SPECIAL REPORT

COLLAPSE COVERAGE:
WHAT ARE YOU REALLY GETTING?

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I recently read a report in *Michigan Lawyer's Weekly* about a collapse claim. The attorney for the plaintiff commented that collapse coverage is so restrictive that "…you really don't get what you are paying for."

I also worry about the collapse coverage, or lack thereof. When I am "on the fence" in placing coverage with Carrier A or B, the deal breaker to me is the collapse coverage exclusion, especially when you have large buildings with flat roofs or unique roof designs which could collapse. The collapse exclusion keeps me up at night more than any other exclusion because the ISO exclusion is so complex, and these losses can be enormous. Only a careful study of the exclusion will tell you what you do and do not have.

THE COLLAPSE EXCLUSION

The ISO form handles this as a coverage/exclusion. It excludes collapse as a peril, and then it includes collapse as a specific additional coverage with many limitations and gaps – in particular roof collapse caused by design error.

In examining the collapse exclusion/additional coverage, we must first take a look at the preamble to the exclusion section in the ISO form. The introduction to the exclusion section is as follows:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Now let's examine two specific exclusions that relate to collapse. The first specific ***exclusion*** is in 2.d.(4). (This language is from ISO form CP 10 30 06.07)

Exclusion 2.d.(4)
Settling, cracking, shrinking, or expansion…but if an excluded cause of loss…results in a "specified cause of loss" we will pay for the loss or damage caused by that "specified cause of loss"…("Specified cause of loss" is defined as fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice, or sleet; water damage.)

Translation: If a settling, cracking, shrinking, or expansion results in a "specified cause of loss," such as a fire, the insurance carrier will pay for the loss or damage caused by the "specified cause of loss." (Because the settling, cracking, shrinking, or expansion cannot result in lightning, windstorm, hail, aircraft or vehicles, riot or civil commotion, or vandalism, the pertinent "specified causes of loss" that could result from a roof collapse would be fire, smoke, leakage from sprinkler systems, or water damage.)

2.k. Collapse, including any of the following conditions of property or any part of the property:

(1) An abrupt falling down or caving in;
(2) Loss of structural integrity, including separation of parts of the property or property in danger of falling down or caving in; or
(3) Any cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion as such condition relates to **(1)** or **(2)** above.

But if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or damage caused by that Covered Cause of Loss.

This exclusion, **k.**, does not apply:

(a) To the extent that coverage is provided under the Additional coverage – Collapse; or
(b) To collapse caused by one or more of the following:
(i) The "specified causes of loss";*
(ii) Breakage of building glass;
(iii) Weight of rain that collects on a roof; or
(iv) Weight of people or personal property.

What this is saying is that if the settling, cracking, shrinkage, or expansion results in a fire, smoke, leakage from sprinkler systems or water damage, the resultant losses are covered but not the roof repair itself (unless it was also damaged by the resultant loss, such as a fire).

It is also saying that if a roof beam fails and collapse is imminent, but there is no damage other than the requirement to replace the beam (which could be expensive), there is no coverage under the ISO form.

So far, you will see there is no coverage for a roof collapse (without an ensuing covered loss) or imminent collapse as a result of:

- Defective design of the roof.
- Defective materials in roof construction.
- Defective methods of construction.
- Acts of contractors, such as a contractor that cuts a supporting beam causing the collapse during or after construction or renovation.
- Hidden decay.
- Insects or vermin damage.
- Acts of tenants, such as a Hi-Lo hitting a roof supporting beam causing a collapse.
- Wet or dry rot.
- Roof water leaks that over time cause the steel roof beams to deteriorate and to break, causing a collapse.

Therefore, the specific exclusions are very broad, basically making an exception for collapse resulting from specified perils and weight of rain, people or personal property (and avoiding a concurrent causation claim denial).

THE COLLAPSE COVERAGE

Now let's examine the ***additional coverage*** for collapse. (This language is taken from the ISO form CP 10 30 06 07.)

