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Parks v. Safeco Insurance Co. of Illinois Appellant's Brief 2 Dckt. 43376

IN THE IDAHO SUPREME COURT

DAVID & KRISTINA PARKS, *Plaintiffs-Appellants,* vs. SAFECO INSURANCE COMPANY OF ILLINOIS, *Defendant-Respondent.*	)	**Idaho Supreme Court** **Case No: 43376**

PLAINTIFFS-APPELLANTS' BRIEF

Appeal from the Sixth Judicial District Court
Bannock County Case No. CV-2013-2253-OC
The Honorable Stephen S. Dunn, Presiding

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Synopsis

On June 28, 2012 the custom home of David and Kristina Parks on Autumn Lane, in Pocatello, was totally destroyed by the "Charlotte Fire" that also destroyed 65 other homes. **CR 671, 673; Safeco Depo. Ex. 7.** The Parks' base coverage under their Safeco "Replacement" policy was $371,900. **CR 258-259, 262, 264; David Parks Depo. Ex. 2, POL 2-3, 6, 8; Safeco Depo. Ex. 2.** An "Extended Dwelling Coverage" rider increased that base coverage by an additional 25% to $464,875. **CR 263, 270; David Parks Depo. Ex. 2, POL 7 & 14 "Extended Dwelling Coverage"; Safeco Depo. Ex. 2.** The base value of $371,900 was determined by Safeco, incidental to an annual review process, that increased premium and policy renewal just six weeks prior to the May 27th renewal date. **CR 258-259; David Parks Depo. Ex. 2, POL 2-3; Safeco Depo. Ex. 2.**

Safeco refused to pay the Parks the $371,900 insured amount contending essentially that the Parks' insurance policy was only an *indemnity* policy that the Parks first had to borrow or buy — out of their own pocket — another home that, even if much smaller and lesser quality, would still set the upper limit of Safeco's obligation.

Safeco tendered a check for $169,000 contending that was the fair market value of their Autumn Lane home as determined by appraiser Robert Jones. **CR 371-393; David Parks Depo. Ex. 13 & 14.** That lead to seeking legal counsel who, ultimately, got Safeco to commit that the Parks could negotiate the lowball $169,000 check without prejudice to their coverage rights. **CR 399-435; David Parks Depo. Ex. 20 & 21.**

Safeco then retained Belfor Property Restoration of Boise to make a thorough assessment of the replacement cost/value of the Parks home. Belfor determined that amount to be $440,195.55 (*exclusive of* land) or $90.60 per square foot for the computed 4,858.28 total square feet. **CR 428-429; David Parks Depo. Ex. 21, pp. 25-26.**

Counsel for the Parks made demand for that $440,195.55 pursuant to the Safeco policy entitling the Parks to their "direct financial loss" subject only to the limits of coverage. **CR 444-445; David Parks Depo. Ex. 27.**

Safeco denied payment, contending no obligation to pay until the Parks had incurred the additional expense of another home — though the "direct financial loss" policy provision did not require such. **CR 446-447; David Parks Depo. Ex. 28.** Five months later the Parks borrowed money to buy a smaller home in Idaho Falls for $255,000.[1] **CR 459-485; David Parks Depo. Ex. 35.**

The court granted summary judgment for Safeco following a policy payout procedure that was *not* the policy the Parks had. The court essentially ruled that the Parks' "New Quality-Plus Policy" policy was only an *indemnity* policy immunizing Safeco from making payment until the Parks had borrowed money to buy a new home. The court came to that result by starting with the definition of "replace" despite acknowledging "replace" *more commonly* meant "the *equivalent* of" rather than "in place of" which did not focus on value. **CR 1063-1064; Memo. Decision, pp. 10-11 (4-23-15).**

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[1] That was the portion of the purchase price allocated to the home; the land was $45,000.

The District Court held that the word "incur" or "incurred" in the Safeco policy could *only* refer to *incurring* a debt or expense while totally ignoring the more common usage — in the insurance context — of "incurring a *loss*" as happened when the Parks' home burned to the ground. **CR 1064-1065; Memo. Decision, pp. 11-12 (4-23-15).**

Nature of the Case

This is an insurance "total" residential fire loss claim under the Plaintiffs David and Kristina Parks' "New Quality-Plus Policy" with Safeco.

Course of Proceedings

After the party depositions, but hearing Plaintiffs' prior-filed Motion to compel discovery from Safeco for withheld discovery, Safeco filed for Summary Judgment. The court ultimately ordered the discovery produced, granted a Rule 56(f) extension of time, and heard cross motions for summary judgment. The District Court granted summary judgment for Safeco, holding (1) There was no obligation to pay the Parks the total loss of their home until the Parks had *first* borrowed the money to buy another home, and (2) Safeco had no obligation to pay the Parks the $371,900 amount they had insured their home for *on Safeco's specific recommendation,* but that Safeco was not obligated to pay more than what the Parks had "incurred" to buy a smaller home in Idaho Falls for $255,000.[2] **CR 1054-1072, Memorandum Decision (4-23-15).**

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[2] The Parks challenged the unfairness of this by comparing it to a policyholder insuring, and paying the premium, to insure, an expensive Mercedes, but only purchasing a cheaper Chevrolet after Safeco refused to *first* pay the insured loss. Safeco's adjuster never responded to that comparison. **CR 459-460 and 654-669; David Parks Depo. Ex. 35 and Safeco Depo. Ex. 6.**

Plaintiffs then filed this Appeal. **CR 1075-1081.**

STATEMENT OF FACTS

On June 28, 2012 a fire in the west hills of Pocatello, called the "Charlotte Fire",[3] totally destroyed the homes of 66 families. Plaintiffs' David and Kristina Parks' home on Autumn Lane was one of the 66. **CR 673; Safeco Depo. Ex. 7, p. 4.**

The Parks home was a "custom design and custom built home." **CR 529; Kristina Parks Depo. 30:19-20.** The Autumn Lane area was "above average in condition and appeal and at the upper end of the value scale for the city" and had "above average views" of the Portneuf Gap Area. **CR 671; Safeco Depo. Ex. 7, p. 2.**

The Parks had been insureds of Safeco since at least May of 1994. Each year around mid-April, about six weeks before the May 27th renewal date of their homeowners policy, Safeco wrote the Parks recommending increased coverage at an increased premium. Typically, those Safeco letters advised that policy coverages were being increased "*based on careful assessment of your home's replacement value*" and stating what the new "careful assessment" replacement value would be upon renewal. **CR 654-669; Safeco Depo. Ex. 6.**

"New Quality-Plus Policy"

Those Safeco-recommended yearly increases brought the Parks' home *base* insured value to $371,900 as of the June 28, 2012 fire. **CR 258-259, 262, 264; David**

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[3] Named after the street where the fire started.

Parks Depo. Ex. 2, POL 2-3, 6, 8. The 2012 renewal policy was labeled a "Safeco New Quality-Plus" policy. **CR 266; David Parks Depo. Ex. 2, POL 10.** That policy had "Extended Dwelling Coverage" that increased the Parks' coverage by 25% because the Parks had accepted the yearly increased recommended valuation and paid the increased premium.[4] **CR 265, 270, 301; David Parks Depo. Ex. 2, POL 9, 14, 45; CR 549-550; Safeco Depo. 29:5-30:21.** That brought their home coverage to $464,875 ($371,900 x 1.25) as of May 27, 2012 (the renewal date) and just a month before the June 28, 2012 "Charlotte fire." **CR 258-259, 262, 264; David Parks Depo. Ex. 2, POL 2-3, 6, 8; Safeco Depo. Ex. 2.** This is how the Safeco-recommended annual increased valuations progressed from 1994 to 2012:

Safeco Renewal/Increased Valuation Letters

Safeco letter	Old Value	New *Base* Coverage	
April 20, 1994	$172,000	$177,000	
April 17, 1995	$177,000	$195,000	
April 17, 1996	$195,000	$198,000	
April 17, 1997	$198,000	$203,000	
April 19, 1998	$203,000	$210,000	
* * * [1999]			
April 17, 2000	$212,000	$218,000	
* * * [2001]	$218,000	$221,000	Declarations page
April 17, 2002	$221,000	$223,000	
* * * [2003]			
April 18, 2004	$299,000	$310,000	

[4] Those Safeco-recommended annual increased valuations are represented in the Safeco policy to be the result of, among others, information Safeco had on "your dwelling's features" and "Labor and material cost trends for your area supplied to us by recognized residential construction cost specialists" with payment of the premium indicating "acceptance of the new amount." **CR 616; Safeco Depo. POL 27.**

April 17, 2005	$310,000	$326,000	
April 17, 2006	$326,000	$332,000	
* * * [2007]	$332,000		
* * * [2008]			
May 27,2009	$	$361,900	Declarations 4-19-2009
May 27, 2010	$	$361,900	Declarations 4-18-2010
* * * [2011]	$361,900	$368,200	* * *
April 17, 2012	$368,200	**$371,900**[5]	**[Fire was 6-28-12]**

— CR 654-669; Safeco Depo. Ex. 6.

