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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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10 The Cincinnati Insurance Company,)

11 Plaintiff,)

12 vs.)

13 Recreation Centers of Sun City, Inc.,)

14 Defendant.)

No. CV-07-0329-PHX-PGR

OPINION and ORDER

15 Pending before the Court is Plaintiff's Motion for Partial Summary
16 Judgment (doc. #23) and Defendant/Counterclaimant RCSC's Cross-Motion for
17 Summary Judgment on Coverage/Breach of Contract (doc. #75). Having
18 considered the parties' memoranda in light of the admissible evidence of record
19 and the oral argument of counsel, the Court finds that plaintiff Cincinnati
20 Insurance Complaint's motion should be denied in its entirety and that defendant
21 Recreation Centers of Sun City, Inc.'s cross-motion should be granted in part.

22 Background

23 This diversity-based declaratory judgment action arises from the denial of
24 insurance coverage for the partial collapse of the roof over the indoor swimming
25 pool and spa area of the Sun Dial Recreation Center that occurred on June 19,
26 2006. The center is owned by Recreation Centers of Sun City, Inc. ("RCSC")

1 and was then insured by Cincinnati Insurance. Cincinnati Insurance denied
2 RCSC's claim on February 12, 2007, and then filed this declaratory judgment
3 action the same day. The complaint seeks a declaration that Cincinnati
4 Insurance owes RCSC nothing under the insurance policy under five different
5 theories of exclusion: hidden or latent defect (First Claim); negligent work
6 (Second Claim); collapse (Third Claim); lack of fortuity (Fourth Claim); and pre-
7 existing loss (Fifth Claim). The complaint alternatively requests that if the Court
8 finds that coverage exists under the policy that the Court order the parties to
9 resolve the issue of the value of the claim through the required appraisal
10 provisions of the insurance contract (Sixth Claim). In response, RCSC filed
11 counterclaims for breach of contract (Count I), and bad faith (Count II). Cincinnati
12 Insurance's pending motion seeks summary judgment regarding the first three
13 claims of its complaint and on RCSC's counterclaim for breach of contract;
14 RCSC's cross-motion seeks summary judgment on the issue of coverage and
15 breach of contract.

16 The recreation center was built in 1972. As originally built, the roof over
17 the enclosed swimming pool area was composed of wood structural panel
18 sheathing over open web wood trusses. The wood trusses were supported by
19 tapered glued laminated ("glulam") wood beams. The two main glulam support
20 beams, both 120' long, free-spanned the pool area some 30' above the floor. The
21 roof support structure was hidden from view by a dropped acoustical ceiling.

22 RCSC had the roof reconstructed in 1987 because high moisture
23 conditions over the pool caused corrosion in the steel pin connectors in the wood
24 trusses and wood decay in the trusses. The roof sheathing and trusses were
25 removed and were replaced by a new superstructure of glulam beams and
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1 tongue and groove wood decking. The two original major glulam support beams
2 remained in place after being found to be structurally sound. RCSC added two
3 spas to the pool area in a 2001 remodeling project. In 2006, approximately half
4 of the roof, some 9,000 square feet, collapsed into a swimming pool when one of
5 the original main glulam support beams fractured near midspan.

6 Experts' Conclusions

7 Cincinnati Insurance's main expert, Marc Sokol, a professional engineer,
8 issued a report, dated January 5, 2007, of his findings regarding the reasons for
9 the roof collapse; the report summarized Sokol's conclusions as follows:

- 10 1. The partial roof collapse originated near midspan of a glued
11 laminated wood beam that spanned across the south end of the
12 pool. The cause of the collapse was a combination of material
13 defects in the tension laminations of the beam near midspan,
14 including:
 - 15 a. Reaction Wood.
 - 16 b. Glue skip between tension laminations.
 - 17 c. Close spacing of lamination finger joints adjacent to the
18 areas of glue skip.
 - 19 d. Plane snipe.
- 20 2. The partial roof collapse is not attributable to the following:
 - 21 a. Overload of the roof (assuming the attic ventilation system
22 was operating properly).
 - 23 b. Weather events.
 - 24 c. Work performed by a roofing contractor approximately 1
25 week prior to the collapse.
 - 26 d. Fungal deterioration (rot).
 - e. Termite or similar degradation.
 - f. Changes to the roof structure that occurred during a
renovation in approximately 1987, including changes in
the dead load of the roof and changes in how the beam
was laterally supported.
 - g. Material or workmanship defects in the stub columns.