D. Additional Coverage – Collapse

The coverage provided under this Additional Coverage – Collapse applies only to an abrupt collapse as described and limited in **D.1.** through **D.7.**

1. For the purpose of this Additional Coverage – Collapse, abrupt 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 intended purpose.
2. We will pay for direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:
   - **a.** Building decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;
   - **b.** Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to collapse;
   - **c.** Use of defective material or methods in construction, remodeling or renovation <u>if the abrupt collapse occurs during the course of the construction, remodeling or renovation</u>.
   - **d.** Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs <u>after</u> the construction, remodeling or renovation is complete, but only if the collapse is caused in part by:
     - **(1)** A cause of loss listed in **2.a.** or **2.b.**;
     - **(2)** One or more of the "specified causes of loss";
     - **(3)** Breakage of building glass;
     - **(4)** Weight of people or personal property; or
     - **(5)** Weight of rain that collects on a roof.
3. This **Additional Coverage – Collapse** does **not** apply to:
   - **a.** A building or any part of a building that is in danger of falling down or caving in;
   - **b.** A part of a building that is standing, even if it has separated from another part of the building; or
   - **c.** A building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.
4. With respect to the following property:
   - **a.** Outdoor radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers;
   - **b.** Awnings, gutters and downspouts;
   - **c.** Yard fixtures;
   - **d.** Outdoor swimming pools;

e. Fences;
f. Piers, wharves and docks;
g. Beach or diving platforms or appurtenances;
h. Retaining walls; and
i. Walks, roadways and other paved surfaces; if an abrupt collapse is caused by a cause of loss listed in **2.a.** through **2.d.,** we will pay for los or damage to that property only if:
(1) Such loss or damage is a direct result of the abrupt collapse of a building insured under this Coverage Form; and
(2) The property is Covered Property under this Coverage Form.

5. If personal property abruptly falls down or caves in and such collapse is **not** the result of abrupt collapse of a building, we will pay for loss or damage to Covered Property caused by such collapse of personal property only if:
e. The collapse of personal property was caused by a cause of loss listed in **2.a.** through **2.d.**;
f. The personal property which collapses is inside a building; and
g. The property which collapses is not of a kind listed in **4.**, regardless of whether that kind of property is considered to be personal property or real property.

The coverage stated in this Paragraph **5**. does not apply to personal property if marring and/or scratching is the only damage to that personal property caused by the collapse.

6. This Additional Coverage – Collapse does not apply to personal property that has not abruptly fallen down or caved in, even if the personal property shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

7. This Additional Coverage – Collapse will not increase the Limits of Insurance provided in this Coverage Part.

8. The term Covered Cause of Loss includes the Additional Coverage – Collapse as described and limited in **D.1.** through **D.7.**

Translation: Collapse must be an "abrupt falling down." A beam that is cut, but where no collapse occurs immediately, is not a collapse claim even though the building cannot be occupied for safety reasons and rents or other income are lost.

However, if an abrupt loss occurs, direct physical damage or damage to covered property is covered but only if such collapse is caused by one or more of the following:

- Unknown building decay hidden from view.
- Unknown insect or vermin damage hidden from view.
- Abrupt collapse during the course of construction, remodeling, or renovation as a result of defective materials or methods in construction. *(Note: Design error is not included as being covered.)*
- Abrupt collapse after construction, remodeling, or renovation is completed but only if the collapse was caused by:
  - Unknown building decay hidden from view.
  - Unknown insect or vermin damage hidden from view.
  - Specified causes of loss (fire; lightning; explosion; wind or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire protection devices; falling objects; weight of snow, ice or sleet.
  - Breakage of building glass.
  - Weight of people or personal property.
  - Weight of rain that collects on a roof.

Again, you are left with a situation where design defects in a roof are likely not covered because this would most likely not be construed as being a defective material or method in construction.
It also is clear that if a collapse occurs after construction, remodeling, or renovation is complete, collapse must be caused by either unknown building decay that is hidden from view; unknown insect or vermin damage that is hidden from view; "specified causes of loss;" breakage of building glass; weight of people or personal property; or weight of rain that collects on a roof. Therefore, there is no coverage if the collapse is caused by defective materials or methods in construction or by design defect after construction, remodeling, or renovation is complete.

Also, under section D. Additional Coverage – Collapse, the ISO form indicates in paragraph 3 that the coverage does not apply to:

a. A building or any part of a building that is in danger of falling down or caving in;
b. A part of a building that is standing even if it is separated from another part of a building; or
c. A building that is standing, or any part of the building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage, or expansion.

There is no coverage for collapse of outdoor radio or television antennas. Large radio transmission towers used by contractors, for example, or others would not be covered. Also, there is no coverage for collapse of fences or retaining walls.

