North Bay Business Journal
NORTH SAN FRANCISCO BAY AREA: SONOMA, NAPA, AND MARIN COUNTIES

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Court reverses homeowner's damage claim

Retaining wall on the brink of collapse? Insurer may not foot the repair bill

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STAFF REPORTER

MARIN COUNTY – Sitting in her home, which rests atop a hill in Point Reyes Station, Ciara Cox was startled on a Saturday morning in May by a loud cracking noise. She went outside to discover that part of the hill had fallen away and a 50-foot section of the 175-foot retaining wall supporting her house and property had failed at the highest point.

After calling 911, her second call was to her insurance company, where a representative immediately said her homeowners' policy doesn't cover the wall. Now, Ms. Cox may be facing up to $200,000 in repair costs, the public road below the wall remains closed, and the autumn rains are fast approaching.

Ms. Cox is also in negotiations with her insurance company.

"We had no idea that the wall wasn't covered," says Ms. Cox, who bought the property three years ago. "Why would you have insurance if it doesn't cover something like that? We always try to insure everything for the top amount. We want to make sure we are covered, so if we cause harm to other people, they are able to get what they need. We pay a lot of money [in premiums] every year."

Citing 'public policy'

With such retaining walls supporting homes, roads, and businesses throughout the hills of Marin County, property owners need to take a thorough look at their insurance policies, advises Jeffrey Lerman, a real estate attorney with Lerman & Lerman in San Rafael. And a recent California Supreme Court decision further underscores that necessity, he says.

In *Rosen v. State Farm*, the Supreme Court reversed two lower court decisions to find that an insurance company is not required to cover the repair of a retaining wall or deck that is on the brink of collapse unless the policy language explicitly states otherwise. In that situation, coverage would only kick in when the wall has actually collapsed.

"With the hillside construction we have here in Marin County, there are a lot of decks, retaining walls, and other structures impacted by decisions like this," says Mr. Lerman. "It sends a signal to homeowners that the insurance policy is the policy, and if you are going to look to courts to watch out for you in these situations, then beware."

In the Rosen case, the plaintiff, following the recommendation of a contractor, repaired the two decks attached to his home, because he believed they were in a state of imminent collapse. He was under the impression that "imminent" collapse would entitle him to policy benefits. However, State Farm denied the claim, saying the policy was expressly restricted to "actual" collapse.

In the earlier rulings, the lower courts sided with the plaintiff, citing a public policy concern over what would happen if homeowners saw an advantage in waiting to repair deteriorating structures. The trial court decision, which was affirmed by the Court of Appeal, reads: "The public policy of the State of California is…that policy holders are entitled to coverage for collapse as long as the collapse is imminent, irrespective of policy language."

Honoring the restrictions within the policy language may, according to the trial court, "encourage property owners to place lives in danger in order to allow insurance carriers to delay payment of claims until the structure actually collapses…."

Real estate attorney Jeffrey Lerman in front of a collapsed retaining wall in Fairfax.

The right to contract

However, the Supreme Court found fault in the lower courts' attempts at enacting public policy, especially when the policy language in the Rosen case was clear and explicit.

"Applying the same logic, with the same lack of restraint, courts could convert life insurance into health insurance," reads the Supreme Court decision. "In rewriting the coverage provision to conform to their notions of sound public policy, the [lower courts] exceeded their authority, disregarding the clear language of the policy and the equally clear holdings of this court."

The court adds that to rule otherwise would deny both parties the right to contract freely.

"The insurer made promises, and the insured paid premiums, against the risk of loss," reads the decision. "To rewrite the provision imposing the duty to indemnify in order to remove its limitation to actual collapse would compel the insurer to give more than it promised and would allow the insured to get more than is paid for…."

But language that is explicit and clear to the courts and lawyers may not come across as explicit and clear to property owners.

"These policies are written by lawyers for lawyers," says Mr. Lerman. "Homeowners should go over them with their lawyers. If the language is ambiguous, then there might be more wiggle room. But if the language is clear, like in the Rosen case, you can expect a court is going to enforce it strictly."