Groundless Denials

Safeco counsel, in the *Amended Answer to the Complaint*, asserted Safeco was "unaware of any such letter"[6]. But in the Rule 30(b)(6) deposition, Safeco's designated representative had to admit those letters were, indeed, well known to Safeco:

> Q. Okay. You know that Safeco routinely sent out letters incidental to renewals coming up?
> A. Yes.
> Q. What would it have taken for you to have produced these letters in response to our request in terms of where Safeco keeps them?
> A. This would have been a request from our underwriting department.
> Q. Okay. And they would have those?
> A. Yes.
> **— CR 546; Safeco Depo. 14:4-13**

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[5] That $371,900 base coverage on the Parks "Dwelling" was only a *lowest limit* base coverage as the policy provided "an additional 25% or an additional 50% of your dwelling limit." **CR 606, 609-610; Safeco Depo. Ex. 2, pp. POL 7, 8 and 14 "Extended Dwelling Coverage".** The Parks thus had "Dwelling" coverage of $371,900 plus the stated additional 25% to 50% or total dwelling coverage of up to $557,850. This extra coverage of "at least 25%" is admitted. **CR 549-550; Safeco Depo. 29:5-30:21.**

[6] That letter is actually considered to be a part of the policy as stated on the cover page Affidavit of Patricia Ouellette, the Safeco Archivist who provided the copy of the policy. Safeco defense counsel answered the Complaint stating Safeco was "unaware of any such" letter. **CR 616; Safeco Depo. Ex. 2, POL 27, Section I — "Property Conditions" ¶ 2.**

Lowball Payment Disregarding the Insured "Replacement Cost"

Despite those 18+ years of dealing and the Safeco-recommended coverage increase to $371,900 just *before* the fire, about a month *after* the fire, Safeco sent Plaintiffs a check for only $169,000 with a notation on it "In Payment of: Cov[erage] A – Dwelling – Market Value". **CR 400; David Parks Depo. Ex. 20, p. 2, Check No. 8004530 (7-26-12)**. *Less than half* of what their *base* coverage was.

The $169,000 payment was based on an appraisal by Robert Jones of Pocatello who had been retained by Safeco, but "shorted" the true value by only valuing 1,943 square feet — less than half of the home's actual 4,858.28 total square feet. **CR 705; Safeco Depo. Ex. 8, p. 25 "Grand Total Areas"; CR 554-555; Safeco Depo. 49:23-50:3**.

Further, that Jones appraisal used two-year old 2010 "comparables" rather than 2012 values and took those "comparables" from three of six other "tract" houses rather than the more exclusive area of Autumn Lane where the Parks lived. — **CR 673; Safeco Depo. Ex. 7**. Safeco admitted that was wrong. **CR 563; Safeco Depo. 85:13-19**.

Six "Comparable" homes — Averaging $118.45 and $128.21 per square foot

The Jones appraisal created a table for three "comparable" out-of-area homes with square footage values of $107.94 and $129.07, and $118.36 — an average of $118.45. The appraisal, however, had pictures and data of three other "comparable" homes that were appraised at square footage values of $106.59 and $122.17 and $155.86

— an average of $128.21. **CR 670-690, 546, 561-563; Safeco Depo. Ex. 7; 14:18 and 77:18-85:16.**

The Parks disagreed with the low Jones appraisal. **CR 553; Safeco Depo. 44:19-45:5; CR 227 and 232; David Parks Depo. 90:4-16 and 112:1-113:23; CR 528-529; Kristina Parks Depo. 29:24-30:25.** Because of the $169,000 check notation "In Payment of: Cov[erage] A – Dwelling – Market Value" was for *less than half* of their $371,900 base coverage, the Parks did not cash the check but sought legal counsel on August 30, 2012. Plaintiffs' counsel sought Safeco's affirmative statement that the Parks could negotiate that check without prejudice to any of their insurance rights. **CR 399; David Parks Depo. Ex. 20, p. 1.** Three weeks later, on September 20, 2012, Safeco finally gave the Parks written assurance that the $169,000 check could be negotiated without prejudice. **CR 401-402; David Parks Depo. Ex. 21.**

Belfor Property Restoration Appraisal — $90.60/square foot

After that lowball Jones appraisal, and prior to September 20, 2012, Safeco retained Belfor Property Restoration of Boise, Idaho to determine the true reconstruction replacement cost of the Parks' residence using "equivalent construction." Belfor Property Restoration determined the Parks home to have been 4,858.28 square feet and the replacement cost with comparable materials to be $440,195.55 *exclusive of* land — $90.60 per square foot. **CR 705; Safeco Depo. Ex. 8, p. 25 "Grand Total Areas"; CR 554-555; Safeco Depo. 49:23-50:3.**

No Insurance until the Parks Incurred Debt??

Despite the gross tactical undervaluing of the Parks home by Safeco through the Jones appraisal and the comprehensive accurate and thorough evaluation of the Parks loss by Belfor Property Restoration, Safeco still did not pay the Parks for their actual loss.

Safeco's position was that, notwithstanding the insured value on the home, Safeco's annual letter increasing coverage to $371,900, and the Belfor Property Restoration detailed and accurate appraisal, the Parks could *not* receive the full insured value because they bought a less expensive home in Idaho Falls and Safeco had no obligation to pay until the Parks had "incurred" the debt of another home. **CR 442-443; David Parks Depo. Ex. 26.**

Stated otherwise, Safeco contended the Parks did *not* have an insurance policy but only an *indemnity* policy requiring them to *first* "foot" the loss they had incurred and then ask for reimbursement.

The Policy "Loss Settlement"Provisions

That position of Safeco was wrong. The Parks' Safeco policy is *not* an *indemnity* policy but provides for "*Loss* Settlement" and not "*debt* incurred settlement."

Two "Loss Settlement" Options

Under the "Loss Settlement"[7] provisions of the policy there are two

[7] It is significant that the policy uses the term "Loss Settlement" *rather* than "Indemnity" settlement.

different settlement options. Neither makes a blanket requirement that the Parks *borrow* money to buy a different house before being compensated for their insured loss.[8]

The first option, is the process the District Court went through — albeit erroneously — that limited the Parks recovery to the cost of the smaller Idaho Falls house that the Parks borrowed money to purchase. The second option has a more simple process; it provides for payment of "the smallest of" policy limits or "the direct financial loss you incur."[9] **CR 284; David Parks Depo. Ex. 2, POL 28; Safeco Depo. Ex. 2.**

The District Court totally ignored the "Direct financial loss" Option

In granting summary judgment to Safeco, the District Court erred by ignoring the second option — "direct financial loss" — though the District Court recognized that process as being in the policy. **CR 284; David Parks Depo. Ex. 2, POL 28; Safeco Depo. Ex. 2; CR 1054-1072, Memorandum Decision (4-23-15).**

Admitted Non-delegable Duty of Good Faith & Fair Dealing

All of this occurred in the context of Safeco admitting in its Rule 30(b)(6) deposition that it had a duty of good faith and fair dealing with the Parks that did *not* end just because a coverage or payment lawsuit is filed:

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[8] If "Extended Dwelling Coverage" rights are exercised the damaged house must be rebuilt, but that requirement is specifically limited to the bonus 25% coverage and does not apply to the base insured coverage of $371,900. Nor were insureds required to rebuild or even purchase another house in order to be paid their "direct financial loss you incur" subject only to not exceeding policy limits.