COLLAPSE OF PERSONAL PROPERTY

We often think in terms of building collapses when we think about collapse coverage. However, in looking at the additional coverage for collapse and its exceptions, collapse of personal property must be caused by the abrupt collapse of the building. Review the following:

D. Additional Coverage – Collapse

5. If personal property abruptly falls down or caves in and such collapse is not the result of abrupt collapse of a building, we will pay for loss or damage to Covered Property caused by such collapse of personal property only if:

- **a.** The collapse of personal property is caused by a loss listed in 2.a. through 2.d.; (These are the building loss exceptions.)
- **b.** The personal property which collapses is inside a building; and
- **c.** The property which collapses is not of a kind listed in No. 4 (such as outdoor radio or television antennas, swimming pools, fences, retaining walls, etc.) The personal property collapse is covered if caused by the typical No. 2 a-d exceptions unless the damage is marring and/or scratching only.

For example, a number of years ago there was a significant loss with a paint supplier. This paint supplier had rows of shelving storing paint in its warehouse. One rack fell over, hitting another rack and causing a domino effect. This caused a major loss with all of the paint cans. This type of loss would not be covered under the ISO form because it is not one of the exceptions indicated under the Additional Coverage – Collapse section.

The ISO collapse exclusion is fraught with exceptions and limitations. The only clear statement one can make is that weight of snow, ice, sleet, or rain collecting on a roof as well as weight of people or personal property on the roof causing collapse would be covered. Furthermore, you can say that there is coverage for defective materials or methods of construction during construction, remodeling, or renovation. You can also say that building decay hidden from view unless known is covered as well as unknown insect or vermin damage are covered.

We mentioned that the ISO form <u>does not cover imminent collapse</u>. At least one carrier, Travelers Insurance Company, does have coverage for imminent collapse under one of its forms as a separate section. It indicates that as respects buildings or structures in a state of <u>imminent collapse</u>, it <u>will not pay</u> for loss of damage <u>except if</u> the state of imminent collapse has been caused only by one or more of the following which have occurred during the policy period:

- Fire; lightning; explosion; windstorm or hailstorm; riot or civil commotion; sinkhole collapse; weight of snow, ice, or sleet.
- Weight of people or personal property.
- Weight of rain that collects on a roof.
- Use of defective material or methods in construction, remodeling, or renovation if the state of imminent collapse occurs during the course of construction, remodeling, or renovation.

Obviously this form would be preferable to a form such as the ISO which does not have this coverage for imminent collapse because, as we said previously, imminent collapse is not covered.

EARTHQUAKE

What if an earth tremor or earthquake causes a roof to collapse? Is this covered? No coverage is provided because earthquake or tremors are not a "specified cause of loss" and do not fall under any other exception. <u>Earthquake coverage is needed</u>.

CHUBB INSURANCE COMPANY

The Chubb form does not include <u>a specific collapse exclusion</u>; however, there are several ***<u>exclusions</u>*** that could be used to exclude or limit collapse claims.

Planning, Design, Materials Or Maintenance	This insurance does not apply to loss or damage (including the costs of correcting or making good) caused by or resulting from any faulty, inadequate or defective: • planning, zoning, development, surveying, sitting; • design, specifications, plans, workmanship, repair, construction, renovation, remodeling, grading, compaction; • materials used in repair, renovation or remodeling; or • maintenance, of part or all of any property on or off the premises shown in the Declarations. This Planning, Design, Materials Or Maintenance exclusion does not apply to ensuing loss or damage caused by or resulting from a peril not otherwise excluded.

Note the words "design," "workmanship," "construction," "materials," and "maintenance." The exclusion concludes by indicating that it does not apply to ensuing loss or damage resulting from a peril not otherwise excluded.

Translation: If a roof collapses because of a bad design, the resulting damage is covered but not the roof itself (unless it is damaged by the ensuing loss).

Wear And Tear Or Deterioration	This insurance does not apply to loss or damage caused by or resulting from wear and tear or deterioration. The Wear And Tear Or Deterioration exclusion does not apply to ensuing loss or damage caused by or resulting from a **specified peril** or **water**.

