DOCKET NO. CV-16-6010428-S	: SUPERIOR COURT
RICHARD N. DINO, ET AL	: JUDICIAL DISTRICT
VS.	: OF TOLLAND
SAFECO INSURANCE COMPANY OF AMERICA, ET AL	: JUNE 28, 2018

REVISED MEMORANDUM OF DECISION

The plaintiffs, Richard and Melanie Dino, have brought this action against five insurance companies that insured their home from March 2000 through October 2015. Their claim arises out of the deteriorating condition of their basement walls caused by aggregate material used in the concrete that causes the oxidization and expansion of the concrete. The plaintiffs allege that this process is irreversible and will ultimately reduce the concrete to rubble with the result that the entire home will fall into the basement. The court has before it the defendant insurers' motions for summary judgment. As explained below, the court concludes that the admissible evidence in the record all suggests the plaintiffs' loss occurred in 2015 when they discovered the damage. There is no admissible evidence in the record sufficient to suggest otherwise. Under the manifestation trigger of coverage theory adopted by the court, only the Liberty policies are potentially triggered. As to Liberty, the court also concludes that questions of fact preclude the entry of summary judgment on its other coverage positions.

FACTS

The plaintiffs' home in Tolland was built in 1985 and they purchased it in 1995. An inspection of the home was conducted around the time of purchase and, to the extent it revealed any cracking in the basement walls, the cracks were typical of concrete basement walls and not a matter of concern. Soon thereafter, the plaintiffs finished the basement such that the concrete

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walls were no longer visible except in the furnace room, where the view of the walls was obscured by stored items, and in two other out-of-the-way places. The plaintiffs observed no cracking in their basement walls until July or August of 2015. At that time, media coverage of the widespread problem of deteriorating concrete walls in the area prompted the plaintiffs to inspect the walls in their furnace room. They consulted with the original builder, the local building inspector and a contractor and discovered that their basement walls appear to be afflicted with the same condition impacting the basement walls of many other area homeowners. Upon removing drywall to expose the concrete walls in the finished area of the basement, the plaintiffs discovered that the cracking was severe and the walls were "visibly bowing."

The plaintiffs had their home inspected on September 11, 2015 by a structural engineer, David Grandpré, who states that at the time of his inspection "the structural integrity of the concrete basement walls was substantially impaired by the cracking condition." He has also offered the opinion that the walls reached a point of substantial impairment of structural integrity ten years prior to his inspection. The defendants have challenged the admissibility of both of these opinions pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S.Ct. 1384, 140 L.Ed.2d 645 (1998).[1] By the time Grandpré inspected the walls in September 2015, they exhibited bulging and bowing, "evidence that the original concrete basement walls had begun to move inward due to the lateral pressure exerted by the exterior soil." Because the deteriorating condition of the concrete was irreversible and the walls would ultimately fail completely, Mr. Grandpré opines that the "only effective method for remedying the condition was the complete removal and replacement of the concrete portion of the original

[1] The court conducted a hearing pursuant to *Porter* on January 5, 2018, the details of which are discussed below.

basement walls." In September 2015 work began to remove the original walls and replace them, with most of the work completed by December 2015.

The defendants and the periods during which they provided coverage to the plaintiffs are: Safeco Insurance Company of America ("Safeco")(March 2000 to April 2004); Twin City Fire Insurance Company ("Twin City")(April 2004 to October 2005); Middlesex Mutual Insurance Company ("Middlesex Mutual")(October 2005 to October 2007)[2]; Sentinel Insurance Company ("Sentinel")(October 2007 to October 2013); and Liberty Mutual Insurance Company ("Liberty")(October 2013 through the commencement of suit in March 2016). All of the defendants denied the plaintiffs' claims for coverage. The provisions of the defendants' policies differ in material respects on some of the terms and conditions that are relevant to the plaintiffs' claims for coverage. In one respect, however, they are substantially the same. Each policy covers only first party property losses that occur during the policy period.[3] This fact is dispositive of all of the pending motions, except Liberty's.

Liberty's policies covered the plaintiffs' home at the time they discovered the damage to their basement walls. The plaintiffs claim coverage under the Liberty policies pursuant to the "Additional Coverage" for "Collapse." The collapse coverage provides as follows:

> **8. Collapse.** We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:

[2] The plaintiffs have withdrawn their claims against Middlesex Mutual.

[3] Safeco's policies provide "This policy applies only to loss under Section I, or *bodily injury* or *property damage* under Section II, which occurs during the policy period." (Italics in original.) The Twin City and Liberty policies contain a virtually identical provision. The Sentinel policies include a substantially equivalent provision within Section I of the policy, which covers first party property losses: "This policy applies only to loss which occurs during the policy period."

a. Perils Insured Against in COVERAGE C—PERSONAL PROPERTY. These perils apply to covered buildings and personal property for loss insured by this additional coverage:

b. Hidden decay;

c. Hidden insect or vermin damage;

d. Weight of contents, equipment, animals or people;

e. Weight of rain which collects on a roof; or

f. Use of defective material or methods in construction, remodeling or renovation;

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b., c., d., e., and f. unless the loss is a direct result of the collapse of a building.

Collapse does not include settling, cracking, shrinking, bulging or expansion.

. . . .

The plaintiffs claim the damage to their basement walls constitutes a "collapse" under this language, whereas Liberty maintains the damage is outside this coverage, which "does not include settling, cracking, shrinking, bulging or expansion." Liberty also argues that the plaintiffs are claiming a loss to a "foundation" or "retaining wall," also excluded from the collapse coverage. Liberty further maintains the plaintiffs have not complied with the policy's suit limitation provision, which states as follows:

> **Suit Against Us.** No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.[4]

[4] This one year period was extended by statute to eighteen months effective July 1, 2012 and subsequently to twenty four months effective July 1, 2014. General Statutes §§38a-307 and 38a-308. The policy in effect when the plaintiffs discovered the damage, therefore, required the plaintiffs to start their action within two years after the date of loss.

Relying on the plaintiffs' offer of Mr. Grandpré's opinion that there were significant cracks in the walls ten years before he inspected them, Liberty argues that the plaintiffs not only cannot establish that the loss occurred during its policy periods, but that even if it is assumed the loss occurred on the first day of Liberty's coverage, October 17, 2013, the plaintiffs commenced suit almost three years later and thus did not comply with the suit limitation provision.

The plaintiffs have asserted breach of contract claims against each of the defendants based upon their denials of coverage. As to each defendant they have also asserted a claim that their denial of coverage constitutes an unfair insurance practice under the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes §38a-815 et seq., because the defendants are engaged in a general business practice and a conspiracy orchestrated through the Insurance Services Office (ISO) to unreasonably refuse to provide coverage for claims involving crumbling concrete basement walls. They assert causes of action against the defendants based on the alleged unfair insurance practice pursuant to the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes §42-110a et seq. The defendants have moved for summary judgment on both the breach of contract and CUTPA/CUIPA claims.

DISCUSSION

I. SUMMARY JUDGMENT STANDARDS

"[S]ummary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 820-21, 116 A.3d 1195

(2015). "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) Id., 821.

"To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015).

II. INSURANCE POLICY INTERPRETATION

An insurance contract is interpreted by the court according to "the same general rules that govern the construction of any written contract." (Internal quotation marks omitted.) *Johnson* v. *Connecticut Ins. Guaranty Assn.*, 302 Conn. 639, 643, 31 A.3d 1004 (2011). Thus, "[t]he determinative question is the intent of the parties, that is, what coverage the . . . insured expected to receive and what the insurer was to provide, as disclosed by the provisions of the policy." (Internal quotation marks omitted.) Id. If the policy's terms are "clear and unambiguous," then that language "must be accorded its natural and ordinary meaning." (Internal quotation marks omitted.) Id. If the terms of the insurance policy are "ambiguous," however, meaning

"reasonably susceptible to more than one reading," then ambiguity "must be construed in favor of the insured because the insurance company drafted the policy." (Internal quotation marks omitted.) Id. "The court must conclude that the language should be construed in favor of the insured unless it has 'a high degree of certainty' that the policy language clearly and unambiguously excludes the claim." *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 796, 967 A.2d 1 (2009), citing *Kelly* v. *Figueiredo*, 223 Conn. 31, 37, 610 A.2d 1296 (1992). When interpreting an insurance policy, the court "must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Internal quotation marks omitted.) *National Grange Mutual Ins. Co.* v. *Santaniello*, 290 Conn. 81, 88–89, 961 A.2d 387 (2009).

"In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading." (Internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group,* 311 Conn. 29, 37-38, 84 A.3d 1167 (2014), quoting *Johnson* v. *Connecticut Ins. Guaranty Assn.*, supra, 302 Conn. 643. "[T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, supra, 290 Conn. 796. Nevertheless, "[c]ontext is often central to the way in which policy language is applied; the same language may be found both ambiguous and unambiguous as applied to different facts. . . . Language in an insurance contract, therefore, must be construed in

the circumstances of a particular case, and cannot be found to be ambiguous or unambiguous in the abstract. . . . In sum, the same policy provision may shift between clarity and ambiguity with changes in the event at hand . . . and one court's determination that a term . . . was unambiguous, in the specific context of the case that was before it, is not dispositive of whether the term is clear in the context of a wholly different matter." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, supra, 41-42.

III. TRIGGER OF COVERAGE

A threshold issue under each of the insurance policies involved in this case is whether a loss occurred during the policy period, potentially triggering coverage under that policy. More particularly, in the case of a progressive first party property loss, where a covered event may have resulted from hidden decay or the use of defective material or methods in construction, how is the court to determine the date of loss and what policy or policies must respond to the loss? Both the Appellate Court and the Connecticut Supreme Court have addressed similar questions in the context of liability insurance policies, but not in the context of first party property insurance. This court concludes that the correct trigger of coverage theory in this context is the manifestation theory as articulated in *Prudential-LMI Commercial Insurance* v. *Superior Court*, 51 Cal. 3d 674, 798 P.2d 1230, 274 Cal. Rptr. 387 (1990).

"Trigger of coverage is a concept used by courts to determine whether and when an event implicates a particular insurance policy." *R.T. Vanderbilt Company, Inc.* v. *Hartford Accident and Indemnity Company*, 171 Conn. App. 61, 97-98, 156 A.3d 539, cert. granted 327 Conn. 923, 171 A.3d 62 (2017).. While most insurance policies, including those at issue here, do not explicitly address the trigger issue, the language of the policies is the starting point of the

analysis. Id., 98. It must also be acknowledged, however, that courts resolving this question in the context of progressive losses, injury and damage have placed great emphasis upon fairness and efficiency, as well as the predictability and manageability of insurance policies and coverage disputes. Id., 122-23; *Prudential-LMI Commercial Insurance* v. *Superior Court*, 274 Cal. Rptr. 403-04. While these concerns typically do not arise in most insurance disputes because it is clear when the underlying loss, injury or damage occurred, they are implicated when these events may justifiably be perceived to take place over the course of years while multiple insurance policy periods come and go. Courts have reached widely disparate conclusions on this subject in the context of liability insurance; however considerable authority supports the view that, in the first party property insurance context, it is the manifestation theory that best accords with the policy language and these other concerns.