*
IT WAS NOT.

22 RCSC's main expert, Bryan River, an expert in wood science, issued a
23 report, dated August 21, 2007, of his findings regarding the reasons for the
24 collapse; his report summarized his findings as follows:

25 [F]ailure of this [glulam support] beam was initiated by degradation of
26 the finger joint adhesive, and consequent fracture of a critical finger

1 joint in the region of the main bending failure.

2 The adhesive used to bond the finger joints is susceptible to strength
3 degradation by heat and moisture in a warm humid service
4 environment and stress. Degraded adhesive is shown by the
macroscopic appearance of many failed finger joints and,
microscopic inspection of the adhesive in failed finger joint surfaces.

5 The manufacturing processes of the finger jointing and laminating
6 were not good. This is seen in the frequency of laminate joints with
7 low wood failure, or no deep wood failure, and with partial bonds or
complete voids that are concentrated in the main bending failure, but
which also occur throughout the beam.

8 A majority of limber pieces used in the critical tension laminations in
9 the main bending failure were below grade in density and percent
latewood.

10 Frequent poor to void laminate joints, below grade lumber in the
11 outer tension laminae, and increased load all reduced the margin of
12 safety designed in the beam and contributed to its catastrophic
collapse, but time dependent degradation was the ultimate cause for
failure of this beam.

13 Relevant Provisions of the Insurance Policy

14 The commercial and personal property insurance policy at issue, no. CPP
15 074 40 66, which was effective between June 30, 2003 and June 30, 2006,
16 provided in relevant part as follows:

17 Section A. Coverage

18 * * *

19 3. Covered Causes of Loss

20 * * *

21 b. Exclusions

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23 While the report of Cincinnati Insurance's main expert, Marc Sokol, did
24 not address the question of degradation of the adhesive due to long term
25 exposure to moisture and heat, Cincinnati Insurance's wood expert, John J.
26 Janowiak, Ph.D., stated in a letter to Cincinnati Insurance's counsel that he was
in "general agreement with no major conflict" regarding the conclusions Bryan
River reached in his report to RCSC regarding the cause of the collapse. Sokol
stated at his deposition that based on Janowiak's review of River's report that he
(Sokol) could not conclusively rule out long-term degradation of the finger joint
adhesive as a causative factor of the collapse.

(2) We will not pay for "loss" caused by or resulting from any of the following:

* * *

* * *

Collapse, except to the extent provided in 5. Coverage Extensions, c. Collapse. However, if collapse results in a Covered Cause of Loss at the "premises", we will pay for that portion of the "loss" caused by that Covered Cause of Loss.

(3) We will not pay for "loss" caused by or resulting from any of the following: (3)(a) through (3)(c). However, if an excluded cause of loss that is listed in (3)(a) through (3)(c) results in a Covered Cause of Loss, we will pay for that portion of the "loss" caused by that Covered Cause of Loss.

Faulty, inadequate, or defective:

* * *

(3) Materials used in repair, construction, renovation or remodeling; ...
of part or all of any property on or off the "premises".

* * *

* * *

* * *

(2) We will pay for "loss" to Covered Property, caused by collapse of a building or any part of a building insured under this Coverage Form, if the collapse is caused by one or more of the following:

* * *

(b) Decay that is hidden from view, unless the presence of such decay is known or should reasonably have been known to an insured prior to collapse;

* * *

(f) ... However, if the collapse occurs after construction, remodeling, or renovation is complete and is caused in part by a cause of "loss" listed in (2)(a) through (2)(e) of this Coverage Extension, we will pay for "loss" even if the use of defective material or methods.