Note that the Wear and Tear or Deterioration exclusion is different than the Planning, Design, Materials or Maintenance exclusion because the ensuing loss or damage must be caused by a specified peril or water. These are defined as follows:

Specified Peril	**Specified peril** means: • aircraft or self-propelled missiles; • explosion; • fire; • leakage from fire protection equipment; • lightning; • mine subsidence; • riot or civil commotion; • sinkhole collapse; • smoke; • vandalism; • vehicles; • volcanic action; or • windstorm or hail.
Water	**Water** means water that: • escapes from processing equipment, plumbing systems, refrigeration systems, cooling systems or heating systems (other than underground storage tanks, underground piping or underground tubing) provided such water is intended to be contained in such processing equipment, plumbing systems, refrigeration systems, cooling systems or heating systems; • backs up or overflows through sewers, drains or sump; • seeps or leaks through basements, foundations, roofs, walls, floors or ceilings of any building or other structure; or • enters doors, windows or other openings in any building or other structure.

Translation: If the deterioration of a roof beam causes a collapse and the resulting ensuing loss or damage is caused by, for example, bursting of pipes, the water damage is covered but not the roof (unless the resulting water damages the roof).

Earthquake	This insurance does not apply to loss or damage caused by or resulting from earthquake, regardless of any other cause or event that directly or indirectly: • contributes concurrently to; or • contributes in any sequence to, the loss or damage, even if such other cause or event would otherwise be covered. This Earthquake exclusion does not apply to ensuing loss or damage caused by or resulting from a **specified peril**.

Translation: If an earthquake causes a roof to collapse and sprinkler pipes burst as a result (or fire, explosion or smoke result), coverage is provided. However, if plumbing water pipes burst, coverage is not provided. Since the roof collapse was caused by earthquake, unless the ensuing specified peril damages the roof, no coverage is provided for the roof. (Always add earthquake coverage.)

Settling	This insurance does not apply to loss or damage caused by or resulting from settling, cracking, shrinking, bulging or expansion of land, paved or concrete surfaces, foundations, pools, buildings or other structures. This Settling exclusion does not apply to ensuing loss or damage caused by or resulting from a **specified peril**.*

* Note that water damage caused by bursting of water pipes is not covered unless they are fire protection equipment pipes.

Translation: The result is the same as the earthquake exclusion. If a building settles, only an ensuing loss caused by a "specified peril" is covered. This means that bursting of plumbing pipes causing water damage is not covered.

CONCLUSION

So what can we say if we are examining a proposal between an ISO form carrier and others?

1. A carrier with an “imminent collapse” exception, such as Travelers, is better than ISO forms without this exception. Why? Business interruption will be covered even though there has been no ensuing loss.

2. The Chubb form would be better than pure ISO forms because a collapse arising out of design or material defects resulting in ensuing loss would be covered. (ISO forms do not cover design defects even if there is an ensuing loss.) If the collapse is as a result of, for example, a deterioration of a roof beam, the claim would be covered if the ensuing loss or damage is caused by or results from fire, explosion, sprinkler leakage, smoke or water. (The other specified perils are not pertinent.) (ISO forms do not cover “deterioration” but do cover “decay” hidden from view. The dictionary suggests that these words are the same.)

3. Chubb will cover sprinkler leakage arising out of earthquake, even if the insured has not purchased earthquake coverage (but other pipes are not covered).

Concurrent Losses

This complicates the subject even more. The case law in Michigan is that if two perils caused a loss and one of the perils is covered and the other is excluded, there is no coverage (United States District Court for the Eastern District 07, CV-12230 TMW Enterprises v. Federal Insurance (see attached Opinion & Order).

In this 2009 case, construction defects caused water loss and the Court upheld the claim denial.

There is no easy answer to collapse losses other than loss prevention by way of frequent roof inspections to discover possible water intrusion that could cause deterioration of steel roof decking or support beams

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TMW ENTERPRISES, INC., et al.,

Plaintiffs,

v. Case No. 07-CV-12230

FEDERAL INSURANCE COMPANY,

Defendant.
/

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Pending before the court are a number of summary judgment motions. First, Plaintiffs TMW Enterprises, Inc. and Shain Park Associates, LLC, filed a motion for partial summary judgment which was soon thereafter followed by another partial summary judgment motion. Defendant then filed a motion for complete summary judgment. As will be discussed more thoroughly below, Plaintiffs' combined motions function as a cross-motion for summary judgment. All motions have been fully briefed, and the court concludes a hearing is unnecessary. *See* E.D. Mich. LR 7.1(e)(2). For the reasons stated below, the court will grant Defendant's motion for summary judgment and deny Plaintiffs' motions for partial summary judgment.