There are four prevailing theories on how coverage may be triggered under an insurance policy. These four general theories provide respectively that coverage is triggered: (1) when the subject of the loss, injury or damage is first exposed to its cause ("exposure"); (2) when injury or damage actually takes place ("injury-in-fact"); (3) when the loss, injury or damage becomes known or reasonably discoverable ("manifestation"); and (4) over the entire period of time between first exposure and manifestation, triggering all policies issued during that time ("continuous trigger"). See *Security Insurance Company of Hartford* v. *Lumbermens Mutual Casualty Company*, 264 Conn. 688, 697 n.12, 826 A.2d 107 (2003). In this case, the plaintiffs urge the court to apply a continuous trigger. None of the insurers agree with that position. The plaintiffs, however, also argue that the Liberty policy in effect during 2015 is triggered under a manifestation theory. Liberty relies upon an injury-in-fact theory and argues that the plaintiffs' loss occurred long before its policies went into effect. Twin City and Sentinel do not expressly

take a position on trigger beyond opposing the application of a continuous trigger. They do recognize this court's prior adoption of the manifestation trigger in its jury instructions in *Musgrave* v. *Twin City Fire Ins. Co.*, Superior Court, judicial district of Tolland, Docket No. CV-15-6009840-S (November 7, 2017) (Transcript of Proceedings), and argue that there are no facts to support a conclusion that their policies are triggered under that theory. Safeco also takes no position on which trigger theory applies, but argues that its policies are not triggered under any theory other than a continuous trigger, which it opposes. The court concludes that the manifestation trigger is the applicable theory in this context and finds it is a question of fact, and therefore a question for the jury, whether the 2015 Liberty policy is triggered by the plaintiffs' alleged loss.

The plaintiffs argue that under Connecticut law a continuous trigger applies to progressive first party property losses, citing *United Technologies Corporation* v. *American Home Assurance Company*, 989 F. Supp. 128, 153 (D. Conn. 1997) and *Roberts* v. *Liberty Mutual Fire Insurance Company*, 264 F. Supp. 3d 394 (D. Conn. 2017). The plaintiffs also cite the Seventh Circuit's decision in *Strauss* v. *Chubb Indemnity Insurance Company*, 771 F.3d 1026 (7th Cir. 2014) as further persuasive authority. The *United Technologies* decision, however, does not adopt a continuous trigger theory and, even if it is read otherwise, it does not persuade the court that a continuous trigger does or should apply. *Roberts*, which is consistent on its facts with the application of a manifestation trigger, does not analyze the trigger issue and relies upon cases addressing the subject in the context of liability insurance. Finally, the court is not persuaded to apply a continuous trigger by the Seventh Circuit's decision in *Strauss*, which appears to be based on policy language substantively different than the applicable policy language in this case.

The plaintiffs argue that two federal district courts applying Connecticut law support their position that a continuous trigger of coverage applies to progressive losses covered under property insurance policies. *United Technologies* v. *American Home Assurance Company*, supra; *Roberts* v. *Liberty Mutual Fire Insurance Company*, supra. The court disagrees. The *United Technologies* case dealt with the trigger issue in the context of the repeated release of contaminants at different locations over a period of years. The court, asserting that Connecticut had previously adopted an injury-in-fact trigger,[5] interpreted that approach as involving "multiple triggers" in gradual environmental contamination cases, reasoning that this approach "reflects the reality that one contaminating event can result in several different losses after the date of its occurrence." *United Technologies* v. *American Home Assurance Company*, supra, 989 F. Supp. 153. The plaintiffs read the court's decision to apply a continuous trigger to progressive first party losses. As Connecticut law stands today, a continuous trigger theory does apply to progressive injury cases under liability insurance policies. *R.T. Vanderbilt Company, Inc.* v. *Hartford Accident and Indemnity Company*, supra, 171 Conn. App. 118-23. Whether the same trigger applies in the first party property context, however, is an unresolved issue. In *United Technologies*, the court drew no distinction between first party property insurance and third party liability insurance. As discussed below, there are important distinctions between the two types of insurance. Moreover, in *United Technologies,* the court purports to be applying an injury-in-fact theory, albeit recognizing that there is more than one injury involved. In this case, there is only one loss at issue, the alleged collapse of the plaintiffs' home. See *Kowalyshyn* v. *Excelsior Insurance Company*, United States District Court, Docket No. 3:16-cv-00148 (JAM)

[5] The court based this assertion on two prior trial court decisions involving comprehensive general liability policies. *Aetna Casualty & Surety Co.* v. *Abbott Laboratories, Inc.*, 636 F. Supp. 546 (1986); *Stanton* v. *Northbrook Property and Casualty Insurance. Co*,, Superior Court, judicial district of New Haven, Docket No. CV-93-0349982-S (July 29, 1994) (12 Conn. L. Rptr. 273).

(D. Conn. Feb 13, 2018)("The 'collapse' itself did not occur innumerable times over the years, unlike the injuries or losses in environmental or disease cases."). *United Technologies* does not address the circumstances before this court and, to the extent it may be read to apply a continuous trigger of coverage theory to progressive first party property losses, this court does not agree that the continuous trigger theory applies to such losses.

The plaintiffs also cite *Roberts* v. *Liberty Mutual Fire Insurance Company*, supra, in support of their position that a continuous trigger of coverage applies in this case. *Roberts* does involve a first party property claim for crumbling concrete basement walls. In that case, in rejecting Liberty's argument that its 2007 policy was not triggered, the court stated, "[f]or 'long-tail' losses such as 'gradual contamination,'... Connecticut applies the 'continuous trigger theory,' which holds that 'whenever the claimant was exposed to the cause of the injury, was injured in fact, or the injury became manifest, ... any of th[o]se events trigger the applicable insurance policy in force at the time of the event.'" Id., 264 F. Supp. 3d 400, n.3., citing *Travelers Casualty & Surety Company of America* v. *Netherlands Insurance Co.*, 312 Conn. 714, 753 n.32, 95 A.3d 1031 (2014); *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity. Co.*, supra, 171 Conn. App. 118; and *United Technologies Corp.* v. *American Home Assurance Co.*, supra, 989 F. Supp. 152–53. *Roberts* is distinguishable on its facts because in that case Liberty was on the risk at the time of manifestation. See *Kowalyshyn* v. *Excelsior Insurance Company*, supra, n.3. Moreover, the cases cited in *Roberts* in support of the application of a continuous trigger either do not support that proposition or are distinguishable. The *Netherlands* case and *R.T. Vanderbilt* concern liability policies and *United Technologies* relies upon other cases involving liability policies. Moreover, the Appellate court reads *Netherlands* differently than the plaintiffs. In *R.T. Vanderbilt*, the court said "the most reasonable interpretation of the

Netherlands decision is that our Supreme Court merely (1) upheld the trial court's use of an injury-in-fact trigger theory as reasonable under the specific facts of that case and (2) recognized that the application of an injury-in-fact trigger by the trial court in *Netherlands* was not inconsistent with the application of a continuous trigger theory by the trial court in *Security*."[6] Id., 171 Conn. App. 105.

Despite the cases relied upon by the plaintiffs, the court considers the trigger of coverage issue, for progressive first party losses, a matter of first impression for Connecticut appellate courts. At the outset, the analysis must begin with the relevant policy provisions. All of the defendants' policies provide first party property coverage in "Section I" and liability coverage in "Section II." The plaintiffs' claims are brought under Section I. Section I, Coverage A in each of the policies covers "direct physical loss to property" or "direct loss to property... only if that loss is a physical loss," except as thereafter limited and subjected to exclusions. Section I also extends enumerated "Additional Coverages." The language in the defendants' policies applicable to the trigger issue under Section I provides that the policies apply to "loss which occurs during the policy period." That loss might be a direct physical loss to property under Coverage A, or the loss might be one covered under an enumerated "Additional Coverage." The plaintiffs' claims for coverage against Twin City, Sentinel and Liberty are limited to coverage for "collapse" under an Additional Coverage. As to Safeco, the plaintiffs claim their loss constitutes a direct physical loss under Coverage A that is not limited or excluded under the Safeco policy.

The plaintiffs argue that the Ninth Circuit's decision in *Strauss* v. *Chubb Indemnity Insurance Company*, supra, is persuasive authority, based on policy language, supporting the

[6] *Security Insurance Company of Hartford* v. *Lumbermens Mutual Casualty Company*, supra.

application of a continuous trigger to progressive first party property insurance claims. *Strauss*, however, rests upon a definition of "occurrence" in the defendants' insurance policies that does not apply to Section I of the policies. In *Strauss*, a home built in 1994 suffered damage due to the continuous infiltration of water caused by a construction defect. The water infiltration began at the time of construction, but damage was not discovered until 2010. The defendants had insured the home from the time it was built until 2005. They maintained that under Wisconsin law a manifestation trigger theory applied, which would have triggered a 2010 policy, and the plaintiffs argued that a continuous trigger applied. The court concluded that "the provisions found in the [p]olicy require the application of the continuous trigger theory." Id., 1032. Unlike the policies in this case the policies in *Strauss* contained a policy period provision applicable to first party property claims that incorporated language typically reserved for third party liability coverage. The coverage applied "only to occurrences that take place while this policy is in effect." "Occurrence" was a defined term, meaning "a loss or accident to which this insurance applies occurring within the policy period. Continuous or repeated exposure to substantially the same general conditions unless excluded is considered to be one occurrence." Id. The court held that "this language demand[ed]" application of a continuous trigger. Id.

> Here, while there was only one ongoing occurrence as defined by the Policy, there was continual, recurring damage to the property with each successive rainfall. The [d]efendants do not dispute that physical damage to the building envelope of the home took place during each policy period from October 1994, when the home was constructed, to October 2010, when the effects of the water infiltration manifested. Because the [p]olicy language demonstrates that the parties intended for the continuous trigger theory to apply, the benefits of the [p]olicy are now available to the [plaintiffs].

Id., 1033. Rejecting the defendants' reliance on *Prudential-LMI*, supra, and their argument that the continuous trigger only applies to third party liability claims, and again referencing the

defendants' choice to employ language commonly used in liability insurance, the court stated, "Letting the [defendants] off the hook now would reward their sloppy drafting. It is not the province of this [c]ourt to alter the unambiguous terms of the [p]olicy." Id.