[9] A third "smallest of" factor dealt with "our prorata share" among insurance policies if there were more than one, but there was not, so the third option did not apply. **CR 284; David Parks Depo. Ex. 2, POL 28; Safeco Depo. Ex. 2.**

> Q. Do you realize that *the duty of good faith and fair dealing does not end* with the filing of a lawsuit or policy coverage or resolution?
> MR. ANDERSON: Calls for a legal conclusion.
> THE WITNESS: *I do.*
> **— CR 549; Safeco Depo. 26:1-24**

Similarly, Safeco admitted it could not escape its duty of good faith and fair dealing by distancing itself from the lowball $169,000 check sent to the Parks because it was based on the low appraisal[10] of Robert Jones — a non-Safeco employee — that Safeco hired. **CR 670-690; Safeco Depo. Ex. 7.**

> Q. That Safeco cannot excuse a failure to deal in good faith and with fair dealing by virtue of the conduct of somebody they retain; do you understand that?
> A. Yes.
> **— CR 566; Safeco Depo. 96:2-96:5**
>
> * * *
>
> Q. Do you understand that Safeco's duty of good faith and fair dealing is *a nondelegable duty*?
> MR. ANDERSON: Object to the form.
> BY MR. HAWKES:
> Q. Do you know what that means?
> A. Yes.
> Q. Okay.
> A. That's the answer. Yes.
> Q. That Safeco *cannot excuse a failure to deal in good faith and with fair dealing by virtue of the conduct of somebody they retain; do you understand that?*
> A. *Yes.*
> **— CR 566; Safeco Depo. 95:19-96:5**

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[10] Despite Safeco's known fiduciary duty to the Parks, Safeco gave no guidelines to Mr. Jones incidental to his providing the low-ball appraisal. **CR 552; Safeco Depo 38:3-8.** Mrs. Abendschein testified she had asked Mr. Jones to give Safeco "current 2012 values" of the Parks' home "the day before the fire" and not 2010 values that Jones used and Safeco was content with. **CR 563; Safeco Depo 85:13-19.**

The Appraisal was less than half the house

The Parks' home was a two-level, custom upgraded, home in an exclusive area with a sloping view lot of the Portneuf Gap and with a full "Daylight" walkout *above grade* on the lower level. **CR 529; Kristina Parks Depo 30:19-21; cr 232; David Parks Depo. 112:24-113:1; CR 671; Safeco Depo. Ex. 7.**

In fact, it was undisputably determined to be 4,858.28 square feet with an upper main west entrance level and a lower east entrance level that exited through separate sliding glass view doors to an easterly view of the "Portneuf Gap" and mountains. **CR 671; Safeco Depo. Ex. 7 (Jones appraisal); CR 694-695; Safeco Depo. Ex. 8, p. 3, l. 23 (Belfor itemized estimate); CR 529; Kristina Parks Depo 30:16-21; CR 232; David Parks Depo. 112:24-113:1.**

Admitted Square Footage Was 4,858.28

Further, the correct square footage of the Parks' home — as set forth in the Safeco's own retained expert, Belfor Property Restoration itemization — was admitted in the Safeco deposition to be 4,858.28 square feet. **CR 705; Safeco Depo. Ex. 8, p. 25 "Grand Total Areas"; CR 554-555; Safeco Depo. 49:23-50:3.**

Non-comparable "Comparables"

In addition, the Jones lowball appraisal used out-of-area "comparables" that were *not* "comparable." That was easily discernable to Safeco as it recited that the area of the Charlotte fire differed from the recited "comparables" because the Parks home was "above average in condition and appeal at the upper end of the value scale for the city."

CR 671; Safeco Depo. Ex. 7, p. 1. The "comparables were also "tract homes" rather than custom homes like the Parks' home was. **CR 529; Kristina Parks Depo 30:16-25.**

Appraisal used Old Data

Further, Jones' lowball appraisal used 2010 values rather than appropriate and current 2012 values that Safeco had specifically written the Parks about to increase their coverage to current levels. **CR 673; Safeco Depo. Ex. 7, p. 4.**

Self-imposed Ignorance

Though those key deficiencies were shown in the Jones lowball appraisal and thus "there for the looking," Safeco's designated Rule 30(b)(6) representative and primary insurance adjuster with the Parks admitted that she was *not aware* of these serious deficiencies. **CR 552; Safeco Depo. 38:20-39:14.**

> Q. ...You knew that the Parks had a home that was *two levels and was a full walkout basement*; right?
> A. Yes.
> Q. Do you think in appraisal the value of that house it was fair to compare their fair market value by houses in which he only considered the above-grade square footage?
> MR. ANDERSON: Object to the form. Lack of foundation and assumes facts.
> THE WITNESS: *I don't direct or provide any guidelines for the appraisal*, so –
> BY MR. HAWKES:
> Q. You had to decide whether to accept that appraisal; correct?
> A. Correct.
> Q. That was your judgment call?
> A. We requested that and *we accepted it.*
> Q. Okay. Who was the "we"?
> A. *Safeco.*
> **— CR 552, Safeco Depo. 39:19-40:12**

Corrected Appraisal Values from "Comparables" = $575,463.26

The per square foot market value that Jones put on the 3 "comparable" homes in his appraisal were $107.94 and $129.07 and $118.36 for an average of $118.45 per square foot. Applied against the admitted 4,858.28 square footage, Safeco accepted in Safeco's own retained expert Belfor Property Restoration's assessment that the *average* value of the Parks home was $575,463.26. **CR 672, 705; Safeco Depo. Ex. 7, p. 3; Safeco Depo. Ex. 8, p. 25.**

PLAINTIFFS' ISSUES ON APPEAL

(a) The District Court erred in not considering the "Direct financial loss" provision of the Safeco policy that entitled the Parks to early payment.

(b) The District Court erred in holding that Safeco had no duty to pay the Parks for the total fire loss of their home until the Parks had first borrowed money to buy a smaller home.

(c) The District Court erred in holding that the smaller home in Idaho Falls that the Parks borrowed money to purchase for $255,000 was "the equivalent" of the home Safeco had advised the Parks shortly before the fire needed to be insured for no less than $371,900.

(d) The District Court erred in ignoring material facts that precluded summary judgment for Safeco and were relevant to insurance industry practices and standardized policies.

ATTORNEY FEES ON APPEAL

Attorney Fees are sought pursuant to *Idaho Code* § 41-1839(1).

STANDARD OF REVIEW

On appeal from the grant of a motion for summary judgment, the Supreme Court reviews that decision *de novo* while applying the same Rule 56 standards. ***Carnell v. Barker Management, Inc.*, 137 Idaho 322, 326, 48 P.3d 651 (2002); *McColm-Traska v. Valley View, Inc.*, 138 Idaho 497, 500, 65 P.3d 519 (2003); *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 662, 115 P.3d 751, 753 (2005).**

Insurance contracts must be construed according to the entirety and the *context* in which terms occur. ***Idaho Code* §41-1822; *Dave's Inc. v. Linford*, 153 Idaho 744, 751, 291 P.3d 427 (2012); *North Pac. Ins. Co. v. Mai*, 130 Idaho 251, 254-55; 939 P.2d 570 (1997); *Purdy v. Farmers Ins. Co. of Id.*, 138 Idaho 443, 444, 65 P.3d 184 (2003); *Weinstein v. Prudential* Ins., 149 Idaho 299, 315, 233 P.3d 1221, (2010).**

In interpreting an insurance policy, the Court construes insurance contracts in a light *most favorable to the insured* and ***in a manner which will provide full coverage*** for the indicated risks rather than to narrow its protection." ***Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 662-663, 115 P.3d 751 (2005).**