I. BACKGROUND

The facts are largely undisputed, and the material facts are not disputed at all. Plaintiffs bought a new condominium housing and commercial retail project, located in Birmingham, Michigan, on December 29, 2004. (Pls.'s 1/14/09 Mot. at 2.) Around the

same time, Plaintiffs added coverage for the property under an insurance policy already maintained with Defendant. (*Id.*) Some time later, Plaintiffs hired an architecture firm to make upgrades and modifications to the property. (*Id.* at 3.) As part of this upgrade process, Plaintiffs undertook certain structural changes to the property. (*Id.* at 4; Def.'s Mot. at 6.) These structural changes, which necessitated the demolition of some walls (Pls.'s 1/14/09 Mot. at 4), revealed significant and widespread damage to, at the minimum, internal fireproofing, structural steel, and masonry fasteners. (*Id.*; Def.'s Mot. at 6.) Plaintiffs, believing that the damage to the property was caused by water infiltration, made a claim under its insurance policy with Defendant on June 26, 2006. (Pls.'s 1/14/09 Mot. at 4.) Defendant then hired an engineering company to inspect the property and determine the cause of the damage. (*Id.*; Def.'s Mot. at 6.) This engineering company agreed with Plaintiffs that significant water damage was present (Def.'s Mot., Ex. 13 at 1), but stated that the water damage was the result of "numerous construction defects . . . [which] involve moisture penetration issues." (*Id.*) Based on the report, Defendant denied coverage for Plaintiffs' loss. (Def.'s Mot. at 6-7.) Specifically, Defendant relied upon two policy exclusions to preclude coverage, the "Planning, Design, Materials or Maintenance Exclusion" and the "Wear and Tear Exclusion." (*Id.* at 7; Pls.'s 1/14/09 Mot. at 5.) Plaintiffs requested reconsideration of Defendant's decision and, while that reconsideration was on-going, Plaintiffs brought their complaint for declaratory judgment. (Def.'s Mot. at 8; Pls.'s 1/14/09 Mot. at 5.)

Plaintiffs present two partial summary judgment motions. In the first, Plaintiffs argue that the clear language of the exclusions Defendant cited to deny coverage include "ensuing loss" clauses which function to "give back" coverage for the water

damage to the property. (Pls.'s 1/14/09 Mot. at 9-18.) Plaintiffs also argue that only "the most direct cause of loss" is relevant to the court's interpretation of the insurance policy (*id.* at 18-20), which, they assert, is water. Defendant responds that Plaintiffs' interpretation of any "ensuing loss" clause is contrary to Michigan law. (Def.'s 3/10/09 Resp. at 3-4.) In addition, Defendant argues that Michigan courts have expressly rejected a "concurrent cause of loss doctrine," and thus Plaintiffs' claims are barred if any policy exclusion applies, even if it only caused a portion of the loss. (*Id.* at 5.) Plaintiffs' second partial summary judgment motion attacks three of Defendant's affirmative defenses, which Defendant contests.

Finally, Defendant's motion for summary judgment argues that the policy's exclusions are clear and do not work to add back any coverage. (Def.'s Mot. at 13-20.) Defendant also addresses the timing of Plaintiffs' claim for coverage and Defendant's alleged violation of a federal statute. (*Id.* at 20-23.) Taken as a whole, Plaintiffs' two motions for partial summary judgment, Defendant's motion for summary judgment, and the accompanying responses and replies are properly construed as cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56 and have the potential to fully resolve the issues pending between these parties.

II. STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." *Sagan v. United*

States, 342 F.3d 493, 497 (6th Cir. 2003). "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

The court does not weigh the evidence to determine the truth of the matter, but rather, to determine if the evidence produced creates a genuine issue for trial. *Sagan*, 342 F.3d at 497 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). The moving party must first show the absence of a genuine issue of material fact. *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 934 (6th Cir. 2000) (citing *Celotex*, 477 U.S. at 323). The burden then shifts to the nonmoving party, who "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). He must put forth enough evidence to show that there exists a genuine issue to be decided at trial. *Plant*, 212 F.3d at 934 (citing *Anderson*, 477 U.S. at 256). Summary judgment is not appropriate when "the evidence presents a sufficient disagreement to require submission to a jury." *Anderson*, 477 U.S. at 251-52 (1986).