In this case, the plaintiffs argue that the language contained in the defendants' policies is not materially different than the language contained in the *Strauss* policy. The court disagrees. The Sentinel policy period provision is entirely separate from its liability coverage counterpart and the policy period provisions in the other defendants' policies draw a clear distinction between the liability coverage and the property coverage.[7] They all use the word "occur" in connection with the property coverage but that is where any arguable similarity ends. The liability coverage provided by the defendants' policies applies to "'bodily injury' and 'property damage' caused by an 'occurrence' to which this coverage applies." "Occurrence" is a defined term meaning "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a. [b]odily injury; or b. [p]roperty damage." Thus, "occurrence" as a defined term applies in the context of bodily injury and property damage under the liability section of the policies. Liability coverage is triggered when bodily injury or property damage take place during the policy period. *Travelers Casualty and Surety Company of America* v. *Netherlands Insurance Company*, supra, 312 Conn. 743-46. In contrast, the policy period provisions applicable to the property coverage are triggered by "loss," not "bodily injury or property damage," that takes place during the policy period. There is no connection to the definition of "occurrence" that applies to the liability coverage. The definition of "occurrence" is obviously drawn to apply only to the liability coverage, but that definition is what the plaintiffs' entire policy language argument rests upon. See *Allstate*

[7] See footnote 3.

Insurance Company v. *Hunter*, 242 S.W.3d 137, 142 n.5 (Tex. Ct. App. 2007) ("[T]he term 'occurrence' is not used in connection with the 'Section I' dwelling coverage.")

The distinction between liability coverage and property coverage is a significant one in the context of establishing an appropriate trigger of coverage. *Montrose Chemical Corp.* v. *Admiral Insurance Co.*, 10 Cal.4th 645, 913 P.2d 878, 42 Cal.Rptr.2d 324 (1995); *Prudential-LMI*, supra; C. Lantz, "Triggering Coverage of Progressive Property Loss: Preserving the Distinctions Between First-And Third-Party Insurance Policies," 35 Wm. & Mary L. Rev. 1801 (1994); D. Grand, "Nailing Down Occurrence Triggers for Property Damage in the Wake of Redevelopment--Why a Distinction Should Be Made Between First and Third Party Policies," 68 La. L. Rev. 605 (2008). After having adopted a manifestation trigger for first party progressive losses in *Prudential-LMI*, the California Supreme Court applied a continuous trigger to comprehensive general liability policies called upon to respond to third party liability lawsuits "seeking damages for continuous or progressively deteriorating bodily injury and property damage that occurred during [] successive policy periods" in *Montrose*. In doing so the court drew several distinctions between the two types of insurance coverage that warrant the application of different trigger theories. A critical distinction is that "[f]irst party property coverage is typically purchased in an amount sufficient to cover the insured's maximum potential loss… Hence there is no reason to look to more than one policy in the event of loss… Third party liability coverage differs substantially… at best, the insured makes an educated guess about its potential exposure to third parties. At worst, the insured's best guess falls far short of the mark." (Citations and quotation marks omitted) Id., 333. There is a significant difference between the reasonable expectations of insureds under these two types of coverage, as well as broader and distinct public policy considerations implicated in the third party liability context.

In *Prudential-LMI*, the insured "discovered an extensive crack in the foundation and floor slab" of an apartment building, later determined to have been the result of "expansive soil that caused stress, rupturing the foundation of the building." Id., 390-91. Two years earlier, when the defendant insurer's policy was in effect and the insured had installed carpeting, no cracking was observed. The insurer argued the loss did not occur during its policy period but the insured maintained that a continuous trigger should apply to progressive losses, such that all policies covering the property while this process was underway should respond. The court disagreed and applied the manifestation trigger of coverage advocated by the insurer. The court reasoned as follows:

> …[P]rior to the manifestation of damage, the loss is still a contingency under the policy and the insured has not suffered a compensable loss… Once the loss is manifested, however, the risk is no longer contingent; rather an event has occurred that triggers indemnity unless such event is specifically excluded under the policy terms. Correspondingly, in conformity with the loss-in-progress rule, insurers whose policy terms commence after initial manifestation of the loss are not responsible for any potential claim relating to the previously discovered and manifested loss. Under this rule, the reasonable expectations of the insureds are met because they look to their present carrier for coverage. At the same time the underwriting practices of the insurer can be made predictable because the insurer is not liable for a loss once its contract with the insured ends unless the manifestation of loss occurred during its contract term.

(Citations omitted) Id., 1246-47. Other courts addressing the same question have largely reached the same conclusion. *Mangerchine* v. *Reaves*, 63 So.3d 1049 (La. App. 2011); *Allstate Insurance Company* v. *Hunter*, 242 S.W.3d 137 (Tex. App. 2007); *Jackson* v. *State Farm Fire and Casualty Company*, 835 P.2d 786 (Nev. 1992); *Winding Hills Condominium Association, Inc.* v. *North American Specialty Insurance Company*, 752 A.2d 837 (N.J. Super. 2000); See also *Parker* v. *Worcester Insurance Company*, 247 F.3d 1 (1st Cir. 2001) (applying a "discovery rule" under Connecticut law in connection with a suit limitation provision); cf *Kief Farmers*

Cooperative Elevator Company v. *Farmland Mutual Insurance Company*, 534 N.W.2d 28 (N.D. 1995).

While the court's decision in *Prudential-LMI* does not anchor itself in policy language, it does focus on the nature of a "loss" under first party coverage, as distinguished from "bodily injury" and "property damage" in the third party liability context. Other courts applying a manifestation trigger have placed more emphasis on the policy language and specifically the meaning of "loss" in the insurance context. For example, in *Mangerchine* v. *Reaves*, supra, the court applied a manifestation trigger to a claim for collapse coverage where construction defects caused structural damage to the floor joists in a house. The policy language was virtually identical to the relevant language in the defendants' policies at issue in this case. The court distinguished the objective nature of "damage" from "loss" and emphasized that a "loss" in the insurance context "combines the element of physical damage to the property with that of corresponding reduction in patrimony from the subjective standpoint of the insured." Id., 1056. It is the financial detriment caused by damage that constitutes the loss triggering coverage, as distinguished from the infliction of the damage itself, that triggers coverage under the commonly used liability coverage language. While the damage may unfold over a period of years, "[o]nce the loss is manifested..., the risk is no longer contingent." *Prudential-LMI*, supra, 274 Cal. Rptr. 403. Thus, at the time of manifestation, the loss "occurs." The court concludes that the relevant policy language is more supportive of a manifestation trigger, which accounts for the subjective notion of "loss," than a continuous trigger. For that and other reasons discussed below, the court concludes that a continuous trigger of coverage theory does not apply to progressive first party property losses.

This linguistic analysis of "loss" as the triggering event also counsels against the application of an "injury-in-fact" trigger for progressive first party losses. Liberty advocates for the application of an injury-in-fact trigger which, as described above, focuses upon when damage actually occurs. Thus, the collapse claimed by the plaintiffs under Liberty's policy, pursuant to the plaintiffs' interpretation of what "collapse" means,[8] occurred when the basement walls reached a point of substantial impairment of structural integrity. The policy in effect at that point in time would be the only policy triggered. Relying upon the contested testimony of the plaintiff's expert that the basement walls reached a point of substantial impairment of structural integrity at least ten years before he inspected the home in September 2015, Liberty argues the loss occurred long before its first policy went into effect in October 2013. This approach fails to account for the subjective element of "loss" and, more importantly, it renders the first party coverage unworkable in the context of a progressive loss.

Liberty cites no cases in support of its position that an injury-in-fact trigger should apply. The court is aware of only two cases often cited for this proposition. *Kief Farmers Cooperative Elevator Company* v. *Farmland Mutual Insurance Company*, supra; *Ellis Court Apartments Limited Partnership* v. *State Farm Fire and Casualty Company*, 72 P.3d 1086 (Wash. App. 2003). Those cases, however, involve substantively different policy language, which those two courts found ambiguous and construed favorably to the policyholders. *Kief* and *Ellis Court* also fail to recognize and reconcile the internal inconsistencies that arise in first party property coverage when an injury-in-fact trigger is applied to progressive loss claims.

In *Kief*, a construction defect in a portion of a grain storage bin caused damage upon its first use that was hidden but became progressively worse until it was noticed for the first time

[8] See Section VI below.

four years later. Applying policy language substantively different than the language at issue in this case, the court declined to follow the manifestation rule adopted in *Prudential-LMI*, which it considered to be "based on public policy," and reached what it viewed as the inevitable conclusion required by the policy language.[9] The insurer argued that a manifestation trigger of coverage should apply, which would have placed the loss outside its policy period. The policyholder asserted that an injury-in-fact trigger should apply. The court found both interpretations of the policy were "rational" but "ambiguous when applied to these facts." *Kief*, supra, 534 N.W.2d 32. Of particular significance to the court was the use of the word "commencing" in the policy period provision stating, "We cover loss or damage commencing: [] [d]uring the policy period..." The court read this language to suggest that "if property loss or damage begins during the policy period, coverage is triggered." Id., 35. The court also noted that the employee dishonesty coverage under the policy included language triggering coverage based upon the discovery of a loss. Id., 35-36. Without such language in the property coverage, the court resolved the perceived ambiguity in favor of the insured and applied an injury-in-fact trigger of coverage.

In *Ellis Court*, a condominium suffered structural damage as a result of water intrusion. The actual damage, which was hidden, took place over a period of time during which the defendant had issued policies covering the property. After the defendant's policies had expired, the insured discovered that the property had experienced a substantial structural impairment as a result of the water intrusion and made a claim for collapse with the defendant. The defendant

[9] The policy in *Kief* provided that it covered "loss or damage commencing: [] [d]uring the policy period." In this case, the defendants' policies cover "loss" not "damage" and they cover "loss which occurs during the policy period," not loss that "commences" during the policy period. In *Kief*, the policy defined "loss" as "direct and accidental loss or damage." In the defendants' policies, "loss" is undefined but is distinct from "property damage" as that term is used in the context of the liability coverage. In *Kief*, the policy also defined "occurrence" as "an accident...," thus drawing that definition into the first party property coverage analysis.

insurer, relying on the same policy language involved in *Kief*, argued in favor of a manifestation trigger of coverage and the insured favored an injury-in-fact trigger. Again the dispute focused upon competing interpretations of the word "commencing." The insurer maintained that "commence" meant "at the time damage was made manifest" and the insured argued it meant "when the damage first began, not when it was discovered." *Ellis Court*, supra, 72 P.3d 1090. The court followed *Kief* and, resolving ambiguities in favor of the insured, held that undiscovered water damage that took place during the policy period triggered coverage. Id., 1091.

Kief and *Ellis Court* both purport to rest their holdings on a reading of the policy as a whole, referencing the employee dishonesty coverage. There is, however, a far more significant part of the defendants' policies, in this case at least, that is wholly unaddressed by those courts. The word "loss" appears repeatedly throughout the contractual conditions imposed on the policyholder in connection with the first party property coverage. The repeated use of the word "loss" in the contractual conditions applicable to Section I of the policy leads to the inescapable conclusion that "loss" must include a subjective element, specifically the insured's awareness that a loss has taken place. The defendants' policies all include conditions imposing upon the insured certain "duties after loss." An insured is required to give "immediate" or "prompt" notice following a loss, protect the property from further loss, inform the insurer of the date and time of the loss and, most significantly, in the event the insured wishes to bring suit, the insured must do so "within [two] year[s] after the date of loss."[10] It is beyond dispute that an insured

[10] The actual time within which the insured must file suit varies among the policies and with the amendments to General Statutes §§38a-307 and 38a-308 over time. More significantly, Safeco's suit limitation provision requires the commencement of suit "within one year after the *inception* of the loss." (Emphasis added.) Still, the triggering event is the "loss" and the question remains how a reasonable insured can be expected to report a "loss" or file suit when the insured is reasonably unaware of the loss. The word "loss" presupposes the insured's awareness of the

cannot reasonably be expected to do any of those things unless the insured is aware of the loss, or at least reasonably should be aware of the loss. The word "loss" may be read consistently throughout the policy if it is understood to occur at the time of manifestation.