Because insurance policies are not subject to negotiation between the parties, ambiguities must be construed most strongly against the insurer. The burden is on the insurer to use clear and precise language if it wishes to restrict the scope of coverage; exclusions or provisions not stated with specificity will not be presumed or inferred. ***Clark v. Prudential Prop. & Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242 (2003).**

ARGUMENT

POINT ONE

THE PARKS WERE ENTITLED TO THEIR "DIRECT FINANCIAL LOSS" THAT WAS *AT LEAST* EQUAL TO THE BELFOR DETERMINATION OF $440,195.55

Two "Loss Settlement" Payment Options

Under the Parks' Safeco policy there were two "Loss Settlement" processes for the Parks to get paid. The first was to determine "the smallest" dollar amount between five considerations — subparagraphs (a) through (e) as set forth in the box below:

> 5. **Loss Settlement.** Covered property losses are settled as follows:
>
> a. **Replacement Cost.** Property under Coverage A or B at ***replacement cost,*** not including those items listed in 5.b.(2) and (3) below subject to the following:
>
> (1) We will pay the full cost of repair or replacement, but not exceeding the smallest of the following amounts:
>
> (a) the limit of liability under the policy applying to Coverage A or B;
>
> (b) the ***replacement cost*** of that part of the damaged building for equivalent construction and use on the same premises as determined shortly following the loss;
>
> (c) the full amount actually and necessarily incurred to repair or replace the damaged building as determined shortly following the loss;
>
> (d) the direct financial loss you incur; or
>
> (e) our pro rata share of any loss when divided with any other valid and collectible insurance applying to the covered property at the time of loss.
>
> (2) When more than one layer of siding or roofing exists for **Building Property We Cover,** we will pay for the replacement of one layer only. The layer to be replaced will be at your option. The payment will be subject to all other policy conditions relating to loss payment.
>
> When more than one layer of finished flooring exists we will pay for the finish of only one layer.
>
> (3) If the cost to repair or replace is $1,000 or more, we will pay the difference between ***actual cash value*** and ***replacement cost*** only when the damaged or destroyed property is repaired or replaced.

— CR 284; David Parks Depo. Ex. 2, POL 28; Safeco Depo. Ex. 2, (¶ 5.a.(1-3)).

The second "Loss Settlement" process available to the Parks provided "you may disregard" the first process in the paragraphs above and recover the "direct financial loss you incur" as alternatively provided in the "Loss Settlement" provisions in the policy. The second process was *not* subject to any "smallest of" other events, except the limits of coverage, or Safeco's prorata liability if the loss was covered by more than one policy.

> (4) You may disregard the ***replacement cost*** loss settlement provisions and make claim under this policy for loss or damage to buildings on an ***actual cash value*** basis but not exceeding the smallest of the following amounts:
>
> (a) the applicable limit of liability;
>
> (b) the direct financial loss you incur; or
>
> (c) our pro rata share of any loss when divided with any other valid and collectible insurance applying to the covered property at the time of loss.
>
> You may still make claim on a ***replacement cost*** basis by notifying us of your intent to do so within 180 days after the date of loss.

— CR 284; David Parks Depo. Ex. 2, POL 28; Safeco Depo. Ex. 2, (¶ 5.a.(4)).

That first option was erroneously utilized, and otherwise treated, by the District Court as the *exclusive* method for the Parks to get paid under their Safeco policy; it was *not* the exclusive process to get paid. **CR 284; David Parks Depo. Ex. 2, POL 28; Safeco Depo. Ex. 2; ¶ 5. a (1) through (3), p. 12.**

4,858.28 Square Feet at $90.60/square foot = $440,195.55

That Belfor Property Restoration evaluation determined that there were 4,858.28 total square feet in the Parks' Autumn Lane home. It further determined that the replacement cost was $440,195.55 for those 4,858.28 square feet. That equaled — $90.60 per square foot. **CR 705; Safeco Depo. Ex. 8, "Grand Total Areas" p. 25, CR 554-**

555; Safeco Depo. 49:23-50:3.

That square foot determination value of $90.60 by Belfor Property Restoration for the Parks' home with 4,858.28 square feet of floor space contrasted with the nine "Comparables" in the Jones appraisal where the fair market value averaged $122.03 per square foot:

"Comparable" Homes	Square Foot Value
No. 1	$107.94[11]
No. 2	$129.07
No. 3	$118.60
No. 4	$155.86
No. 5	$122.17
No. 6	$106.59
No. 7	$103.03
No. 8	$134.84
No. 9	$120.14
Total	**$1,098.24** divided by 9 = **$122.03**

— CR 672, 677-678; Safeco Depo. Ex. 7, Jones Appraisal.

Applying that average $122.03 per square foot, for all nine "Comparables" to the admitted 4,858.28 square footage of the Parks home as accepted by Safeco from the Belfor Property Restoration determination, the *average* value of the Parks home would be $592,855.91. **CR 672; Safeco Depo. Ex. 7, p. 3; CR 705; Safeco Depo. Ex. 8, p. 25.**

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[11] The above stated Jones appraisal "Comps # 1 ($107.94/sq. ft.) and 2 ($129.07/sq. ft.) were judged the most representative and similar overall." **CR 672; Safeco Depo. Ex. 7, p. 3 under "Summary of Sales Comparison Approach."**

Proof of minimum loss because lowest square foot valuation

Thus, it was beyond reasonable dispute that the Parks' *direct financial loss* was *at least* equal to the Belfor Property Restoration value of $440,195.55 assessment; it was the *lowest* square foot valuation of the Parks' home when compared to the *nine* "Comparables" in the Jones appraisal.

Safeco agrees to be bound by the Belfor values

On October 17, 2012 Safeco was asked if it was "willing to be bound by" the "amounts, breakdown, and unit pricing" of the Belfor determination. **CR 436; David Parks Depo. Ex. 22.** It took Safeco five weeks to finally give notice to the Parks. On November 24, 2012 Safeco had "approved" the Belfor computations. **CR 438-439; David Parks Depo. Ex. 23.** Safeco reaffirmed, on December 20, 2012, that it had "approved" the Belfor computations and was willing to be bound by those determinations. **CR 442-443; David Parks Depo. Ex. 26.**

Formal Demand for "Direct financial Loss"

Because the Jones appraisal acknowledged that the Parks' home was in a higher value area where homes were "above average in condition and appeal at the upper end of the value scale for the city" — as contrasted with the "Comparables" he used — and that market value was *greater* than replacement value, it was not fairly debatable that using the Belfor Property Restoration value of $440,195.55 was the Parks' *minimum* "direct financial loss." **CR 671-673; Safeco Depo. Ex. 7 (Jones Appraisal); CR 705-707;**

Safeco Depo. Ex. 8 (Belfor itemized estimate).

Thus, on December 26, 2012 "formal demand" was made on Safeco for the Belfor Property Restoration determination of $440,195.55 as the "direct financial loss" of the Parks. **CR 444-445; David Parks Depo. Ex. 27.** Safeco's response was to send two letters totally omitting reference to the "direct financial loss you incur" provisions of the second option provided in subparagraph (4) of the "Loss Settlement" clause, while telling the Parks in both letters that the Parks had to pay their own loss before getting reimbursed. **CR 446-447 and 450-452; Safeco Depo. Ex. 28 and 31 (letters December 27, 2012 and January 23, 2013).**

Suit was filed thereafter.

Safeco adheres in deposition to the Belfor computations and value

After suit was filed, a Rule 30(b)(6) deposition of Safeco was taken on March 6, 2014. In that deposition Safeco was given a further opportunity to back-off or disavow the value determinations of Belfor Property Restoration. Safeco's representative acknowledged its agreement with *all* of the "numbers and computations" contained in the Belfor Property Restoration determination. **CR 564; Safeco Depo. 89:17-22.**

Safeco's failure to pay that minimum required policy amount was not only a breach of contract, but an act of bad faith, and the District Court was in error to not grant summary judgment to the Parks for their contractual loss at a minimum.