The existence of a factual dispute alone does not, however, defeat a properly supported motion for summary judgment – the disputed factual issue must be material. *See id.* at 252 ("The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict – 'whether there is [evidence] upon which a jury can properly proceed to find a

verdict for the party producing it, upon whom the *onus* of proof is imposed.'" (alteration in original) (citation omitted)). A fact is "material" for purposes of summary judgment when proof of that fact would establish or refute an essential element of the claim or a defense advanced by either party. *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984) (citation omitted).

Finally, under the long-standing *Erie* doctrine, if an action is brought in federal court and invokes diversity jurisdiction, a court must apply the same substantive law as would have been applied if the action had been brought in a state court of the jurisdiction where the federal court is located. *Corrigan v. U.S. Steel Corp.*, 478 F.3d 718, 723 (6th Cir. 2007) (citing *Equitable Life Assurance Soc'y of the U.S. v. Poe*, 143 F.3d 1013, 1016 (6th Cir. 1998)). In this diversity action, the court applies Michigan law.

III. DISCUSSION

Where the dispute between the parties concerns the extent of insurance coverage, the court must determine that to which the parties agreed in the applicable policy. *Auto-Owners Ins. Co. v. Churchman*, 489 N.W.2d 431, 433-34 (Mich. 1992). Such a determination requires the court to apply a two-part analysis. *Heniser v. Frankenmuth Mut. Ins.*, 534 N.W.2d 502, 510 (Mich. 1995). First, the court determines if the policy provides coverage to Plaintiffs. In this case, that involves both looking to the kind of property that is covered (the "interest" clause) and examining the type of events causing loss that are covered (the "insuring" clause). *Vons Cos., Inc. v. Federal Ins. Co.*, 212 F.3d 489, 491 (9th Cir. 2000). If the policy covers both the kind of

property[1] and the type of event causing the loss, then the court applies the second part of the analysis and determines if the coverage is negated by an exclusion. *Buczkowski v. Allstate Ins. Co.*, 526 N.W.2d 589, 594 (Mich. 1994).

A special case exists, though, where there are "two or more identifiable causes, at least one of which is covered under the policy and at least one of which is excluded thereunder, [which] contribute to a single loss." *Iroquois on the Beach, Inc. v. Gen. Star Indem. Co.*, 550 F.3d 585, 588 (6th Cir. 2008) (quoting 7 Steven Plitt, et al., *Couch on Insurance* § 101:45 (3d ed. 2008)). This special case is known to Michigan courts as the theory of "dual or concurrent causation." *Iroquois*, 550 F.3d at 588. The Michigan Supreme Court has "expressly declined to adopt [concurrent causation.]" *Id.* (citing *Vanguard Ins. Co. v. Clarke*, 475 N.W.2d 48, 53 (Mich. 1991) (*overruled on other grounds by Wilkie v. Auto-Owners Ins., Co.*, 664 N.W.2d 776 (Mich. 2003)). Indeed, "the default rule under Michigan law is that a loss is *not* covered when it is concurrently caused by the combination of a covered cause and an excluded cause." *Iroquois*, 550 F.3d at 588 (emphasis in original); *see also United States Fid. & Guar. Co. v. Citizens Ins. Co. of Am.*, 506 N.W.2d 527, 529 (Mich. Ct. App. 1993); *Commerce Ctr. P'ship v. Cincinnati Ins. Co.*, No. 265147, 2006 WL 1236745, *1 (Mich. Ct. App. May 9, 2006); *Auto Club Ins. Co. v. Petz*, No. 242933, 2003 WL 22975501, *1 (Mich. Ct. App. Dec. 18, 2003) ("[T]he Supreme Court declined to accept the theory of dual or concurrent causation in determining insurance issues where the exclusion . . . was unambiguous.");

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[1] The parties do not dispute that the insurance policy at issue covers "direct physical loss or damage to [a] building; or personal property caused by or resulting from a peril not otherwise excluded." (Pls.'s 1/14/09 Mot., Ex. B at 20.)

Pioneer State Mut. Ins. Co. v. Splan, No. 220477, 2003 WL 1361552, *4 (Mich. Ct. App. Mar. 18, 2003) ("[T]he courts of this state have rejected the concurrent causation theory in the context of insurance liability.") (quotation omitted).

Despite the extensive briefing on a variety of legal issues in the three motions before the court, there is but a single issue that merits the court's attention, as it is dispositive. Under Michigan's "default rule," if there were two concurrent causes that resulted in the property damage here, and one of the causes is unambiguously excluded under the policy, Plaintiffs cannot recover. *Iroquois*, 550 F.3d at 588. Such a situation exists under the undisputed facts.

