dry rot is "hidden decay" that causes a collapse.

The court went on to examine the meaning of "collapse." The court cited a California appellate case decided last year, *Rosen v. State Farm General Ins. Co.*, [deck in danger of imminent collapse not a covered loss] and noted that a mere "imminent" collapse would not support Jordan's claim; there must be an actual, complete collapse. Looking to the record, the court determined that it was not clear whether the damage constituted a "collapse," and accordingly the case was remanded to the trial court for further proceedings.

This case is significant in that it has opened a loophole for the wet or dry rot exclusion. However, the new exception will be limited to circumstances where the wet or dry rot (1) is "hidden decay" and (2) causes collapse. Moreover, last year's *Rosen* case will further serve to limit the new exception with a narrow definition of "collapse." Arguably, the court's ruling leaves room for more exceptions. "Hidden decay" may include more than just dry rot; for example, rust, mold or corrosion may fall within the exception.



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Summary:

Mr. Olmsted is an attorney practicing in the areas of employment litigation and compliance, business litigation, insurance defense, and insurance bad faith. His experience in insurance defense includes automobile, commercial, and homeowners claims, and encompasses personal injury, property damage, mold claims, and wrongful death matters. He has litigated bad faith cases including homeowners, mold, automobile, and disability insurance claims. Additionally, he has represented clients in the areas of business and commercial litigation, asbestos litigation, construction collection and construction defects.

Mr. Olmsted's employment litigation experience includes: FEHA claims regarding race, gender, age, religion, national origin, sexual orientation, disability, pregnancy and sexual harassment; California CFRA and federal FMLA; federal ADA and ADEA; False Claim and whistleblowing actions; public policy violations; ERISA; Labor Board and Unemployment Insurance claims. He has represented clients in state and federal jury

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Mr. Olmsted is a member of: San Diego Risk and Insurance Management Society, Association of Business Trial Lawyers, California Bark Employment Law Section and San Diego County Bar Association Insurance Section.

Reported Cases:

- Wittkopf v. County of Los Angeles, 90 Cal.App. 4th 1205; Colmenares v. Braemar Country Club, 89 Cal.App. 4th 778.

Seminars presented include:

- Speaker on "The Nuts & Bolts of Prevailing Wage Law" for the Engineering General Contractor's Society, San Diego, December 2, 2003.
- Speaker regarding California Leaves of Absences, Lorman Educational Services Seminar, San Diego, CA, October 15, 2003.
- Speaker on "How to Litigate Your First Civil Trial in California," National Business Institute, San Diego, CA, 2003.
- Firm-sponsored seminar on Employment Law: Avoiding Liability in the Hiring Process, San Diego, CA, March 27, 2003.
- Speaker regarding Employment Issues for the Construction Trade, Lorman Educational Services Seminar, San Diego, CA July 20, 2002.

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