The facts of this case amply demonstrate why applying an injury-in-fact trigger of coverage to progressive first party losses can defeat the purpose of the insurance and thwart the reasonable expectations of an insured. If, as Liberty maintains, the claimed loss occurred when the walls reached a point of substantial impairment of structural integrity ten years prior to Mr. Grandpré's inspection, that is in September 2005, the loss took place during Twin City's policy period. Twin City disputes that but argues in the alternative that the plaintiffs' failure to comply with its policies' suit limitation provisions, which require that suit be commenced "within one year after the date of loss," would bar the plaintiffs' claim if its policies were triggered. Twin City argues that, at the latest, the plaintiffs were required to bring suit within one year after its last policy expired, October 2006. This approach would treat the word "loss" consistently between the insuring agreements, the policy period provision and the insured's duties after loss, but it would also make certain that an insured who reasonably failed to discover a loss until more than one year after the policy expired could not possibly satisfy the conditions required to obtain coverage for that loss. In the meantime, the insured's present insurer would escape responsibility because the loss did not occur within its policy period. No policy would be required to respond to what, for purposes of this discussion, must be considered a covered loss. C. Lantz, supra, 35 Wm. & Mary L. Rev. 1840. ("Terminating fortuity, and thus coverage, at a date earlier than discovery would effectively eliminate indemnification for progressive, delayed manifestation damage because of the twelve month suit limitation provision.")

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loss in the manner in which the word is used in the policies. Thus the "inception of the loss" would reasonably refer to the beginning of a reasonable insured's awareness that a loss has occurred.

Application of a manifestation trigger of coverage theory, rather than an injury-in-fact theory, not only rests upon a consistent interpretation of the word "loss" across the various sections of the first party coverage in the defendants' policies, but it also has the virtue of making the insurance meaningful in the context of a progressive loss. "When a homeowner initiates a claim against his homeowner's insurance carrier, coverage should be triggered when the homeowner discovered or reasonably should have discovered the damage. Application of the manifestation theory in this context complies with the policy language of the standard homeowner's policy and conforms with the expectation a typical homeowner has in looking to the insurer to whom he is paying premiums to cover such damage." D. Grand, supra, 68 La. L. Rev. 605, 628.

Application of the manifestation theory to first party property coverage is also more practical and advantageous than applying a continuous trigger theory. Unlike in the third party liability context, an insured can be certain the covered property is fully insured under one single, current policy because the total value of the property, in contrast to uncertain tort judgments, is discernible. It is unnecessary to employ a continuous trigger to protect the insured or, for that matter, third party claimants. Another practical advantage of the manifestation trigger theory over a continuous trigger is the certainty it brings to property insurance. "[T]he underwriting practices of the insurer can be made predictable because the insurer is not liable for a loss once its contract with the insured ends unless the manifestation of loss occurred during its contract term." *Prudential-LMI Commercial Insurance* v. *Superior Court*, supra, 274 Cal. Rptr. 404. This promotes more accurate premiums and lower costs to the consumer. Id., 403. The same certainty applies to subsequent insurers, who will not be concerned about underwriting a loss in progress and litigating disputes over fortuity. Id., 403-04. Also, a manifestation trigger "avoids

the inevitable complex problems of apportionment of liability among successive carriers. Clearly, the incurring of such problems adds significantly to litigation costs and eventually to premium costs." *Winding Hills Condominium Association, Inc.* v. *North American Specialty Insurance Company*, 752 A.2d 837, 840 (N.J. Super. 2000). To the extent that one perceives these considerations as injecting public policy into the analysis, as apart from the policy language, public policy does play a role in Connecticut on this subject as illustrated by the *R.T. Vanderbilt* case. See *R.T. Vanderbilt Company, Inc.* v. *Hartford Accident and Indemnity Company*, supra, 171 Conn. App. 122-23.

For all the foregoing reasons, the court concludes that a manifestation trigger of coverage theory applies to the plaintiffs' claims against the defendants. In order to apply the manifestation trigger theory to the evidence in this case, however, it is first necessary to determine the scope of that evidence. There is a dispute over the admissibility of the testimony of the plaintiffs' expert, David Grandpré. One disputed opinion offered by Mr. Grandpré concerns his testimony regarding the point in time at which the plaintiffs' basement walls reached a degree of deterioration such they that there was a substantial impairment of their structural integrity, reflecting the plaintiffs' view of what constitutes a "collapse" under the policies issued by Liberty, Twin City and Sentinel.[11] Evidence concerning the condition of the plaintiffs' basement walls during the ten years prior to Mr. Grandpré's inspection could conceivably supply a foundation for an argument that the loss reasonably should have been discovered by the plaintiffs sooner than 2015, or sooner than October 17, 2013 when Liberty issued its first policy. Consequently, before applying the manifestation trigger theory to this case, the court must first address the admissibility of Mr. Grandpré's testimony.

[11] Safeco's policies do not include an Additional Coverage for collapse. For purposes of triggering coverage, the question as to Safeco is whether a "direct physical loss" occurred during its policy periods.

IV. ADMISSIBILITY OF DAVID GRANDPRÉ'S TESTIMONY

In addition to their motion for summary judgment, Twin City and Sentinel filed a motion in limine, later joined by Liberty and Safeco, seeking to exclude Mr. Grandpré's opinions from the summary judgment record and precluding his testimony at trial should summary judgment be denied, pursuant to *State v. Porter,* 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L.Ed.2d 645 (1998).[12] The defendants seek to preclude both his opinion that the plaintiffs' basement walls were in a condition of substantial impairment of structural integrity when he inspected them in September 2015, and his opinion that they had been in that condition for at least ten years.

"Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." *Prentice* v. *Dalco Electric, Inc.*, 280 Conn. 336, 342, 907 A.2d 1204 (2006) quoting *State* v. *Billie*, 250 Conn. 172, 738 A.2d 586 (1999). Where expert testimony is based on scientific evidence, the scientific evidence that forms the basis for the expert's opinion must undergo a validity assessment to ensure reliability before it is admitted into evidence. Id. 343. The court is required to make a threshold determination concerning "the reliability of the methodology underlying the evidence and whether the evidence at issue is, in fact, derived from and based upon that methodology...." (Citations omitted; internal quotation marks omitted.) *Maher* v. *Quest Diagnostics, Inc.*, 269 Conn. 154, 168, 847 A.2d 978 (2004).

[12] While there is no guidance from our appellate courts on whether a *Porter* challenge may be asserted in the context of a motion for summary judgment, it is a recognized practice in federal procedure to consider such challenges under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). *Cortes-Irizarry* v. *Corporacion Insular De Seguros*, 111 F.3d 184, 188 (1st Cir. 1997). There are some differences among the federal courts on whether and under what circumstances a live hearing is required. See Id.; *Oddi* v. *Ford Motor Co.*, 234 F.3d 136, 151-55 (3d Cir. 2000). In this case, however, the court did conduct a live *Porter* hearing.

In performing a validity assessment the court considers "a number of different factors, nonexclusive and whose application to a particular set of circumstances could vary, as relevant in the determination of the threshold admissibility of scientific evidence...: general acceptance in the relevant scientific community; whether the methodology underlying the scientific evidence has been tested and subjected to peer review; the known or potential rate of error; the prestige and background of the expert witness supporting the evidence; the extent to which the technique at issue relies upon subjective judgments made by the expert rather than on objectively verifiable criteria; whether the expert can present and explain the data and methodology underlying the testimony in a manner that assists the jury in drawing conclusions therefrom; and whether the technique or methodology was developed solely for purposes of litigation." (Citations and internal quotation marks omitted.) Id., 179-80. Also, "the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based upon [the scientifically reliable] methodology.... [A]lthough some conclusions can be reasonably inferred from the methodology employed, others cannot." (Citations and internal quotation marks omitted.) Id. "[T]he proponent of the evidence must provide a sufficient articulation of the methodology underlying the scientific evidence. Without such an articulation, the trial court is entirely ill-equipped to determine if the scientific evidence is reliable upon consideration of the various *Porter* factors. Furthermore, without a clear understanding as to the methodology and its workings, the trial court also cannot properly undertake its analysis under the fit requirement of *Porter*, ensuring that the proffered scientific evidence, in fact, is based upon the reliable methodology articulated." Id., 181.

Mr. Grandpré is a civil engineer with a specialization in structural engineering. He earned his undergraduate degree in civil engineering from the University of Rhode Island in

1982 and he has a master's degree in business from Rensselaer at the Hartford Graduate Center. He became a licensed professional engineer in Connecticut in 1986 following a four year apprenticeship and successful completion of the required examinations. He is also licensed in Rhode Island and Massachusetts. His work experience includes the design and construction of buildings and the inspection and observation of bridges and bridge construction. For the past twenty years he has been a consulting structural engineer in connection with the investigation and analysis of structural failures. At the heart of his training and experience is the study and understanding of applied forces acting upon the wood, steel and concrete elements of structures. This involves applying principles of mathematics, physics and other sciences to the shape and properties of materials such as concrete. Mr. Grandpré has worked with concrete in a variety of contexts in his capacity as an engineer. He is not specifically focused on concrete as a specialty, but a large amount of his experience has involved concrete and he has been engaged as a consulting expert in scores of cases involving deteriorating concrete in the homes of Connecticut residents that are now the subject of litigation such as this case.

The parties do not dispute that the opinions offered by Mr. Grandpré in this case are scientific in nature and thus subject to a threshold analysis under *Porter* for admissibility.[13] The two opinions presently at issue are: (1) as of the date of his inspection on September 11, 2015 the plaintiffs' basement walls had reached the point of "substantial impairment of structural integrity;" caused by an expansive chemical reaction taking place within the concrete; and (2) based on the conditions he observed and his experience, the walls had reached that state ten years prior to his inspection. It is the latter opinion that, in theory, might impact the trigger of

[13] For the most part the court agrees. As discussed below, however, there is one aspect of the standard by which "collapse" is measured in the absence of a policy definition that the court concludes is not scientific. To the extent that Mr. Grandpré might be permitted to offer an expert opinion on that aspect of the case, the court does not subject it to a *Porter* analysis.

coverage issue, but the first opinion is of potential significance to any insurer whose policy is triggered.