POINT TWO

THE $255,000 IDAHO FALLS HOME WAS NOT "THE EQUIVALENT OF" THE PARKS TOTALLY DESTROYED HOME THAT WOULD TAKE $440,195.55 TO "REPLACE"

In granting summary judgement for Safeco, the District looked exclusively to just the first option of the "Loss Settlement" provisions in the Parks' policy — paragraphs **5. a (1) through (3)** to determine "the smallest" dollar amount of a multiple steps process. **CR 1060-1067, Memorandum Decision, pp. 7-14 (4-23-15); CR 284; David Parks Depo. Ex. 2, POL 28; Safeco Depo. Ex. 2; ¶ 5. a (1) through (3), p. 12.**

The District Court then held that the $255,000 smaller Idaho Falls home — that the Parks had to borrow money to buy on December 6, 2012 — was "the equivalent of" their totally-destroyed home. It was *undisputedly not* "the equivalent" of what the Parks lost; Safeco agreed it would cost $440,195.55 to replace the Parks' home. And the Jones' appraisal put market values above replacement cost. **CR 1060-1067, Memorandum Decision, pp. 7-14 (4-23-15).**

The District Court's erroneous process started by addressing the words "repair or replace the damaged building" in the policy for purposes of determining "the smallest of" the four itemized categories. **CR 1060-1067, Memorandum Decision, pp. 7-14 (4-23-15).**

Plaintiffs' position, as acknowledged by the District Court, was that

"buying a home in Idaho Falls does *not* constitute repairing or replacing the home that was totally lost under subsection (c)" because "the damaged building was not repaired or replaced" when reading the language of the policy construed most favorably to the Parks. **CR 1063; Memorandum Decision, p. 10 (4-23-15).**

The court agreed that "repair" did not apply because the Parks' "house was completely destroyed in the fire." **CR 1063; Memorandum Decision, p. 10 (4-23-15).**

The court then undertook to determine whether the "completely destroyed" home was "replaced" under rules applicable to insurance policies. **CR 1063; Memorandum Decision, p. 10 (4-23-15).** The Parks' position was that the home was not "replaced" by buying a smaller home in Idaho Falls because the Idaho Falls home did not "restore" them to their "former condition", or give them "the like", as the term is most commonly used and defined by Webster's Dictionary. **CR 1063; Memorandum Decision, p. 10 (4-23-15).**

The District Court then set forth the following definitions of "replace" from Webster's Dictionary:

> 1. To place again; *to restore* to a former place,[12] position, condition, *or the like*.
> 2. *To refund*; to repay; *to restore*.
> 3. To supply or *substitute an equivalent for*.
> 4. To take the place of; to supply the want of.
> 5. To put in a new or different place.
> — **CR 1063; Memorandum Decision, p. 10 (4-23-15).**

[12] All *italics* and **bold** herein are added unless stated otherwise.

While it is true that the Idaho Falls home "took the place of" their former home — just as a hotel room or a cheap apartment would have become their new abode — it certainly was *not* the "equivalent for" or "the like" of their Pocatello home, nor did it "restore" to the Parks what they had lost and paid Safeco a premium to get the "equivalent" of.

Entitled to the "Equivalent" of what they lost

On the next half a page of his *Memorandum Decision*, the District Court referred *five times* to the Parks being entitled to "an equivalent for" what they lost, while stating that the five enumerated definitions by Webster's of "replace" were "*not* in conflict with one another." **CR 1064; Memorandum Decision, p. 11 (4-23-15).** The Court then, for the *sixth* time, stated that the Parks were entitled to the "equivalent" of what they lost:

> Within the context of the Replacement Cost provision, all interpretations of "replace" as used in the Policy plainly provide that Defendant has three options to "supply or substitute *an equivalent for*" Plaintiffs' destroyed home.
> — **CR 1064; Memorandum Decision, p. 11 (4-23-15)**

The District Court then essentially ignored what it had just concluded by stating that the $255,000 the Parks paid for the Idaho Falls home was "the amount actually incurred to repair or replace" the Parks' Pocatello home. **CR 1066; Memorandum Decision, p. 13 (4-23-15).**

To the extent that there were competing definitions of "replace" for which

the majority of the definitions meant "the equivalent of" or "the like" as contrasted with the contrasting and minority definition of "To put in a new or different place" the District Court erred in not holding that the Parks were entitled to "the equivalent" of what they lost. Further, the law is clear that when interpreting an insurance policy, the Court construes insurance contracts in a light *most favorable to the insured* and ***in a manner which will provide full coverage*** for the indicated risks rather than to narrow its protection." ***Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 662-663, 115 P.3d 751 (2005)**. Additionally, because insurance policies are contracts of adhesion, not subject to negotiation between the parties, ambiguities must be construed most strongly against the insurer. The burden is on the insurer to use clear and precise language if it wishes to restrict the scope of coverage; exclusions or provisions not stated with specificity will not be presumed or inferred. ***Clark v. Prudential Prop. & Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003).**

The cheaper Idaho Falls home was *not* "the equivalent" of the Pocatello home

Additionally, the District Court jumped to that erroneous fact and legal conclusion without ever addressing head-on the fact issue of whether the Idaho Falls home was indeed "the ***equivalent***" of the home the Parks lost. It was not, and the District Court erred in so concluding; $255,000 was *not* the "equivalent" of the $371,900. Safeco's renewal letter stated was the home replacement cost of $440,195.55 as determined by Safeco through its chosen expert Belfor Property Restoration.

Safeco never contended the cheaper Idaho Falls home was "the equivalent"

Further, Safeco never contended, in *any* of its communications or filings, that the much cheaper Idaho Falls home was "the equivalent" of the Parks' Pocatello home that Safeco had advised should be insured for no less than $371,900 as of the June 28, 2012 fire. **POL 2-3, 6, 8.** That June 28th letter is part of the Safeco policy to the extent it contradicts the printed provisions of the policy.[13] *See* policy cover page affidavit of Patricia Ouellette, **POL 1. CR 257-259, 262, 264; David Parks Depo. Ex. 2, POL 1-3, 6, 8; Safeco Depo. Ex. 2.**

The District Court failed to follow the law in only looking at one portion of the Safeco policy and requiring the Parks to first "pay their own loss" before receiving any insurance payment.

POINT THREE

IT WAS ERROR TO NOT APPLY A DEFINITION OF "INCUR" THAT WAS REASONABLE AND MORE FAVORABLE TO THE INSUREDS, THE PARKS

In granting summary judgment for Safeco, the District Court recognized the correct rules that differing interpretations of language present questions of fact and, as between policy language reasonably susceptible to different meanings, the definition

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[13] Separate correspondence can become part of the policy. **See, Farmers Insurance Company of Idaho v. Talbot, 133 Idaho 428, 432, 987 P.2d 1043 (1999)**(The district court concluded that the 'Dear Policyholder' language was part of the UIM endorsement which conflicted with the limitation of liability and setoff provisions, thus, making the endorsement ambiguous).

and usage most favorable to the insured must be used:

> Where the policy is reasonably subject to differing interpretations, the language is ambiguous and its meaning is a question of fact. *Moss v. Mid-America Fire and Marine Ins. Co.*, 103 Idaho 298, 300, 647 P.2d 754, 756 (1982).
> **— CR 1057-1058; Memorandum Decision, pp. 4-5 (4-23-15)**
>
> * * *
>
> An insurance policy provision is ambiguous if "it is reasonably subject to conflicting interpretations." [referencing fn 18 and citing *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.,* 141 Idaho 660, 663, 115 P.3d 751, 754 (2005)]
>
> * * *
>
> If a policy is found to be ambiguous, then its interpretation is a question of fact and any ambiguities in the policy must be construed against the insurer. [referencing fn 19 and citing *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.,* 141 Idaho 660, 663, 115 P.3d 751, 754 (2005)]
> **— CR 1059; Memorandum Decision, pp. 6 (4-23-15)**

However, the District Court failed to follow those basic rules which resulted in the consequence or essentially writing-out of the Parks' policy the very essence of "insurance."

The District Court ignores meaning of "Incurring a *loss*"

Further, the reversible error was in interpreting the word "incurred" to *exclusively* mean to *incur* a *debt* or expense while ignoring the more common usage — in the insurance context of — "to incur a loss."