- * they did not know; it was hidden

1 in construction, remodeling or renovation,
2 contributes to the collapse.

3 Cincinnati Insurance's Denial Letter

4 Cincinnati Insurance denied RCSC's claim on February 12, 2007. The
5 denial letter, which was signed by Nancy Davis, a senior claims representative,
6 stated in relevant part:

7 Pursuant to the express provisions, conditions, and limitations in
8 the applicable policy of insurance, Cincinnati Insurance "will not pay
9 for 'loss' caused directly or indirectly by * * * hidden or latent defect or
10 any quality of property that causes it to damage or destroy itself; [or]
11 * * * faulty and inadequate or defective * * * materials used in repair,
12 construction, renovation or remodeling." Based on Cincinnati's
13 investigation and the independent engineering report, the glulam
14 beam that failed, did so because of certain hidden or latent defects -
15 reaction wood, glue skip between tension laminations, close spacing
16 of lamination finger joints, and plane snipe - in the beam that caused
17 it to collapse on itself, which is an excluded cause of loss. It is also
18 our understanding that the glulam beam that failed was from the
19 original construction, and then reused during the 1987 repair and/or
20 renovation. In other words, the 1987 renovation contained
21 inadequate or defective materials, which is another excluded cause
22 of loss. Thus, there is also no coverage for this loss because it did
23 not commence during the policy period.

24 Moreover, while the loss was most probably a collapse, as
25 defined by the collapse extension, said collapse was not caused by
26 one of the enumerated causes of loss provided in the policy.
According to the engineering report, the loss was not caused by
overload of the roof, insects, weather vents or rot. It is clear that the
collapse was not caused by any other "specific causes of loss
defined in the policy," and the collapse itself did not occur during
"construction, remodeling, or renovation." Thus, the collapse
extension does not provide coverage for this loss.

27 Discussion

28 Each side asserts that it is entitled to partial summary judgment on the
29 coverage/breach of contract issue: Cincinnati Insurance contends that RCSC's
30 claimed loss is not covered due to the exclusions for latent or inherent defects
31 and negligent work, and is not a covered loss under the collapse coverage
32 extension; RCSC contends that its loss is covered notwithstanding the exclusions

1 relied on by Cincinnati Insurance due to the collapse coverage extension for
2 hidden decay. The Court agrees with RCSC.

3 Under the governing Arizona law, the insured bears the burden of
4 establishing that coverage exists under an insuring clause, which includes
5 coverage resulting from an exception to an exclusionary clause, and the insurer
6 bears the burden of establishing the applicability of any exclusion. Hudnell v.
7 Allstate Ins. Co., 945 P.2d 363, 365 (Ariz.App.1997).

8 A. Definition of "Decay"

9 The parties' initial, and main, coverage dispute concerns the definition of
10 the term "decay", which is a term that is nowhere defined in the policy and is one
11 that has not been defined by the Arizona courts in a similar context. Cincinnati
12 Insurance argues that the term should be narrowly defined as pertaining to just
13 organic decay, such as rot or fungus,² whereas RCSC argues that the term should
14 be broadly defined so as to include inorganic degradation, such as the
15 breakdown of the adhesive in the glulam beam caused by the heat and moisture
16 of the pool area.

17 The interpretation of an insurance policy is a question of law properly
18 decided by the Court. Sparks v. Republic Nat'l Life Ins. Co., 647 P.2d 1127, 1132
19 (Ariz.), *cert. denied*, 459 U.S. 1070 (1982). In construing the term "decay," the
20 Court must determine its plain and ordinary meaning using the viewpoint of
21 someone not trained in law or the insurance business², and may not interpret the
22 term so as to defeat RCSC's reasonable expectations of coverage. Samsel v.

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24 ²

25 While there is some disagreement among the parties' experts as to the
26 applicability of the term "decay" to the degradation of the adhesive in the glulam
beam, that disagreement is not relevant to the Court's interpretation of the term.