The question whether the structural integrity of the plaintiffs' basement walls was substantially impaired either in 2005 or in 2015 is raised due to the plaintiffs' claim that the coverage provided for "collapse" under the defendants' policies includes "any substantial impairment of structural integrity" resulting from a covered peril. They base this claim on the our Supreme Court's decision in *Beach* v. *Middlesex Mutual Assurance Company*, 205 Conn. 246, 532 A.2d 1297 (1987) where the court, finding the undefined term "collapse" ambiguous, adopted a default definition of the term to include "any substantial impairment of structural integrity of a building." Id., 252. Thus, under Liberty's policies, a substantial impairment of the structural integrity of the plaintiffs' home, or any part of it, caused by "hidden decay" or the use of "defective material" in the construction of the plaintiffs' home would be covered, subject to other provisions of the collapse coverage.

Mr. Grandpré acknowledges that "substantial impairment of structural integrity" is not a recognized engineering term, but he is able to give most of the term meaning in that context. As an engineer, he understands "structural integrity" to mean the ability of a structural element to be relied on to perform a specific task. Thus, in the case of the plaintiffs' basement walls, it means their ability to hold up the house and hold back the earth outside the walls.[14] Things become more difficult when applying the "substantial impairment" portion of the default definition of "collapse." As an engineer, Mr. Grandpré understands an "impairment" of structural integrity to mean any loss of a structural element's ability to perform an intended function. If a crack in a

[14] Mr. Grandpré would identify a third function of those walls to be simply the maintenance of their original solid state. It is unnecessary to resolve whether this function lies within the scope of what the *Beach* court considered the structural integrity of a building for purposes of resolving the defendants' motions for summary judgment.

basement wall does not impact the wall's ability to hold up the house or hold back the earth, there is no impairment of those functions. The point at which such impairment becomes "substantial" is a sticking point under a *Porter* analysis because Mr. Grandpré could offer no scientific formula or protocol for making that determination. Instead, he arrives at that opinion based on his personal observation of the nature and extent of the cracking he observes, comparing that with other basement walls he has previously examined. It is not possible to replicate and confirm the results of that methodology without also replicating and adopting Mr. Grandpré's subjective knowledge, perceptions and experience. Mr. Grandpré himself has not recorded any objective data obtained in the course of his work on this subject. This is not an impediment in Mr. Grandpré's view because, in his opinion, any basement experiencing cracking because of an internal, expansive chemical reaction has experienced a substantial impairment of structural integrity. It is an impediment to the court, however, when attempting to apply the validity test under *Porter* to this aspect of his opinion.

The defendants attack Mr. Grandpré's opinion on the substantial impairment issue from several angles, including the fact that he is not a concrete material specialist, he cannot specify the precise chemical reaction taking place within the walls and because he performed no compression testing to quantify the strength of the concrete. These qualifications and tests may be relevant to diagnosing the underlying cause of the concrete deterioration, but in the court's view they are not essential to the premise underlying Mr. Grandpré's opinion. Mr. Grandpré is able to explain, based on his expertise in structural engineering, the nature of the forces that caused the plaintiffs' basement walls to crack sufficiently to rule out external forces. Rather, he can explain based on the location, visible presentation and the orientation of the cracks, that it is an internal force causing the concrete to crack and deteriorate, which can only result from an

expansive chemical reaction occurring inside the concrete. The process of making those observations and applying the laws of physics to the visible changes in the concrete, recorded in photographs, is a methodology another structural engineer could replicate and either confirm or refute. The fact that Mr. Grandpré is not a chemist, that he cannot or is not qualified to identify the precise chemical reaction taking place within the concrete and the fact that he cannot quantify the strength of a sample of concrete from the wall based on compression testing do not undermine the scientific validity of his opinion, though those facts may go to the weight of his opinion.

Accepting then that Mr. Grandpré is capable of and actually has applied scientific principles to conclude that an internal, expansive reaction within the concrete is causing the concrete to progressively deteriorate and crack, and to project that this process will ultimately lead to a complete failure of the concrete, his testimony is based on a scientifically valid and replicable methodology. Identifying the point in time or progress at which this process achieves a substantial impairment of structural integrity is a separate and more difficult question to answer by employing a scientifically valid methodology, except to the extent that one can actually observe the loss of one or more of the intended functions of the walls taking place. In this case, Mr. Grandpré observed that the plaintiffs' basement walls exhibited bulging and bowing, "evidence that the original concrete basement walls had begun to move inward due to the lateral pressure exerted by the exterior soil." This objective evidence of loss of function at least raises a question of fact as to whether there is a "substantial" impairment of structural integrity.

It is true that Mr. Grandpré has not identified a scientific methodology by which he measures whether the impairment of structural integrity is "substantial." This may be more indicative of a problem with the *Beach* standard than it is a basis for precluding Mr. Grandpré's

opinion on the subject.[15] The *Beach* court did not draw upon science in formulating that standard; it is a judicially created standard and the courts themselves are in conflict over what it means. See *Roberts* v. *Liberty Mutual Fire Insurance Company*, supra, 264 F.Supp.3d 406. The fact that Mr. Grandpré does not have a scientific methodology by which he measures the facts of the case against this vague and disputed, non-scientific standard is not surprising. It is not grounds, however, for the preclusion of his opinion that the structural integrity of the walls is impaired in a meaningful way. It is for the jury to determine whether that loss of function is "substantial," assuming the *Beach* standard applies, and for the court to explain to the jury what "substantial" means in this context.[16] Whether Mr. Grandpré will be permitted to express an opinion in those terms at trial does not have to be resolved at this stage. The court concludes his opinion that the plaintiffs' basement walls have experienced an impairment of structural integrity is sufficiently supported by a scientific methodology to be admissible. Whether expert testimony is admissible or even required to establish a "substantial" impairment, and what further elaboration on what "substantial impairment" means is required, are questions the court will reserve for trial to the extent not addressed below. At this juncture, the court concludes only that this aspect of Mr. Grandpré's testimony is not required to satisfy *Porter*.

The second opinion of Mr. Grandpré at issue on summary judgment is his opinion that the plaintiffs' basement walls achieved the status of "substantial impairment of structural integrity" ten years prior to his inspection. It is one thing for Mr. Grandpré to apply his expertise to evaluate something he is actually observing and quite another for him to extrapolate from that

[15] The meaning of the word "substantial" in this context appears to be largely subjective. In fact, other courts applying this standard have used words such as "serious" and "material" in place of "substantial." *Government Employees Insurance Co.* v. *DeJames*, 261 A.2d 747, 751 (Md. App. 1970); *Morton* v. *Great American Insurance Co.*, 419 P.2d 239, 241-42 (N. Mex. 1966)

[16] See Section VI below.

to an evaluation he would have made had he examined the plaintiffs' basement walls ten years earlier. To make that determination, Mr. Grandpré would have to be able to model the timing and progression of the chemical reaction and the rate of deterioration taking place at this particular location. Because it involves a process of oxidization, his opinion would have to account for variables such as the amount of air and water the plaintiffs' basement walls are exposed to. An opinion such as that must be based upon scientific and mathematical principles.

As it relates to this case, Mr. Grandpré's opinion on timing and progression would be of considerable significance on the question of trigger of coverage. One may plausibly argue that reasonable homeowners should realize there is a problem requiring notice to their insurance company when cracking in their basement walls reaches the point where there has been a substantial impairment of structural integrity. There may be other factors, however, such as there are in this case, that would reasonably prevent homeowners from discovering the problem. Specifically, the plaintiffs' basement is a finished basement, so the concrete walls are hidden from view. The plaintiffs observed no cracking in their basement walls until July or August of 2015. Disputes of this nature generally raise questions of fact that cannot be resolved on summary judgment. *Prudential-LMI Commercial Insurance* v. *Superior Court*, supra, 274 Cal. Rptr. 404 ("When, however, the evidence supports only one conclusion, summary judgment may be appropriate.") In this case, the only evidence upon which a factfinder might base a finding that manifestation occurred prior to 2015 is Mr. Grandpré's opinion.

Aside from Mr. Grandpré's lack of qualifications as a chemist, he was unable to identify any replicable scientific methodology for extrapolating back in time, ten years in this case, to determine the likely past condition of concrete in basement walls afflicted with the internal, expansive chemical reaction at issue here. His opinion on timing and progression is based upon

his own personal observations of the conditions present in scores of houses with similar problems, but even those observations are undocumented making the entire exercise purely subjective, albeit in the mind of a structural engineer. The essential point is no other structural engineer could duplicate the "methodology" employed by Mr. Grandpré to form this opinion because of its subjective nature. It is the plaintiffs' burden to "provide a sufficient articulation of the methodology underlying the scientific evidence. Without such an articulation, the trial court is entirely ill-equipped to determine if the scientific evidence is reliable upon consideration of the various *Porter* factors. Furthermore, without a clear understanding as to the methodology and its workings, the trial court also cannot properly undertake its analysis under the fit requirement of *Porter*, ensuring that the proffered scientific evidence, in fact, is based upon the reliable methodology articulated." *Maher* v. *Quest Diagnostics, Inc.*, supra, 269 Conn.181. This requirement is unmet in this case and, therefore, Mr. Grandpré's opinion on the timing and progression of the impairment of structural integrity in the plaintiffs' basement walls, specifically that it reached a state of substantial impairment in 2005, is not admissible.

V. APPLICATION OF THE MANIFESTATION TRIGGER OF COVERAGE

Because the court has concluded that Mr. Grandpré's opinion on the timing and progression of the deterioration of the plaintiffs' basement walls is inadmissible, the only evidence in the record upon which the factfinder can base a manifestation finding is the testimony of the plaintiffs that, with minor and relatively obscure exceptions, their basement walls were not visible over the years during which this condition developed.[17] They testified that they never actually observed the cracks in the concrete until July or August of 2015, while

[17] The furnace room in the plaintiffs' basement, a well closet and a small crawlspace contained exposed concrete. Those locations were rarely observed by the plaintiffs and the furnace room walls were obscured by items placed in it for storage.