Thus, using only the definition of "incurring a debt", the Court held that the Parks were *required* to "incur a debt or expense" in borrowing the money to buy another

house *before* they were entitled to be paid anything under their Safeco *insurance* policy.[14]

A policyholder cannot "incur a *loss*" ???

Safeco essentially persuaded the Court to say to the Parks — We don't have to pay you for your totally-destroyed house until you *first borrow the money* — *incur a debt* — to buy another one. And if you just happen to be short of money so you have to buy a smaller house than you lose, sorry. — [15]

The issue was well framed:

> Second, Plaintiffs argue it is not a reasonable reading of the Policy that they are required to "incur" out-of-pocket expenses in order to collect on their loss. Plaintiffs claim that the definition of "incurred" should include the incurrence of repair estimates, like the one Belfor performed.
> **— CR 1064; Memorandum Decision, p. 11 (4-23-15)**

The foregoing did not reflect the interchange between Plaintiffs' counsel and the Court during oral argument that the Safeco policy had nothing stating that the Parks had to incur a debt or new expense in order to collect under the Safeco policy. Counsel explained by the example of "if my car is stolen...I have incurred a loss." The Court even agreed that was a reasonable use of the word that would not limit its usage to

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[14] Additionally, Plaintiffs argue it is not a reasonable interpretation of the Policy that they were required to "incur" expenses to rebuild before receiving coverage. **CR 1059; Memorandum Decision, p. 6 (4-23-15).**

[15] Indeed, that is the only reasonable reading of the incurred requirement, because it would not likely be possible for the insured to actually pay the full repair estimate shortly following the loss; the very purpose of insurance is to avoid that very thing. Further, defining "incurred" as including a repair estimate, such as the detailed one performed by Belfor Property Restoration, is consistent with the Safeco policy definition of "Replacement cost." **CR 950; Miller Declaration, ¶14.**

simply incurring new debt:

> **Mr. Hawkes:** Now, in the deposition, Rob Anderson made a big deal that because they hadn't gone out and bought anything, that they hadn't *incurred a loss*.
> **The Court:** Right.
> **Mr. Hawkes:** Garbage.
> **The Court:** Why?
> **Mr. Hawkes:** When that house burned to the ground, they lost it. There is only one portion of this page 28 that uses the word "incurred," and it is not in the last portion that I pointed out to you.
> **The Court:** Well, it's listed under 4(b), the direct financial *loss you incurred.*
> **Mr. Hawkes:** Yeah, yeah. Does that mean — does that mean to the average person that you don't have any insurance at all so you go get a loan and build that house? It obviously doesn't mean that.
> **The Court:** Why does it not mean that? That's been a debate that's been going on in the Idaho courts for decades, as to whether or not you have to go out and actually replace it before you get paid. That's been a provision in so many cases. That discussion has been going on for a very long time.
> **Mr. Hawkes:** Then you have to — you have to have a definition of "incur" in this policy that says you have to spend the money first before we have to pay you a nickel. And the policy doesn't say that. How else would you describe, if my car is stolen...
> **The Court:** Right.
> **Mr. Hawkes:** ...*I've incurred a loss*. I've *incurred* a loss when it's gone. Isn't that the plain meaning of the word "incur"?
> **The Court:** ***It's possible, I suppose.*** That's what your argument is okay.
> **Mr. Hawkes:** I'm saying when I paid a premium for a house to protect it against a fire, and when that fire burns that to the ground, I have incurred the loss for which I paid the premium that they agreed to insure. The fact that I — the fact that they want to argue I haven't incurred a loss because I haven't then

in addition to the insurance gone out and borrowed money, I think is foolish. And I don't thing it's a fair reading.

I don't think of that being an ambiguity. I think the common meaning of the word is an event has happened, **I have *incurred* a loss. I now don't have something that I did. It's gone.**

The Court: Okay. And what is your loss?

Mr. Hawkes: My loss is what all of agree I had or what I would get under a replacement policy for what burned down. And that's where Belfour comes in.

The Court: And so your position basically is *if I pay a premium for a Mercedes, I get a Mercedes.* If my Mercedes gets crushed or stolen, I get a Mercedes no matter what, even though I replace it with a Chevrolet.

Mr. Hawkes: Yes. The twist is you don't get a car if you paid for a house.

The Court: *I know. The analysis is simple.*

— Hearing Transcript 24:13-26:19 (May 27, 2014)(ea)

Though it would seem most basic as to any purchase of insurance,

Plaintiffs' briefing pointed out that,

> "the policy did not require that the Parks 'incur' expense to rebuild before their would have coverage under the Policy."
> **— CR 1038; Plaintiffs' Reply Memo, p. 1 (2-17-15)**

Plaintiffs' briefing also pointed out that,

> There is no requirement that the Parks pay their loss out-of-pocket before Defendant must pay under the Policy. Such is not even "insurance." Defendant dismisses this by stating that whether the Parks were required to "incur" additional expense is "speculative" because the Plaintiffs never elected to "rebuild their house." **— CR 1010, Safeco Opposing Memo, p. 18 (2-6-15); CR 1048; Plaintiffs' Reply Memo, p. 11 (2-17-15)**

In defining "incurred" so as to require a loan, the District Court — again — erred in selecting, between two *reasonable* choices, a definition that most favored the insurer. The Court applied the law backwards. Here is how that played out:

The Court chose the 2014 *Black's Law Dictionary* definition of "incur" as "to suffer or bring on oneself (a liability or expense)." **CR 1065; Memorandum Decision, p. 12 (4-23-15).** And the Court looked no further, even erroneously stating that the Plaintiffs had not proffered any "conflicting definition" to consider:

> In fact, *Plaintiff* [sic] has not proffered a conflicting definition of incur, but simply asserted the definition should include incurred repair estimates.
> **— CR 1065; Memorandum Decision, p. 12. (4-23-15)**

The District Court erred in stating that it was the *Plaintiff* that did not proffer a conflicting definition of *incur*. It was the *Defendant* who did not! See Safeco's **CR 1010-1011, Safeco Opposing Memo, heading C. "Incurring Additional Expense" pp. 18-19 (2-6-15).**

Mr. Parks had testified in his deposition that the word "incurred" to him meant — that "it occurs."[16] **CR 225; David Parks Depo 83:13-15.**

"Incurred" as used in the Insurance Industry includes the *event* of "a Loss"

Further, Charles Miller, Plaintiff's insurance industry expert, had provided a *Declaration* setting forth the expert fact information that the word "incurred" in the insurance industry had a meaning that was synonymous with *a loss being incurred* and

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[16] Mr. Parks was right. Both "incur" and "occur" have the same Latin root and are synonyms. Oxford English Dictionary, www.oed.com/view/Entry/94140 cf www.oed.com/view/Entry/130192.

the amount of that loss being evidenced by an appraisal or estimate:[17]

> 14. Safeco's obligation to the Parks was to pay replacement cost as limited to what the Parks incurred loss was (or the insured's "financial loss") within a short time following the loss. *The word "incurred" is not defined in the Safeco policy;* ***pursuant to insurance industry standards*** *for the interpretation of insurance policies it should be read to include repair estimates, which have not been paid.* Indeed, that is the only reasonable reading of the incurred requirement, because it would not likely be possible for the insured to actually pay the full repair estimate *shortly after the loss*; the very purpose of insurance is to avoid that very thing. Further, defining "incurred" as including a repair estimate, such as the detailed one performed by Belfor Property Restoration, is consistent with the Safeco policy definition of "Replacement cost."
>
> * * *
>
> 15. Most importantly, Safeco did not require that the Parks *incur* anything before it paid the original $169,000 amount based on the Jones appraisal. Safeco's argument now asserting that the Parks were required to "incur" a further loss[18] before Safeco was obligated to make full payment *turns the very purpose of insurance on its head by requiring an insured to first pay for the very loss sustained and insured against before receiving payment* from the insurer. That is contrary to the policy, Safeco's annual representations to the Parks, Safeco's conduct here and any insured's reasonable expectations in the same circumstances.
>
> **— CR 943, Miller Declaration, ¶14 & 15 (ea)**

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[17] Safeco proffered no expert to contest this proffered fact that "incurred" as used within the insurance industry included the meaning of *incurring a loss*. Mr. Miller's fact information was not challenged. It was, however, totally disregarded by the District Court.