1 Allstate Ins. Co., 59 P.3d 281, 284 (Ariz.2002).

2 The Court concludes that the term “decay” is ambiguous as it is used in the
3 policy at issue. It is clear that the term is reasonably susceptible of more than
4 one meaning, one that provides coverage and one that excludes coverage, as it
5 is undisputed that there exists both dictionary definitions of “decay” and case law
6 defining similar policy language that support both sides’ contrary positions.

7 *Compare e.g., Stamm Theatres, Inc. v. Hartford Casualty Ins. Co.*, 113
8 Cal.Rptr.2d 300, 306 (Cal.App.2001) (concluding that the broader connotation of
9 “decay” as the gradual deterioration in strength and soundness is an ordinary
10 meaning of the term, and that so defined the term includes the deterioration of
11 inorganic building materials), and Northeastern Center Inc. v. St. Paul Fire and
12 Marine Ins. Co., 2006 WL 842396, at *5 (N.D.Ind. March 28, 2006) (concluding
13 that decay is not ordinarily understood to mean only rot inasmuch as its
14 definitions include a decline or progressive failure of strength and soundness),
15 *with Travelers Property Casualty of America v. Eyde Co.*, 2007 WL 107667, at *6
16 (W.D.Mich. Jan. 9, 2007) (concluding that the commonplace or plain English
17 meaning of “decay” is not a general, gradual decline in strength but the organic
18 rot or deterioration from a normal state.) Arizona follows the principle of
19 construction that a strong indication of ambiguity is established when various
20 jurisdiction reach different conclusions as to the meaning, intent, and effect of the
21 language in an insurance contract. Fire Ins. Exchange v. Berray, 694 P.2d 259,
22 262 (Ariz.App.1983), *approved as modified on other grounds*, 694 P.2d 191
23 (Ariz.1984).

24 Since the Court concludes that the term “decay” is actually ambiguous, the
25 Court construes it in favor of RCSC. Sparks, 647 P.2d at 1132. The Court thus
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1 accepts the reasoning of such cases as Stamm and Northeastern Center and
2 finds that “decay” is reasonably defined as a gradual deterioration of strength and
3 soundness, and therefore has an inorganic component that would include the
4 degradation of the adhesive in the failed glulam beam. Such a definition is not
5 only within the mainstream connotation of the term, it falls within the purpose of
6 the insurance policy purchased by RCSC, it is consistent with the transaction as a
7 whole, and it accords with public policy considerations.

8 The Court rejects Cincinnati Insurance’s contention that defining “decay” in
9 such a manner conflicts with the general miscellaneous exclusion and negligent
10 work exclusion relied on by Cincinnati Insurance given that a reasonable insured
11 could read the policy and conclude that any collapse covered by hidden decay is
12 covered, even if that decay is caused by an otherwise excluded factor. This is so
13 because the coverage extension for a collapse caused in part by hidden decay
14 trumps the general exclusions.³ See *e.g.*, Certain Underwriters at Lloyd’s
15 Subscribing to Policy No. WDO-10000 v. KKM, Inc., 215 S.W.3d 486, 494
16 (Tex.App.2006) (concluding that the coverage extension for collapse caused by
17 hidden decay is a separate provision from the general exclusion for losses
18 caused by “rust, corrosion, fungus, decay, decomposition, hidden or latent
19 defects”, and that it extends coverage beyond the carved out exclusions); Jordan
20 v. Allstate Ins. Co., 11 Cal.Rptr.3d 169, 179-80 (Cal.App. 2004) (reconciling a
21 provision extending coverage for a collapse caused by hidden decay with a
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24 The exclusion for defective materials used in the construction or
25 remodeling of the insured premises is trumped by the coverage extension for
26 collapse since that provision states that coverage exists for a collapse caused in
part by a hidden defect even if the use of defective material in the construction or
remodeling of the insured premises contributed to the collapse.