The exact sequence of causation is in dispute – Plaintiffs argue that water was the most recent and therefore more direct cause of damage to the property (Pls.'s 3/12/09 Resp. at 16), while Defendant argues that there can be no dispute that water damage occurred only as a result of construction defects (Def.'s Mot. at 7). While the parties dispute to some extent the order of the events that caused the eventual damage to the property, it is undisputed that the damage was caused, at least in substantial part, by two concurrent causes: construction defects and water. (Pls.'s Resp. at 9, "[Plaintiffs do] not dispute that the latent construction defects permitted water to infiltrate the Building, which resulted in ensuing water damage.") In some states, whether coverage exists for certain events is determined through sequencing and proximate cause analysis. *See, e.g.*, *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901, 905-906 (W.D. Tenn. 2001). In Michigan, however, sequencing is irrelevant – it is the *existence* of two or more concurrent causes that controls, not the order or magnitude of their effect. *Iroquois*, 550 F.3d at 588. Thus, in this case, there is no

genuine issue of material fact that latent construction defects and water incursion were concurrent causes of Plaintiffs' property damage.

In concluding there were two concurrent causes of Plaintiffs' property damage, the court must determine whether one of the causes was unambiguously excluded under the contested insurance policy. *Auto Club Ins. Co.*, 2003 WL 22975501 at *1. Plaintiffs' policy includes coverage for "direct physical loss or damage to: building; or personal property, caused by or resulting from a peril not otherwise excluded." (Pls.'s 1/14/09 Mot., Ex. B at 20.) Among the policy's excluded perils is a section entitled "Planning, Design, Materials Or Maintenance," which states:

> This insurance does not apply to loss or damage (including the costs of correcting or making good) caused by or resulting from any faulty, inadequate or defective:
>
> - planning, zoning, development, surveying, siting;
> - design, specifications, plans, workmanship, repair, construction, renovation, remodeling, grading, compaction;
> - material used in repair, constructions, renovation or remodeling; or
> - maintenance,
>
> of part or all of any property on or off the premises shown in the Declarations. This Planning, Design, Materials Or Maintenance exclusion does not apply to ensuing loss or damage caused by or resulting from a peril not otherwise excluded.

(*Id.*, Ex. B at 34.)

Plaintiffs and Defendant argue extensively for different interpretations of the "ensuing loss" language and whether that language includes water damage, but in light of Michigan's "default" rule for concurrent causes, the important initial question is whether the unambiguous language of the above clause excludes one of the two causes present in this case.

In examining the language of an insurance policy, the court must give words their plain and ordinary meaning and cannot create ambiguity where none exists. *Heniser v. Frankenmuth Mutual Ins. Co.*, 534 N.W.2d 502, 505 (Mich. 1995). If a term is ambiguous, however, the ambiguity is to be construed against the insurer and in favor of coverage. *Id.* at 504. Here, the plain language of the exclusion states that coverage is excluded for damage that resulted from "faulty, inadequate or defective . . . design . . ., workmanship, repair, [or] construction," among other reasons. (Pls.'s 1/14/09 Mot., Ex. B at 34.) The court finds no ambiguity in a clause excluding coverage for the results of "inadequate or defective . . . construction." Nor do the parties contest that the words exclude coverage for construction defects. Further, Plaintiffs admits that there is no "dispute that the latent construction defects permitted water to infiltrate the Building, which resulted in ensuing water damage." (Pls.'s Resp. at 9.) In light of the two concurrent causes of damage present here – defective construction and water infiltration– together with the unambiguous exclusion for one of the causes – defective construction – Plaintiffs cannot recover under the policy as a matter of law. *Iroquois*, 550 F.3d at 588.