The Safeco Policy — The "loss you *incur*"

Further, the Court's approach to the definition of "incur" ignored the very use of "incur" in the sense of a *loss **as contained in the policy itself***:

- (d) the direct financial *loss* you *incur*; **POL 28, ¶5. a.(1)(d)**

- (b) the direct financial *loss* you *incur*; **POL 28, ¶5. a.(4)(b)**
— **CR 284; David Parks Depo. Ex. 2, POL 28; Safeco Depo. Ex. 2.**

Safeco's position to the District Court

Safeco's argument in summary judgment briefing was that the Parks were required to become indebted or spend money on their loss *before* Safeco had *any* obligation to pay under the policy:

- "Safeco would pay the full amount it cost to replace the dwelling when the Parks incurred—i.e., paid the cost of such replacement."
— CR 179, Safeco Memo Supporting Summary Judgment, p. 7 (4-11-14)

- "Parks would have to actually spend something."
— CR 181, Safeco Memo Supporting Summary Judgment, p. 9 (4-11-14)

- Plaintiffs had not spent $440,195.55; "he and his wife had not *incurred* $440,195.55 in costs" **CR 182, Safeco Memo Supporting Summary Judgment, p. 10 (4-11-14)**;

- "The Parks did not incur any rebuilding costs * * * They never paid Belfor any amount" **CR 182, Safeco Memo Supporting Summary Judgment, p. 10 (4-11-14)**;

- "Plaintiffs had not incurred any amount beyond the price of the Idaho Falls home" **CR 184, Safeco Memo Supporting Summary Judgment, p. 12 (4-11-14)**;

Legal and Insurance use of "incur"

It was error for the District Court, in the process of defining "incur," to limit its plain meaning to solely *incurring a debt or expense.* The words incur and incurred are just as commonly used to describe an injury or damage inflicted upon a person or their property. Specifically, what the District Court did was ignore the common meaning of ***incurring*** *a loss* or injury exactly like what happened to the Parks when their house burned down. Because of the "Charlotte fire" the Parks *incurred* the total loss of their home.

There is nothing in the Safeco policy — definitions or otherwise — that says an insured must "incur" additional expense in order to recover for an *insured loss*. Common language usage recognizes that when an insured has damage to their person or their property they have *incurred* a loss or an injury.

"Incurring a loss" is well-recognized in the law

That is exactly what the Idaho Supreme Court defined the term "incurred" to mean in the context of a worker's compensation claim and an injury that "is actually incurred in the employer's employment." The Supreme Court noted that an injury may even be "incurred" *before* it is even manifest because an event has already taken place. ***Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 455-56, 111 P.3d 135, 140-41 (2005)).**

The use of "incur" in the context of "to incur a loss" is universally common in insurance law and the law generally. Both usages are common. Here are a few:

> [The] claimant's injuries residual of his accident gradually increased in extent and severity, by reason whereof *he has* ***incurred*** *physical impairment* in addition to that for which he had been previously compensated....
> **— *Nitkey v. Bunker Hill & Sullivan Min. & Concentrating Co.*, 73 Idaho 294, 296, 251 P.2d 216, 217 (1952)**
>
> * * *
>
> Morrison's employer required him to sign an agreement prepared by the University holding it harmless from any loss or *damage he might* ***incur*** due to the University's negligence....
> **— *Morrison v. Northwest Nazarene University*, 152 Idaho 660, 661, 273 P.3d 1253, 1254 (2012) (Justice Eismann)**
>
> * * *
>
> Where an injured party takes steps to mitigate the damages caused by another, she is entitled to the *costs she reasonably* ***incurs*** *in avoiding those damages.*— **McCormick Intern. USA, Inc. v. Shore, 152 Idaho 920, 923, 277 P.3d 367, 370 (2012)**
>
> * * *
>
> Without getting into specific factual situations, it would be safe to conclude that the implementation of probationers' 'voluntary' work programs sponsored by the State, could probably subject the State to both liability for the negligent actions of such volunteers, and for liability under common law theories for any ***injury*** *that the probationer may* ***incur*** while performing acts within the scope of such voluntary employment."
> **— Idaho Attorney General Opinion 78-17 (3-28-78), 1978 WL 22946**

Thus, there was zero basis for the District Court to limit its definition of "incur" to solely incurring a debt and then leap to the conclusion that the Parks had to "incur a debt" to get paid for the insured loss of their home. *At a* ***minimum***, the policy

definition of incurring a loss is at least ambiguous. And the law is clear — because insurance policies are contracts of adhesion, not subject to negotiation between the parties, ambiguities ***must be construed*** most strongly against the insurer. ***Clark v. Prudential Prop. & Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242 (2003).** The District Court erred in not so doing.

POINT FOUR

THE COURT ERRED IN TOTALLY DISREGARDING THE POLICY CONTEXT OF THE WORDS "AS DETERMINED SHORTLY FOLLOWING THE LOSS"

The errors of the District Court in (1) determining that the cheaper Idaho Falls home was "the equivalent of" the home the Parks lost, and (2) in ruling that the words "incur" or "incurred" could only mean that the Parks had to go in debt for another home before they could collect under their policy was compounded by the District Court failing to read the policy in its full *context*.

The Parks Safeco policy entitled the Parks to be paid "shortly following the loss." Not months later; and not only after they had borrowed the money to cover their loss.

The Safeco Claims Manual

The Safeco Claims Manual set forth "Safeco Service Principles" of prompt

payment:

> Often the last impression we leave our customers with is the settlement and payment of the claim — and it is *another moment of truth*. Customers tell us that *receiving prompt and fair payment is very important* to them and has a significant impact in shaping how they view their claims experience and Safeco. You should set the proper expectations, explain the details of the payment and follow up to ensure the customer received the funds.
> **— CR 737; Safeco Depo. Ex. 11, p. 7, Safeco Claims Manual "Claim Handler Assistance and Resource Tool."**

Disregard of context words "as determined shortly following the loss"

Specifically, the District Court totally focused on the Idaho Falls house purchased *five months* after the fire and only addressed the first part of the clause in paragraph (1)(c) while disregarded the *context* words "as determined shortly following the loss"[19] from this portion of the policy:

> (1) We will pay the full cost of repair or replacement, but not exceeding the smallest of the following amounts:
>
> (a) the limit of liability under the Policy applying Coverage A or B;
>
> (b) the replacement cost of that part of the damaged building for equivalent construction and use on the

[19] That same tail-end modifying clause is in both subdivisions (1) (b) and (c) of the policy. Subdivision (b) refers to "*that part*" of the damaged building and was not further considered by the Court as the Parks' home was totaled. However, there is no reason "that part" could not also refer to *the entire* home being destroyed as it was. It is important to recognize that subdivisions (b) and (c) are *not* counterparts where one is dealing with a partial destruction and the other with a total destruction; subdivision (b) is dealing with a perspective of "on the same premises" whereas subdivision (c) is not so modified.

> same premises as determined shortly following the loss;
>
> (c) the full amount actually and necessarily incurred to repair or replace the damaged building ***as determined shortly following the loss***;
>
> (d) the direct financial loss you incur; or
>
> (e) our pro rata share of any loss when divided with any other valid and collectible insurance applying to the covered property at the time of loss.[20]

The significance is that both are modified by the clause "as determined *shortly following* the loss" so it is not reasonable to read either of them as involving any completed new construction or other home purchase.