1 provision excluding coverage for dry rot by concluding that coverage exists for a
2 collapse caused by dry rot even if noncollapse damage caused by dry rot is
3 excluded); Northeastern Center, 2006 WL 842396, at *6 (harmonizing the
4 coverage for collapse caused by hidden decay with the exclusion for losses
5 caused by “deterioration, mold, wet or dry rot, rust or corrosion” by concluding
6 that decay, corrosion, and deterioration, which it determined were synonymous
7 terms, are not covered unless the decay is hidden and causes a collapse.) *

8 While Cincinnati Insurance certainly has the right to draft an insurance
9 policy that limits the term “decay” in the collapse coverage provision to just
10 organic decomposition, it must specifically make that limitation in the policy itself.
11 Sparks, 647 P.2d at 1133 (“If an insurer desires to limit its liability under a policy,
12 it should employ language which clearly and distinctly communicates to the
13 insured the nature of the limitation.”) But rather than doing so in the policy at
14 issue, it chose at its peril to leave the term “decay” undefined and unrestricted.⁴ *

15 Since Cincinnati Insurance concedes that it is undisputed that some
16 combination of the heat, moisture, and chemicals in the enclosed pool area
17 caused the glulam beam adhesive to degrade, and since the Court construes the
18 term “decay” in the collapse coverage provision of the insurance policy to include
19 inorganic decay, the Court finds as a matter of law that the collapse of the glulam
20 beam was caused at least in significant part by “decay” as that term is used in
21 the policy’s coverage extension for collapse.

{ undisputed

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24 As RCSC points out, Cincinnati Insurance was put on notice no later
25 than 1997 that there was an interpretation problem with its hidden decay
26 language in the collapse coverage extension provision. See Vogel v. Cincinnati Insurance Co., 1997 WL 33284143 (E.D.Wis. Aug. 14, 1997).

1 B. RCSC's Knowledge of the Hidden Decay

2 Relying on the policy's provision that collapse caused by hidden decay is
3 covered "unless the presence of such decay is known or should reasonably have
4 been known to an insured prior to collapse[.]" Cincinnati Insurance argues, for the
5 first time in its reply memorandum, that no coverage exists as a matter of law
6 even if the degradation of the glulam beam adhesive amounts to covered decay
7 because RCSC should have known prior to the collapse that the adhesive could
8 and would degrade because of the heat, moisture, and chemicals in the enclosed
9 pool area. The Court disagrees and finds as a matter of law that the decay
10 causing the collapse was hidden from view and was not reasonably known to
11 RCSC prior to the collapse. *

12 As an initial matter, the Court rejects RCSC's contention, raised for the first
13 time in its reply memorandum, that Cincinnati Insurance waived its right to rely on
14 the actual or constructive knowledge portion of the hidden decay provision
15 because Cincinnati Insurance did not rely on it as a ground for denying RCSC's
16 claim. In support, RCSC cites in part to Hagen v. U.S. Fidelity and Guaranty Ins.
17 Co., 675 P.2d 1340 (Ariz.App.1983), wherein the court noted that an insurer has
18 a duty to notify its insured without delay if it wishes to assert its non-liability and
19 that the insurer's "[f]ailure to act promptly may result in a waiver of the right to
20 deny coverage or an estoppel to assert an exclusion."), *opinion approved and*
21 *adopted*, 675 P.2d 1310 (Ariz.1984).

22 The Court, however, concludes that this issue is more appropriately
23 governed by D.M.A.F.B. Federal Credit Union v. Employers Mutual Liability Ins.
24 Co. of Wisconsin, 396 P.2d 20, 23 (Ariz.1964), wherein the court, in rejecting the
25 insured's claim that the insurer had waived its right to assert any defense in the
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1 trial court other than the defense to liability it had asserted prior to suit, noted that
2 although the insurer had emphasized one defense prior to suit, it had quoted the
3 full text of the exclusion it relied on at trial to the insured in its first letter to the
4 insured. As Cincinnati Insurance points out, it expressly reserved the right to rely
5 on the actual or constructive knowledge language in the hidden decay provision
6 (1) by having RCSC's representatives sign a non-waiver agreement on June 20,
7 2006 that provided that Cincinnati Insurance's investigation of the cause of the
8 loss would not "waive or invalidate any rights whatever of either of the parties",
9 (2) by quoting the "hidden decay" provision policy language in both its reservation
10 of rights letter, dated July 7, 2006, and in its denial letter dated February 12, .
11 2007, and (3) by stating in its denial letter that "[t]he insurance company
12 continues to fully reserve any and all rights and defenses, which may now exist or
13 which may arise in the future. No waiver or estoppel of any kind is intended nor
14 to be inferred." Furthermore, Cincinnati Insurance contends, without
15 contravention by RCSC, that it did not become aware of facts supporting the
16 potential application of the actual or constructive knowledge provision until RCSC
17 produced documents in response to discovery requests. Since Arizona employs
18 the generally accepted definition of waiver of as the intentional relinquishment of
19 a known right, a waiver cannot be implied absent full knowledge of all material
20 facts. Manzanita Park, Inc. v. Ins. Co. of North America, 857 F.2d 549, 555-56 (9th
21 Cir.1988).