Liberty was providing their homeowners insurance. Thus there is sufficient evidence for a jury to conclude that Liberty's policy in effect during those months is triggered by this alleged loss. In contrast, there is nothing more than speculation and conjecture upon which a factfinder could base a conclusion that any of the other defendants' policies are triggered. Although there is no serious doubt that the deterioration of the walls is something that has progressed over time, that is not enough to enable a jury to pinpoint the date when a reasonable homeowner should have realized there was a problem that warranted placing the homeowners insurer on notice. Consequently, Safeco, Twin City and Sentinel are entitled to summary judgment without further analysis of the terms of their policies.[18]

VI. COVERAGE UNDER THE LIBERTY POLICY

The plaintiffs seek coverage from Liberty under the Additional Coverage for Collapse, the terms of which are set forth above. Liberty claims that the "substantial impairment of structural integrity" standard adopted in *Beach* v. *Middlesex Mutual Assurance Company*, supra, does not apply to its policy language and, even if it does, there is insufficient evidence to satisfy that standard in this case as a matter of law. Liberty also argues that the collapse coverage in its

[18] Each of these defendants argues their policies do not provide coverage for the plaintiffs' alleged loss, even if they were triggered. The court does not reach these arguments, but will make a few observations about them. First, in the case of Sentinel, the plaintiffs seek coverage under the Additional Coverage for Collapse. Sentinel's policies include a definition of "collapse" that this court has previously construed and found not to provide coverage for the type of loss claimed by the plaintiffs in this case. See *Perracchio* v. *Homesite Insurance Company*, Superior Court, judicial district of Tolland, Docket No. CV-16-6010324-S (March 6, 2018); *Jemiola* v. *Hartford Casualty Insurance Company*, Superior Court, judicial district of Tolland, Docket No. CV–15–6008837–S (March 2, 2017); *Fortin* v. *Insurance Company of the State of Pennsylvania*, Superior Court, judicial district of Tolland, Docket No. CV-17-6011987 (April 19, 2018). The plaintiffs also seek coverage under the Additional Coverage for Collapse contained in the Twin City policies, which is substantially the same as the collapse coverage provided by Liberty discussed below. The Safeco policies do not provide specific collapse coverage and the plaintiffs seek coverage under the "all-risk" section of the policy, claiming they experienced a "direct physical loss" for which coverage is not excluded. This court has not previously addressed that policy language as it applies to a crumbling concrete case, but notes that the United States District Court for the District of Connecticut has done so twice and in both cases entered summary judgment for the insurer. *Kim* v. *State Farm Fire and Casualty Company*, 262 F.Supp.3d 1 (D. Conn. 2017); *Mazzarella* v. *Amica Mutual Insurance Company*, United States District Court, Docket No. 17CV598 (SRU) (D. Conn. February 8, 2018).

policy is not applicable because it excludes coverage for "loss to... [a] foundation [or] retaining wall" and further, if the court concludes as other courts have that "foundation" may be ambiguous in this context, Liberty is entitled to a trial on the parties' intent with respect to that term, based on extrinsic evidence bearing on the issue. The court concludes that: the *Beach* standard is applicable to Liberty's policy language; it is a question of fact whether the *Beach* standard is met in this case; the "retaining wall" exclusion is not applicable; and "foundation" is ambiguous in this context but potentially subject to clarification based on extrinsic evidence.[19]

A. Applicability and Meaning of the *Beach* Standard

One of the most litigated issues in the crumbling concrete cases proliferating in this district and in the United States District Court for the District of Connecticut is whether the default definition of "collapse" adopted by our Supreme Court in *Beach* v. *Middlesex Mutual Assurance Company*, supra, applies to policies employing the language contained in the Liberty policy. Trial courts have held that the *Beach* definition of "collapse" does apply. *Roy* v. *Liberty Mutual Fire Insurance Company*, Superior Court, judicial district of Tolland, Docket No. CV-15-6009410-S, (February 22, 2017); *Roberts* v. *Liberty Mutual Fire Insurance Company*, 264 F. Supp. 3d 394 (D. Conn. 2017); *Belz* v. *Peerless Insurance Company*, 204 F. Supp. 3d 457 (D. Conn. 2016); *Gabriel* v. *Liberty Mutual Fire Insurance Company*, United States District Court, Docket No. 3:14CV01435 (VAB) (D. Conn. 2017). Liberty argues further, however, that the facts of *Beach* and a difference between its policy language and the language at issue in *Beach*

[19] Liberty also maintains that the plaintiffs' claim is barred by the suit limitation provision in the contract requiring the commencement of suit "within one year after the date of loss." By operation of law, this period was extended to two years. General Statutes §§38a-307 and 38a-308. As discussed above, however, under a manifestation trigger of coverage the "loss" occurred at the time the plaintiffs discovered or reasonably should have discovered it, which may have been as late as September 11, 2015. The plaintiffs commenced their lawsuit against Liberty on March 9, 2016, well within the period allowed if the loss occurred any time after September 11, 2014. Liberty, therefore, is not entitled to summary judgment on this basis.

warrant the introduction of a requirement of imminent catastrophic failure into the application of *Beach's* definition of collapse as "any substantial impairment of structural integrity." The decisions cited above have declined the same invitation to further refine the meaning of "any substantial impairment of structural integrity" in that fashion. Recently, however, the United States District Court has certified the question to the Connecticut Supreme Court, which has not yet resolved whether it will accept certification. *Karas* v. *Liberty Insurance Corp.*, United States District Court, Docket No. 3:13-cv-01836 (SRU) (D. Conn. April 30, 2018).

Liberty's argument that the *Beach* standard does not apply at all is based on the difference between its policy language and the language at issue in *Beach*. In *Beach*, a homeowner notified his insurance company when he discovered a crack in a foundation wall of his home, which was situated on a steep slope next to a lake. Upon further inspection, it was determined that, in addition to the crack, there was a separation between the top of the wall and the bottom of the building structure above it. The insurance company denied coverage based on the policy's exclusion for damages arising out of "settling, cracking, shrinkage, bulging or expansion." The policy did not include any stand-alone coverage for collapse as Liberty's policy does; however, the policy did include an exception to the cited exclusion where "collapse of a building... not otherwise excluded... ensues." The crack continued to widen to a width of nine inches, the wooden support beams on top of the wall pulled apart and the wall tipped over to the point that it was no longer contributing to the support of the house. The insurer still denied coverage, maintaining that despite the deteriorating condition of the home, no "collapse" had occurred. The house never actually caved in and it was repaired without interrupting the occupancy of the home by the homeowner. There was evidence, however, that the house would have eventually fallen into the basement if the repairs had not been made. In this context, the

court concluded that the "collapse" exception to the exclusion was ambiguous and adopted the default definition providing that "collapse" includes "any substantial impairment of the structural integrity of a building." Id., 252. The insurer resisted the court's adoption of that standard, arguing that "'collapse' on its face connotes a sudden and complete catastrophe." Id., 251. The court declined to adopt that "narrow reading." Id., 252. Critically important to Liberty's argument, the *Beach* court, in this context, said the following: "If the defendant 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 now claims to have intended." Id., 251, citing *Nida* v. *State Farm Fire & Casualty Co.*, 454 So.2d 328, 334 (La. App. 1984). What makes this so compelling to Liberty is the fact that the policy language construed in *Nida* appears to be essentially the same as the Liberty policy language presently before this court.

While the *Beach* court's reference to *Nida* was not essential to its holding in the case, it only stands to reason that an insurer, who appears to have taken the court's lead and revised its policy language, would be frustrated to discover that courts now find the new language insufficient to eliminate the ambiguity identified in *Beach*. Nevertheless, the court in *Beach* was not actually construing the language in *Nida* and its reference to that case arguably stands for nothing more than the familiar proposition that insurers are required to draft unambiguous policy language or suffer the burden of providing broader coverage than what they may have unilaterally intended. Moreover, upon closer examination of the *Nida* decision and Liberty's policy language, it does not appear that Liberty's policy language eliminates the ambiguity determined in *Beach* to arise out of an insurance policy's undefined use of the word "collapse," and the *Nida* case does not actually construe that language to connote a "sudden and complete catastrophe."

The Liberty policy language does not define "collapse." Insurers have strenuously argued that it does, but the court disagrees. The policy provides that it covers "collapse" as long as it is caused by a specified peril. It then goes on to restrict the scope of the coverage by excluding certain structures and then by stipulating that "[c]ollapse does not include settling, cracking, shrinking, bulging or expansion." This qualification on the scope of the collapse coverage is more appropriately viewed as an exclusion because collapse "does not include" the identified conditions. This exclusion is not the equivalent of a definition of "collapse." Moreover, the language fails to eliminate the ambiguity surrounding the meaning of "collapse" any more than the same language did in *Beach*, even though the configuration of the language was different there than how it appears in the Liberty policy. In *Beach*, the coverage for collapse arose as an exception to the exclusion for settling and cracking; here, settling and cracking are excluded from the coverage for collapse. In either configuration, there is a distinction to draw between mere "settling, cracking, shrinking, bulging and expansion" on the one hand, and a "collapse" on the other. *Beach* v. *Middlesex Mutual Assurance Company*, supra, 205 Conn. 251 ("Nowhere does the policy express a clear unambiguous intent to exclude coverage for a catastrophe that subsequently develops out of a loss that appeared, at its inception, to fall within the rubric of 'settling, cracking, shrinkage, bulging or expansion.'"). The two are not mutually exclusive. As other courts have observed, mere settling and cracking may not rise to the level of collapse, but it is difficult to conceive of a collapse that does not involve settling and cracking. *Agosti* v. *Merrimack Mutual Fire Insurance Co.*, 279 F. Supp. 3d 370 (D. Conn. 2017); *Bacewicz* v. *NGM Insurance Co.*, United States District Court, Docket No. 3:08CV1530 (JCH), D. Conn. June 20, 2009). Where one crosses the line between mere settling and cracking and "collapse" is

difficult to discern; thus the ambiguity. Under *Beach* that line is crossed when the settling or cracking rises to the level of a "substantial impairment of structural integrity."

In *Nida*, a concrete slab foundation cracked due to the up and down movement of the earth underneath caused by the cyclical expansion and shrinkage of the clay soil beneath it. The insured claimed that the "unequal settlement of the structure had cracked the exterior and interior walls to such an extent as to materially impair basic structural integrity (sic) of the building." There was no claim, however, that the building would ultimately fall down or completely cave in. The court noted the defendant's policy included collapse coverage, but in resolving the issues the court never actually went beyond the all-risk coverage and its exclusions for "earth movement" and "settling." The court never took up the issue of what "collapse" means, though it did note and discuss the different approaches courts have taken in construing that term. Significantly, there was no consideration in that case whether "collapse" must refer to a "sudden and complete catastrophe" because of the exclusion for "settling, cracking, shrinkage, bulging or expansion." Instead, the court upheld the trial court's conclusion that there was no coverage because the earth movement exclusion applied and because the facts of the case established unequivocally that the damage to the home involved mere "settling." Even if the decision, which is not a model of clarity, is read to involve an application of the collapse coverage, the case turns on its own facts, not upon a construction of the collapse coverage provision and certainly not on whether that provision clearly contemplates an imminent catastrophe.