The context *must* be considered

In totally ignoring that "as determined *shortly following* the loss" clause the District Court went afoul of the rule that insurance language must be read in the context in which it appears; the focus cannot be on some words while ignoring the rest:

> When deciding whether or not a particular provision is ambiguous, we *must* consider the provision *within the context in which it occurs* in the policy. North Pac. Ins. Co. v. Mai, 130 Idaho 251, 939 P.2d 570 (1997)
> **— *Purdy v. Farmers Ins. Co. of Idaho* 138 Idaho 443, 444, 65 P.3d 184,185 (2003)**
>
> * * *
>
> "Whether an insurance policy is ambiguous is a question of law over which this Court exercises fee review. When

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[20] See, **CR 1060; Memorandum Decision, p. 7 (4-23-15).**

> deciding whether or not a particular provision is ambiguous, we *must* consider the provision *within the context in which it occurs* in the policy" Purdy v. Farmers Ins. Co. of Idaho, 138 Idaho 443, 445-46, 65 P.3d 184, 186-87 (2003).
> ***— Weinstein v. Prudential Property and Casualty Insurance*, 149 Idaho 299, 315, , 233 P.3d 1221, 1237 (2010)**

Because "shortly following the loss" is almost always going to be in the context of the loss investigation and assessment of the extent of the damage and what it will take to restore what was destroyed, it was *not* reasonable for the District Court to interpret subdivision (c) as relating to the less expensive Idaho Falls house that the Parks bought five months later.

"Incurred" must be read in conjunction with "shortly following the loss"

Plaintiffs' expert, Charles Miller, explained the fact that in the insurance industry the combination of the word "incurred" as to a loss in conjunction with "shortly following the loss" would relate to repair or reconstruction bids or estimates:

> 14. Safeco's obligation to the Parks was to pay replacement cost as limited to what the Parks incurred loss was (or the insured's "financial loss") within a short time following the loss. *The word "incurred" is not defined in the Safeco policy;* ***pursuant to insurance industry standards*** *for the interpretation of insurance policies it should be read to include repair estimates, which have not been paid.* Indeed, that is the only reasonable reading of the incurred requirement, because it would not likely be possible for the insured to actually pay the full repair estimate ***shortly after the loss***; the very purpose of insurance is to avoid that very thing. Further, defining "incurred" as including a repair estimate, such as the detailed one performed by Belfor Property Restoration, is consistent with the Safeco policy

definition of "Replacement cost."
— CR 943, Miller Declaration, ¶14 (ea)

In this case the Belfor Property Restoration appraisal determined what the Parks' *minimum* loss was "shortly following the loss." It was error for the District Court to ignore that modifying clause that the Parks were entitled to be paid "shortly following the loss."

POINT FIVE

THE CONDUCT OF SAFECO WAS BAD FAITH; GENUINE QUESTIONS OF BAD FAITH AND ESTOPPEL PRECLUDED SUMMARY JUDGMENT

At a minimum, even if Safeco's interpretation was correct, it waived the very protections it seeks.

> "It is elementary that ...provisions in an insurance policy ... provided by the insurer for its own benefit ... may readily be waived by the company. And a waiver may be effected by conduct as well as by agreement." ***Lewis v. Continental Life & Accident Co.*, 93 Idaho 348, 354, 461 P.2d 243 (1969)**.

Therefore, even if Safeco had utilized sufficiently clear policy language, which is not conceded, it waived by conduct, any requirement that the Parks must incur a debt before getting reimbursed.

Safeco's claim is inconsistent with its conduct. About a month after the fire, and before the home construction, Safeco voluntarily sent the Parks a check for

$169,000 with a notation on it "In Payment of: Cov[erage] A – Dwelling – Market Value". **CR 400; David Parks Depo. Ex. 20, p.2 (Check No. 8004530 (7-26-12))**. This conduct contradicts Safeco's position and evidences at a minimum a waiver. And at a bare minimum, creates a genuine issue of material fact as to what Safeco's true interpretation of the policy is.

> 15. Most importantly, Safeco did not require that the Parks *incur* anything before it paid the original $169,000 amount based on the Jones appraisal. Safeco's argument now asserting that the Parks were required to "incur" a further *loss* before Safeco was obligated to make full payment turns the very purpose of insurance on its head by requiring an insured to first pay for the very loss sustained and insured against before receiving payment from the insurer. That is contrary to the policy, Safeco's annual representations to the Parks, Safeco's conduct here and any insured's reasonable expectations in the same circumstances.
> **— CR 943; Miller Declaration, p. 7, ¶ 15 (ea)**

However, it may also indicate knowing conduct on the part of Safeco to voluntarily pay a loss, and only later when their appraisal is shown to be facially deficient, claim that any real reimbursement will come only after the insured has incurred *out-of-pocket* loss — which is not expressly required by the policy. This second potential scenario raises the specter of bad faith conduct — an intentional denial or withholding of payment, where the claim was not fairly debatable, and the denial or failure to pay was not the result of a good faith mistake. See, ***Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 176, 45 P.3d 829 (2002).**

The bottom line is that at a minimum there is a waiver of the very condition that Safeco seeks to claim in this case.

POINT SIX

THE PARKS ARE ENTITLED TO ATTORNEY FEES PURSUANT TO IDAHO CODE §41-1839(1)

The Parks request this Court's award of attorney fees on appeal pursuant to *Idaho Code* § 41-1839(1), on the basis that Safeco has not paid the amount justly due.

Idaho Code § 41-1839(1) states:

> "Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever that fails to pay a person entitled thereto within thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, or to pay to the person entitled thereto within sixty (60) days if the proof of loss pertains to uninsured motorist or underinsured motorist coverage benefits, the amount that person is justly due under such policy, certificate or contract shall in any action thereafter commenced against the insurer in any court in this state , or in any arbitration for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action or arbitration."

Idaho Code § 41-1839(1) also applies on appeal. See *Cherry v. Coregis Ins. Co.*, 146 Idaho 882, 888, 204 P.3d 522, 528 (2009); *Cranney v. Mutual of Enumclaw Ins. Co.*, 45 Idaho 6, 9, 175 P.3d 168, 1711 (2007).

CONCLUSION

Safeco did not honor its duty with the Parks. The Parks had been loyal insureds of Safeco for 18 years. Each of those 18 years Safeco urged them to increase the coverage on their home so it was insured for its complete value. Every year the Parks accepted Safeco's valuation and correspondingly paid Safeco the increased premium.

The homeowners policy Safeco sold the Parks concluded with two pages that were titled "Ask yourself: Do you have enough insurance coverage?" and "Let's make sure you're *fully insured.*" The last two lines of the last page of the Safeco policy ended with "Of course, we hope you'll never need these services. But *we'll all sleep better* knowing you're fully insured. *Thank you for trusting Safeco* with your home insurance needs." **CR 304-305; David Parks Depo. Ex. 2, POL 48-49.**

The Parks did "trust" Safeco. They *trusted Safeco* with the annual home value recommendations of "enough insurance coverage" and they paid the increased annual premium that went along with those annual recommendations. The Parks trusted Safeco to be honorable with them and give them *insurance* for which they had faithfully paid the premium for 18 years.

The "Charlotte fire" of June 28, 2012 that destroyed the Parks' quality home and 65 others in Pocatello put the Parks in the position of needing to *trust Safeco* to take care of them. What they got from Safeco was not worthy of trust.

What the Parks got from Safeco was a pronouncement that Safeco would require the Parks to *borrow* money to get another home before Safeco would pay up! Safeco was not providing "insurance" in any sense of the word that allowed the Parks to "sleep better knowing you're fully insured" as Safeco promised. Safeco had the Parks "over the barrel" and was content to take advantage.

The District Court committed error in taking a pro-Safeco interpretation of the Parks' policy that ignored the full terms and context of the policy ""Loss Settlement" provisions. Summary judgment in favor of Safeco should be reversed with entry of Judgment for the Parks for the full insured valuation of the Parks' home that Safeco had asserted and accepted and the case remanded for trial against Safeco on bad faith.

RESPECTFULLY SUBMITTED this 23rd day of November, 2015

LOWELL N. HAWKES RYAN S. LEWIS

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2015 I mailed two copies of the foregoing to Robert A. Anderson and Mark D. Sebastian of Anderson, Julian & Hull, LLP, 250 South Fifth Street, Suite 700, Boise, ID 83707-7426; FAX 208-344-5510.

LOWELL N. HAWKES