22 Although Cincinnati Insurance has not waived its right to rely on the
23 knowledge provision, the Court concludes as a matter of law that RCSC has
24 sufficiently established that no reasonable trier of fact could conclude from the
25 evidence presented that RCSC actually knew or reasonably should have known
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1 prior to the collapse of the degradation of the adhesive in the glulam beam that
2 failed.

3 As for the actual knowledge requirement, Cincinnati Insurance has not
4 cited in its statements of facts to any evidence establishing that any responsible
5 RCSC official actually knew that the adhesive had degraded, whereas RCSC has
6 provided uncontroverted affidavits from Dennis Nichols, RCSC's president, and
7 James Wellman, RCSC's assistant general manager, both of which state that
8 these officials were not aware of any hidden decay in the beams prior to the roof
9 collapse.

10 As for constructive knowledge requirement, Cincinnati Insurance has not
11 cited to any competent evidence from which the trier of fact could reasonably
12 infer that some responsible RCSC official should have known about the presence
13 of the degraded adhesive. For example, while Cincinnati Insurance relies in large
14 part on a report by PWI Engineers prepared in connection with the 1987 roof
15 reconstruction that stated that the combination of chlorine and moisture could
16 have a deteriorating effect on the integrity of the glulam roof system⁵, the trier of
17 fact could not legitimately draw an inference of constructive knowledge by RCSC

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20 Only a few pages of the report of the PWI Engineers is part of the
21 record. The portion relied on by Cincinnati Insurance, which is part of the report
22 that is in the record, states:

23 Due to the high degree of moisture penetration into the interstitial
24 space, PWI Engineers is concerned about the structural integrity of
25 the GLU-LAM system. The combinations of chlorine and moisture
26 can have a very deteriorating effect on the glue used in this type [of]
structural system. Should the structural system be impaired, it would
preclude the placement of equipment on the roof. Also, the
structural capacity of the roof system to handle additional roof
mounted equipment must be evaluated.

1 from that report because the report was apparently only a pre-inspection report
2 outlining how PWI Engineers was going to inspect the pool enclosure roof, thus
3 making the comment just a pre-investigation general comment; the report stated
4 that PWI Engineers would later issue a report recommending structural/roof
5 systems corrections or limitations and discussing a proposed system design
6 scheme - as RCSC correctly points out, there is no evidence that whatever roof
7 reconstruction design PWI Engineers ultimately recommended was not followed
8 by RCSC. Furthermore, Cincinnati Insurance has not cited to any evidence of
9 record establishing who at RCSC received the preliminary report.

10 While Cincinnati Insurance also cites to various recommendations made to
11 RCSC in the 1987-2002 period related to roof and ventilation system issues in the
12 pool area that RCSC did not implement as evidence that RCSC should have
13 known of the presence of the degraded adhesive, the Court also cannot conclude
14 that the trier of fact could legitimately infer from any of the cited-to evidence that
15 RCSC possessed the requisite knowledge. For example, Cincinnati Insurance
16 relies on an August 1987 communication by Plummer Hasan & Associates
17 Consulting Engineers to RCSC that stated that "[i]t is preferred that the beam
18 should be sealed with waterproof sealant."⁶ Cincinnati Insurance's assertion that
19 this recommendation was not implemented is based on the deposition testimony
20 of RCSC's assistant general manager Wellman, who stated, after noting that he
21 had never seen the document before, that he had not come across any
22 documentation suggesting that the reused glulam beams were sealed with a
23 waterproof sealant. Cincinnati Insurance's statements of fact, however, do not

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25 ⁶

26 Cincinnati Insurance's reply memorandum and its applicable statement
of fact leave out the portion of the recommendation that states "it is preferred[.]"