The *Beach* court's reference to *Nida* does not enable Liberty to avoid the *Beach* court's conclusion that "collapse" is ambiguous when it is not defined in an insurance policy and this

court is bound by the court's conclusion in *Beach*.[20] "Collapse" must be read to mean a "substantial impairment of structural integrity." The meaning of that definition, however, is itself a disputed subject in the many pending crumbling concrete cases in Connecticut. Liberty argues that close attention to the facts involved in *Beach* should lead the court to conclude that the *Beach* definition contemplates "a structure in imminent danger of falling over which necessitated immediate repairs." Liberty also urges the court to follow the lead of the Supreme Court of Washington by holding that "'substantial impairment' of 'structural integrity' means an impairment so severe as to materially impair a building's ability to remain upright... [one that] renders all or part of the building unfit for its function or unsafe and, in this case, means more than mere settling, cracking, shrinking, bulging or expansion." *Queen Anne Park Homeowners Association* v. *State Farm Fire and Casualty Co.*, 352 P.3d 790, 794 (Wash. 2015). While the court agrees that more than mere settling, cracking, shrinking, bulging or expansion is required, the imminence requirement that Liberty urges, and is arguably implicit in the *Queen Anne Park* formulation, does not clearly follow. As discussed above, in *Beach* the court confronted language implicating the same distinction between "collapse" and mere "settling and cracking." The court declined to adopt the insurer's view that there was coverage only where a sudden catastrophe was at hand. What stood out to the court in *Beach* was that the trial court found, given the conditions involved there, "eventually the house would have fallen into the cellar." *Beach* v. *Middlesex Mutual Assurance Company*, supra, 205 Conn. 249, 253 n.2. (finding of "collapse" upheld "even though no actual caving-in occurred and the structure was not rendered

[20] Liberty also cites *Tustin Field Gas & Food, Inc.* v. *Mid-Century Insurance Co.*, 219 Cal.Rptr.3d 909 (Cal. Ct. App. 2017) in support of its argument that the default definition in *Beach* is inapplicable to its policy language. California law seems to be at odds with *Beach*, however, requiring an imminent catastrophic failure under the same policy language construed in *Beach*. See *Sabella* v. *Wisler*, 59 Cal.2d 21, 377 P.2d 889, , 27 Cal. Rptr. 689 (1963). To the extent that case stands for the proposition that the exclusion for settling and cracking eliminates the ambiguity found in *Beach*, the court disagrees as explained above. As discussed below, however, the exclusion must be given meaning by including it in the analysis of whether a condition rises to the level of "substantial impairment of structural integrity."

completely uninhabitable."). In *Roberts* v. *Liberty Mutual Fire Insurance Company*, supra, 264 F.Supp.3d 394, the court concluded that the facts and reasoning underlying the decision in *Beach* lead not to a requirement of imminent catastrophic failure, but instead to a determination that the building "would have caved in had the plaintiffs not acted to repair the damage." *Roberts* v. *Liberty Mutual Fire Insurance Company*, supra, 264 F. Supp. 3d 409. This is more than mere cracking and settling, yet strict enough to distinguish the collapse coverage from a maintenance agreement. Id., 406.

The facts of *Beach* provide some guidance to how the substantial impairment of structural integrity standard operates, but the court's reasoning does not limit that standard to the facts of the case. It does bear noting, however, that the meaning of the word "collapse" is ultimately what is at issue, not just the meaning of "substantial." The facts of *Beach* reflect the existence of an immediate danger of a complete falling in of the building, but the immediacy of that danger does not appear to drive the court's reasoning. The court concluded its discussion of the collapse issue by stating that, to support the conclusion that a collapse has occurred, only a finding of "substantial impairment of structural integrity" is required, "even though no actual caving-in occurred and the structure was not rendered completely uninhabitable."[21] Id., 253. The requirement of imminence urged by Liberty (or uninhabitability) is not compelled by the court's decision. On the other hand, it does appear from the facts and the reasoning in *Beach* that the court contemplated a "collapse" involves a threat to a building's ability to remain upright, not just a degradation of strength. To that extent, the court sees no significant difference between *Beach* and Queen *Anne Park Homeowners Association* v. *State Farm Fire and Casualty Co.*,

[21] In addition to finding that the danger of falling in was "immediate," the referee in *Beach* also found the structure "unfit for habitation." *Beach* v. *Middlesex Mutual Assurance Company*, Conn. Supreme Court Records & Briefs, September Term, 1987, Record pp. 24-25.

supra. It stretches *Beach* too far, however, to conclude as Liberty maintains the court did in *Queen Anne*, that the building must be deemed presently uninhabitable and about to fall in completely before it may be considered that a "collapse" has occurred. Whether it has is ordinarily a question of fact and this case is no exception. *Beach* v. *Middlesex Mutual Assurance Company*, supra, 205 Conn. 253.

Based on the court's ruling that the plaintiff's expert may testify to his opinion that, upon his inspection in September 2015, the structural integrity of the plaintiff's basement walls was impaired, it is a question of fact for the jury whether the walls were in a state of "collapse" at that time, pursuant to the *Beach* standard as discussed above. To reach that conclusion, it is an open question whether expert testimony is required to establish that the impairment is substantial and, if so, whether Mr. Grandpré will be allowed to express that opinion. His opinion, if it is offered, will be subject to review for admissibility pursuant to Rule 7-2 of the Code of Evidence, but will not be subject to a *Porter* validity assessment because the court has determined the opinion is not scientific. Based on the extent to which the court has overruled Liberty's claims pursuant to *Porter*, there is sufficient evidence to give rise to a jury question whether the plaintiffs' basement walls were in a state of collapse when inspected by Mr. Grandpré and during the Liberty policy period. Liberty's motion for summary judgment on this ground is denied.

B. Retaining Wall and Foundation Exclusions

Even assuming there may have been a "collapse" within the scope of Liberty's Additional Coverage for Collapse, Liberty maintains that the collapse is not covered because the collapse provision excludes "[l]oss to… [a] foundation [or] retaining wall." The plaintiffs argue that these terms are ambiguous in this context and, therefore, must be construed in favor of

coverage. Anticipating that argument, Liberty further maintains that extrinsic evidence raises a question of fact regarding the parties' understanding of the term "foundation," sufficient to raise a question of fact for a jury to resolve whether the parties had a clear understanding of what it meant.

In *Roy* v. *Liberty Mutual Fire Insurance Co.*, supra, the court found both "foundation" and "retaining wall" ambiguous as applied to basement walls because, among other reasons, all of the various structures excluded from the collapse coverage within this same provision appear to be structures apart from the insured "building," such as patios, swimming pools and septic tanks. The court found the proposition that basement walls would fall into that category implausible, thus rendering the terms ambiguous as used in this context. Every state and federal court decision in Connecticut considering this issue has concluded that "foundation" and "retaining wall" are ambiguous as applied to the basement walls of a house. Id., See *Roberts* v. *Liberty Mutual Fire Insurance Company*, supra; *Belz* v. *Peerless Ins. Co.*, 46 F. Supp. 3d 157 (2014); *Karas* v. *Liberty Insurance. Corp.*, 33 F. Supp. 3d 110 (2014); *Gabriel* v. *Liberty Mutual Fire Insurance Company*, United States District Court, Docket No. 3:14-cv-01435 (VAB), (D. Conn. Sept. 28, 2015); *Bacewicz* v. *NGM Insurance Co.*, supra. This court agrees that "retaining wall" as applied to a basement wall is, at a minimum, ambiguous. The term "foundation," however, is not as obviously ambiguous as "retaining wall," even though it appears to be ambiguous to a number of judges considering it in this context.

Both the plaintiffs and Liberty offer dictionary and encyclopedia definitions of "retaining wall" to support their conflicting interpretations of that term. While as Liberty maintains, the term can be understood to mean a wall that "resists lateral pressure," that is only one thing a basement wall does. Basement walls also hold up the structure above them. A retaining wall

does not do that. A "retaining wall" is more commonly understood as a freestanding wall that *only* resists lateral pressure to hold back earth. It is unnecessary to consider whether Liberty's proffered meaning of "retaining wall" is even reasonable in this context. It is enough to conclude that it is, at best, ambiguous and that it must be construed in favor of coverage.

The parties' conflicting positions on the meaning of "foundation" as used in the exclusion from collapse coverage are not as easily resolved. If, as Liberty maintains, "foundation" refers to basement walls, then it is the only term in this exclusion that might reasonably be considered to be part of the building. It seems out of place. If, on the other hand, "foundation" is understood to be synonymous with "footing," it is easier to reconcile its presence in the exclusion with all the other separate structures that appear there. It also must be acknowledged that, at least in Connecticut, people commonly refer to their basement walls as the "foundation" of their home. In other parts of the country, basements are much less common. There it may be more common to consider "foundation" to refer to footings. Liberty's policy uses standard insurance industry language that may mean different things in different places.

Further complicating things, Liberty's policy actually uses the term "footing" in another context. In the exclusions from the all-risk coverage, the policy excludes loss caused by freezing or the weight of water or ice to both a "foundation" and, by endorsement, a "footing." Thus, in that context, the policy distinguishes between a foundation and a footing, arguably clarifying that a "foundation" is not a "footing" in the context of the collapse coverage. Yet, the loss settlement provision in the policy refers to "foundations, piers or any supports which are below the undersurface of the lowest basement floor." It is not clear whether the phrase, "which are below the undersurface of the lowest basement floor" refers to just "supports" or the entire

subparagraph. Basement walls, however, are not typically found below basement floors and, under the latter construction, "foundation" cannot be considered to refer to basement walls.

Moreover, under the facts of this case, the deteriorating condition of the plaintiffs' basement walls cannot easily be segregated from the structural integrity of the entire building. The plaintiffs claim that the deteriorating condition of the concrete represents a threat not just to the basement walls but to the structure above them. As the process unfolds and the basement walls bow and expand, damage to the upper structure begins to manifest. The "collapse,' if there is one, is not limited to the basement walls. See *Roberts* v. *Liberty Mutual Fire Insurance Company*, supra, 264 F.Supp.3d 413-14.

Left to these considerations, the court would be constrained to conclude, as other courts have, that the term "foundation" is ambiguous in this context. Liberty, however, argues that it has the right to present extrinsic evidence to raise a triable issue on what the actual intent of the parties was. The plaintiffs argue it is legally impermissible to do that once the court has concluded the language is ambiguous. While some discussion of the issue is warranted here, it is unnecessary to resolve the issue on summary judgment.

Liberty has submitted deposition testimony from Mr. Dino suggesting that he understood the term "foundation" to refer to his basement walls. Liberty also has submitted evidence that documents related to the plaintiffs' purchase of the home, including the home inspection report and the appraisal, clearly relate the term "foundation" to the basement walls. Even documents associated with the claim for coverage relate the word "foundation" to those walls and distinguish between the "foundation" and the "footings." Liberty maintains that it is entitled to have a jury consider this evidence and decide whether the plaintiffs had a clear understanding of

what "foundation" meant in this context. The plaintiffs argue that extrinsic evidence may only be considered to eliminate an apparent ambiguity when the dispute before the court is one between two insurers.

Liberty relies upon *Metropolitan Life Insurance Co.* v. *Aetna Casualty and Surety Co.*, 255 Conn. 295, 765 A.2d 891 (2001) to support its position that extrinsic evidence may be considered to resolve an ambiguity before the rule of contra proferentum is applied. The plaintiffs maintain that once a court has considered the policy language in the context of the claim for coverage and concluded the language is ambiguous, extrinsic evidence cannot be considered because to do so would circumvent the rule of contra proferentum. According to the plaintiffs, the only reason extrinsic evidence could be considered in *Metropolitan* was because the case involved a dispute between insurers. In *Fiallo* v. *Allstate Insurance Co.*, 138 Conn. App. 325, 51 A.3d 1193 (2012), however, the court indicated that the consideration of extrinsic evidence is not restricted to disputes between insurers, though it also does not displace the contra proferentum rule. The insurer's burden is to show, through the introduction of relevant extrinsic evidence, there actually is no ambiguity. If the insurer fails to eliminate the ambiguity with extrinsic evidence, the contra proferentum rule applies and the language is construed in favor of coverage. The insurer's burden is a heavy and precise burden. It is the intent of the parties to the contract, when they entered into the contract, that is at issue, not what other people say or think.