In parrying the Michigan default rule, Plaintiffs propose two arguments. First, Plaintiffs urge that applying the default rule would in this case "render the [ensuing loss] Clauses a nullity because an 'ensuing' loss will always be casually [sic] related to a concurrent cause." (Pl.'s 3/12/09 Resp. at 18.) Thus, Plaintiffs argue, applying the default rule would not give effect "'to every word[,] phrase, and clause in the [Policy] and [would not] avoid an interpretation that would render any part of the [Policy] surplusage or nugatory," (*id.*, quoting *Klapp v. United Ins. Group Agency, Inc.*, 663 N.W.2d 447, 468

(Mich. 2003)), in violation of Michigan insurance contract rules of construction. For two reasons the court does not agree. First, rules of policy construction, such as that outlined in *Klapp* and proffered by Plaintiffs, function to interpret the words of an insurance policy. *Klapp*, 663 N.W.2d at 469. Because of the clear default rule governing concurrent causes under Michigan law, the court need not interpret the ensuing loss clause. Had the court sought to analyze the interaction between the ensuing loss clause and the exclusion as a whole, Plaintiffs' proposed rule of construction could be important. Michigan's default rule operates, in a sense, outside of the four corners of the insurance policy and dictates the practical consequences that result from concurrent causes in insurance claims. It does not define the meaning of the policy's words, but it does, in situations such as this, dictate their effect. Second, the court cannot agree that every "'ensuing' loss must be causally related to a concurrent cause." (Pl.'s 3/12/09 Resp. at 18.) To ensue is "to follow . . . to take place afterward *or* as a result."[2] Because the meaning of "ensuing" need not – but may – imply a causal component, an "ensuing loss" need not – but only may – be a loss causally related to an earlier cause, excluded or otherwise. All that may be required for an ensuing loss is that it occurred later in time. Plaintiffs' concern that the ensuing loss Clauses are rendered "a nullity" is unconvincing.

Plaintiffs argue secondly that Defendant intended to contract around the Michigan default rule. (Pls.'s 3/12/09 Resp. at 19.) The "default rule could presumably be altered by the inclusion of an express concurrent-causation provision." *Iroquois*, 550

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[2] Merriam-Webster, *available at* http://www.merriam-webster.com/dictionary_/ensue (last visited Mar. 31, 2009) (emphasis added).

F.3d at 588 n.4 (citing *Hayley v. Allstate Ins. Co.*, 686 N.W.2d 273, 277-78 (Mich. Ct. App. 2004) (Cooper, J., dissenting)). Plaintiffs assert that because Defendant did not include "anti-concurrent causation language," it cannot now rely on the Michigan default rule to defeat coverage. (Pls.'s 3/12/09 Resp. at 19.) As opposed to the *Iroquois* court's observation that parties might "opt-out" of state default rules, Plaintiffs essentially propose that an insurer must "opt-in" to activate the law governing the policy's interpretation. The practical effect of accepting this argument would be absurd, as it would turn the meaning of a "default" rule of interpretation on its head. The very nature of a default rule is that nothing more is required for it to be given effect. If the facts fit, and nothing more is added to the equation (such as, for example, the parties opting out) the default result is reached merely from the application of the rule. Under Plaintiffs' view (moderately, but logically, extended), an insurer would be required to make explicit in its contracts of coverage all law, statutory and common, governing the insurance relationship. The theoretical ability to contract around Michigan's default rule cannot be made to support such an idea. In fact, in another portion of Plaintiffs' argument support is found for the "opt-out" nature of a default rule. Plaintiffs point out that Defendant's policy includes, under the "Ordinance or Law" exclusion section, language stating:

> When direct physical loss or damage is caused by or results from both:
>
> - a peril not otherwise excluded; and
> - an excluded peril,
>
> . . . the valuation will be based on that portion of such costs equal to the proportion that the covered direct physical loss or damage bear to the total direct physical loss or damage.

(*Id.*) This is language evincing an intent to contract around Michigan's default rule. It

allows some recovery where an excluded peril caused some portion of loss. But that is exactly the point: this language, confined to one specific section of the policy, opts out of the Michigan default rule against concurrent causation. If the parties had intended this highly specific language to apply generally to the entire policy, it would not have been confined to a single, slightly obscure, policy exclusion. The fact that the language does not appear elsewhere in the policy further supports the court's finding that the parties intended legal default rules to apply.

IV. CONCLUSION

Because it is undisputed that there were two concurrent causes which resulted in damage to Plaintiffs' insured property, one of which is unambiguously excluded from coverage, the application of Michigan's default rule against concurrent causation in insurance policies impels the court to find there is no dispute of material fact that Plaintiffs are not entitled to coverage for their loss.

Accordingly, IT IS ORDERED that Defendant's "Motion for Summary Judgment" [Dkt. # 69] is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' motions for partial summary judgment [Dkt. ## 65, 68] are DENIED.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: March 31, 2009
I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, March 31, 2009, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk

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