1 refer to the actual communication as being part of the summary judgment record,
2 do not cite to any evidence establishing who at RCSC received the
3 communication, and do not cite to any evidence establishing that sealing the
4 glulam beam would have prevented the adhesive in it from degrading.

5 Cincinnati Insurance also cites to some colorable evidence suggesting that
6 RCSC had knowledge that some of the attic ventilation fans installed as part of
7 the 1987 roof reconstruction may not have been working prior to the collapse.
8 Even if this were true, a reasonable trier of fact could not conclude therefrom that
9 RCSC had sufficient constructive knowledge of the presence of the degraded
10 adhesive. First, while a December 2001 report from Starling & Associates, Inc., a
11 civil and structural engineering company, stated that the roof structure would be
12 in danger of moisture buildup that could cause a failure “similar to the previous
13 occurrence” were the ventilation system to fail or be turned off, the previous
14 occurrence being referred to involved corrosion and rot, not adhesive
15 degradation. Second, Cincinnati Insurance’s expert, Marc Sokol, testified at his
16 deposition that while high humidity could have been a contributing cause of the
17 failure of the glulam beam if the attic space had been unventilated, it would not
18 have been sufficient by itself to cause a collapse. Third, there is not sufficient
19 competent evidence of record from which a trier of fact could legitimately
20 conclude that the attic space above the pool area was in fact unventilated.

21 The Court concludes that the only justifiable inference that the evidence of
22 record permits is that the lay persons running RCSC at the applicable time had
23 no knowledge prior to the collapse sufficient to invoke the “reasonably should
24 have known” portion of the hidden defect coverage provision. This is shown, for
25 example, by the uncontroverted evidence of record establishing (1) that the 1987
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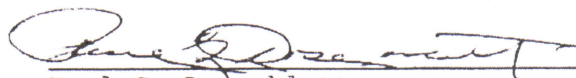
1 roof reconstruction was handled by a qualified architect and that RCSC complied
2 with all requisite rules and regulations and acquired all necessary permits for the
3 reconstruction, (2) that Marc Sokol, Cincinnati Insurance's engineering expert,
4 stated in his report that the architect for the 1987 roof reconstruction had reused
5 the glulam support beams because they had no visual signs of decay, and
6 (3) that the December 2001 report from Starling & Associates, Inc. stated that an
7 inspection of the roof structure in September 2001 found no evidence of
8 significant structural distress that needed to be addressed prior to the remodeling
9 of the pool area, including no evidence of significant moisture damage, lumber
10 rotting or structural weakening in the main support beam, and that the forced air
11 ventilation in the attic above the pool area had kept the attic dry as no evidence
12 was seen of recent moisture or water damage to the structure. Therefore,

13 IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment (doc.
14 #23) is denied.

15 IT IS FURTHER ORDERED that Defendant/Counterclaimant RCSC's
16 Cross-Motion for Summary Judgment on Coverage/Breach of Contract (doc. #75)
17 is granted to the extent that the Court declares that the roof collapse at issue falls
18 within the collapse coverage extension for hidden decay, as set forth in Section
19 A.5(c)(2)(b) of Cincinnati Insurance Company's policy no. CPP 074 40 66.

20 IT IS FURTHER ORDERED that the First Claim (Hidden or Latent Defect),
21 Second Claim (Negligent Work), and Third Claim (Collapse) of the Cincinnati
22 Insurance Company's Complaint for Declaratory Judgment are dismissed.

23 DATED this 31st day of March, 2008.

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25 
26 Paul G. Rosenblatt
United States District Judge