Some of the evidence put forward by Liberty has nothing to do with the parties' intent and understanding at the time they entered into the contract. There is some evidence, however, that Mr. Dino understood "foundation" referred to the basement walls. If so, perhaps there was a clear understanding between the parties. It is unnecessary to determine the relevance and the weight, if any, of all Liberty's extrinsic evidence. The plaintiffs are not moving for summary

judgment. At this stage it is sufficient to determine that Liberty is not entitled to summary judgment based on the exclusion of "foundations" and "retaining walls" from the collapse coverage. If Liberty can produce relevant and otherwise admissible extrinsic evidence at trial, proving that the plaintiffs had a clear understanding that the word "foundation" refers to basement walls, Liberty may prevail on its position that the term is unambiguous. Evidence falling short of doing so will leave the term "foundation" ambiguous and construed in favor of coverage.

VII. CUTPA/CUIPA CLAIMS

The plaintiffs have asserted against each defendant claims that they engaged in unfair claims settlement practices in violation of the Connecticut Unfair Insurance Practices Act (CUIPA) (General Statutes §38a-815 et seq.), giving rise to a cause of action under the Connecticut Unfair Trade Practices Act (CUTPA) (General Statutes §42-110a et seq.). All defendants have moved for summary judgment on these claims. The court must address the claims against Liberty separately from those against Safeco, Twin City and Sentinel because the court has determined that only Liberty is the subject of a colorable claim for coverage.

A. Claims Against Safeco, Twin City and Sentinel

Having concluded there is no coverage for the plaintiffs' alleged loss under the policies issued by Safeco, Twin City and Sentinel, the court must consider in that context the viability of the plaintiffs' unfair insurance practice claims under CUTPA/CUIPA. These defendants argue

that the plaintiffs' claims must fail because there is no coverage under their policies and, even if coverage had been found, because their denials were made in good faith. "When CUTPA and CUIPA claims are premised on denial of coverage under an insurance policy and the insurer's interpretation of the policy is correct, 'there can be no genuine issue of material fact as to whether the application of that interpretation as a general business practice constituted oppressive, unethical or unscrupulous conduct in violation of the statues.'" *Liston-Smith* v. *CSAA Fire & Casualty Insurance Co.*, United States District Court, Docket No. 3:16CV00510 (JCH) D. Conn. Dec. 15, 2017), quoting *Zulick* v. *Patrons Mutual Insurance Co.*, 287 Conn. 367, 378, 949 A.2d 1084 (2008). Because the plaintiffs CUTPA/CUIPA claims rest upon the premise that the defendants' coverage determinations were unreasonable, and because the court has concluded there is no coverage under the policies issued by Safeco, Twin City and Sentinel, an essential element of the CUTPA/CUIPA claims against them is lacking. The court, therefore, grants summary judgment to those defendants on the CUTPA/CUIPA counts.

B. Claim Against Liberty

Courts have reached different conclusions on whether summary judgment should enter on a CUTPA/CUIPA claim where summary judgment has been denied on a breach of contract count arising out of a claim for collapse coverage based on crumbling concrete basement walls. In *Roy* v. *Liberty Mutual Fire Insurance Co.*, supra, the court concluded the plaintiff's allegation that Liberty engaged in an industry wide practice of unreasonably denying coverage for concrete decay claims was sufficient to state a cause of action under CUTPA/CUIPA and that Liberty had failed to carry its burden on summary judgment to negate this allegation and establish there was no genuine issue of material fact whether that allegation was true. In *Roberts* v. *Liberty Mutual Fire Insurance Company*, supra, 264 F.Supp.3d 415-16, the court noted that the plaintiffs' claim

rested upon their contention that other lawsuits raising similar claims for collapse coverage for "concrete decay" involving the same or similar policy language were pending against Liberty and other insurers and that some had survived summary judgment. The plaintiffs advance the same claim here, but also point to at least one other successful lawsuit where the insureds recovered a judgment on such a claim. In *Roberts*, however, the court concluded that until an appellate court determines that Liberty's coverage position was wrong, Liberty cannot be faulted under CUIPA for continuing to advance its position in litigation. Id. This followed the court's earlier conclusion, when addressing the plaintiffs' common law bad faith claim, that the position Liberty was taking was not unreasonable. The court said: "Although Liberty Mutual's position has not prevailed so far, it is not 'unreasonable on its face under existing insurance law', and until such time as those arguments are rejected by Connecticut's appellate courts or the Second Circuit, Liberty Mutual is entitled to continue making them. Cf. *Hutchinson* v. *Farm Family Casualty Insurance* Co., 273 Conn. 33, 45, 867 A.2d 1 (2005) (defendant cannot be held to 'ha[ve] taken [a] position in bad faith' when 'the position, although incorrect, was not an entirely unreasonable one')."

Without question, Liberty has denied a number of claims similar to that of the plaintiffs and, to date, no court has upheld Liberty's coverage position as a matter of law. The *Roberts* court is also correct, however, to observe that no binding legal precedent requires Liberty to adopt a different coverage position on these claims. Significantly, the facts of each case must also enter into any analysis of the reasonableness of an insurer's coverage position. In these cases, for example, some homes are in more advanced stages of deterioration than others. In this case, Liberty is not only raising a legal challenge to the applicability and interpretation of the *Beach* decision, it is arguing that the plaintiffs cannot establish a substantial impairment of

structural integrity as a matter of fact, even assuming that standard applies. The issue of reasonableness is not purely a legal one and, at best, a court's view of the reasonableness of an insurer's coverage position can only extend as far as the legal issues go. Beyond that, the reasonableness of an insurer's coverage position in a given case, and in similar cases, is a question of fact or a mixed question of fact and law. Finally, *Roberts* can be read to establish a bright line rule that insurers are free to adopt any coverage position that has not previously been rejected by appellate authority in the applicable jurisdiction. That rule certainly cannot be gleaned from the language of the statute (General Statutes §38a-816(6)) and the court is not aware of any Connecticut appellate authority adopting such a rule.

In *Hutchinson* v. *Farm Family Casualty Insurance Co.*, 273 Conn. 33, 44-45, 867 A.2d 1 (2005), relied upon in *Roberts*, the court did comment on insurer bad faith in the context of considering whether an "at issue" exception applied to otherwise privileged communications between an insurer and its counsel. In that context the court commented that an insurer's coverage position might, in some circumstances, be "not unreasonable on its face under existing insurance law," the phrase quoted in *Roberts*. The court went on, however, to note that the determination of reasonableness would be one for the relevant factfinder in that case, an arbitration panel. Id. *Roberts* also cites the Second Circuit's decision in *American National Fire Insurance Co.* v. *Kenealy*, 72 F.3d 264 (1995) in support of its resolution of the reasonableness question as a matter of law. In that case, however, the Second Circuit, applying New York law, also deferred to the district court's finding of no bad faith. Id., 271. In *Tucker* v. *American International Group, Inc.*, United States District Court, Docket No. 3:09–CV–1499 (CSH) (D. Conn. Jan. 28, 2015), another case relied upon by insurers in support of Liberty's position, the court references the standard for determining reasonableness under Massachusetts' unfair

insurance practices act. Quoting *Bohn* v. *Vermont Mutual Insurance Co.*, 922 F.Supp.2d 138 (D. Mass. 2013), the court in *Tucker* recites the standard as follows: "[l]iability is reasonably clear if a reasonable person, with knowledge of the relevant facts and law, would probably have concluded that the insurer was liable to the plaintiff." *Tucker* v. *American International Group, Inc.*, supra, n.48. This is not a standard easily met as a matter of law.

In this case, the court's view on the reasonableness of Liberty's coverage position is not dispositive. The question does not turn only upon whether Liberty makes a reasonable argument in the eyes of the court concerning the applicability and proper interpretation of the "substantial impairment of structural integrity" standard adopted in *Beach*. The court has already ruled that Liberty's position is incorrect, as a number of other courts have done. Whether it was more than just incorrect is a question for the factfinder when the CUTPA/CUIPA claim is tried. That determination will turn first upon the outcome of the trial on the breach of contract claim, proof of a general business practice by Liberty to unreasonably deny similar claims and upon whether "a reasonable person, with knowledge of the relevant facts and law, would probably have concluded that [Liberty] was liable to the plaintiff." See *Demeo* v. *State Farm Mutual Automobile Insurance Co.*, 649 N.E.2d 803, 804 (Mass. App. 1995).

For the foregoing reasons, the court denies Liberty's motion for summary judgment on the CUTPA/CUIPA count.

VIII. DETERMINATION PURSUANT TO PRACTICE BOOK §61-4

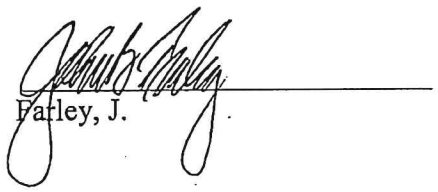
The court's decision results in a final judgment as to three of the four remaining defendants. Only the claims against Liberty remain pending and, of course, the court's decision to deny summary judgment to Liberty is not immediately appealable. Under these

circumstances, the court may nevertheless authorize Liberty to pursue an interlocutory appeal, subject to the concurrence of the Chief Judge of the Appellate Court or the Chief Justice as appropriate, if the court determines that "the issues resolved by the judgment are of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified." Practice Book §61-4. The advantages of making such a determination in this case include the elimination of the potential for multiple trials in the case and the resolution of significant issues that could be determinative not only in this case but in many of the other cases pending in Connecticut state and federal courts concerning insurance coverage for crumbling concrete basement walls. Consequently, should the plaintiffs choose to appeal the court's entry of summary judgment in favor of Safeco, Twin City and Sentinel, the court will, upon motion by Liberty or the plaintiffs, consider whether a determination pursuant to §61-4 is appropriate. Should such a motion be filed, the court will consider the views of all parties on the issue.

CONCLUSION

Based on the foregoing discussion, the court concludes that Safeco, Twin City and Sentinel are entitled to summary judgment because the plaintiffs' loss did not occur during their policy periods. Further, because their policies do not cover the plaintiffs' loss, there can be no liability under CUTPA/CUIPA for their denials of coverage. Those defendants' motions are granted and judgment shall enter in their favor and against the plaintiffs on Counts One through

Eight of the complaint. The court concludes further that questions of fact preclude the entry of summary judgment in favor of Liberty on Counts Nine and Ten. Liberty's motion is denied.



Farley, J.