THE COLLAPSE CONUNDRUM: FINDING COLLAPSE COVERAGE WHEN NO COLLAPSE OCCURS

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INTRODUCTION

Analyzing a collapse coverage claim used to be quite simple. One merely had to determine if the building or structure had fallen down and/or been reduced to rubble. Without that event, coverage was not triggered.

Recently, many courts have revisited the collapse claims and expanded previous notions of coverage. By applying the substantial impairment doctrine, these courts are no longer requiring an actual collapse. Instead, courts are finding the term "collapse" to be ambiguous or that the insurance policy applies to both collapse and the risk of collapse to provide coverage where the insured property has been substantially impaired.

In this paper we will explore the evolution of the modern trend to expand collapse coverage. We will also provide some practical responses to this new approach.

TRADITIONAL APPROACH

Historically the courts have narrowly interpreted property insurance policies providing coverage for a loss due to the collapse of a building. The courts examined the policy language and concluded that absent the property falling down or caving inward, coverage would not be triggered because there simply was no collapse. For the claim to be covered, the building had to have fallen down and be virtually reduced to rubble. The courts' rationale was based upon the belief that the term collapse had a generally accepted and understood meaning and therefore was

unambiguous. *Higgins v. Connecticut Fire Ins. Co.*, 163 Colo. 292, 295, 430 P.2d 479, 480 (1967).

The Supreme Court of California in *Sabella v. Wisler,*59 Cal. 2d 21, 377 P.2d 889 (1963), addressed the elements needed to be satisfied to trigger collapse coverage. In *Sabella*, plaintiffs purchased a newly constructed home which exhibited signs of settling and cracking in the walls and foundation three years after the purchase. *Sabella,* 59 Cal. 2d 21 at 377 P.2d at 892. Plaintiffs had an "all physical loss" homeowners policy with National Union Fire Insurance Company which excluded coverage for loss by "settling, cracking, shrinkage… [unless loss by collapse ensues.]" *Sabella,*59 Cal. 2d at 26, 377 P.2d at 892-92. Plaintiffs argued that they were entitled to coverage because the sudden and severe damages that their house sustained were not due to settling of the house as defined by their policy. *Sabella,*59 Cal. at 30, 377 P.2d at 894. The court, however, noted that the policy excluded with sufficient clarity all loss by settling unless a collapse of the dwelling occurred. *Sabella,*59 Cal. at 31, 377 P.2d at 895. Therefore, the court concluded that "since the house remained usable and continued to be occupied, it cannot be said that any 'collapse' occurred." *Id.* The court also found the settling exclusion applied as the plaintiffs' house had settled, asserting that "[w]hile somewhat more clarity of statement might be desirable from the standpoint of the average lay purchaser of insurance, it would appear that the present exception was sufficiently understandable by an ordinary reader." *Sabella,*59 Cal. at 31, 377 P.2d at 895.

In *Krug v. Millers' Mutual Ins. Ass'n of Ill.,* 209 Kan. 111, 495 P.2d 949 (1972), the court reached a similar conclusion when interpreting the term "collapse" in a homeowners insurance policy. In *Krug,* plaintiff sustained a water leak near his home which allowed water to flow into his basement. *Krug,* 209 Kan. at 112, 495 P.2d at 951. A few months after the leak, plaintiff

noticed that his kitchen wall had separated from the ceiling. *Krug,* 209 Kan. at 112, 495 P.2d at 951. The property damage was due to a water leak which caused the soil to sag and thereby create a crack in the kitchen wall. *Id.*

Plaintiff's policy provided coverage against direct loss for "[c]ollapse (not settling, cracking, shrinkage, bulging or expansion) of building(s) or any part thereof…" *Id.* Initially, the court noted that the term "collapse" had been previously interpreted as being ambiguous by the Kansas Supreme Court since it had not been qualified in any manner. *Krug,* 209 Kan. at 113, 495 P.2d at 952 (citing *Jenkins v. United State Fire Ins. Co.,* 185 Kan. 665, 347 P.2d 417 (1959)). In response, insurance companies rewrote their policies to cover "collapse" but not "settling, cracking, shrinkage, bulging or expansion" until a collapse occurred. *Krug,* 209 Kan. at 114, 495 P.2d at 953. The court explained that the term collapse was no longer ambiguous as it was specifically defined to not include "settling, cracking, shrinkage, bulging or expansion." *Krug,* 209 Kan. at 116-17, 495 P.2d at 954. Accordingly, the court held that plaintiff's claim was not covered under the policy. *Krug,* 209 Kan. at 118, 495 P.2d at 955.

Similarly the Superior Court of Pennsylvania held that the term "collapse" was not ambiguous in *Dominick v. Statesman Ins. Co.,* 692 A.2d 188 (1997). In *Dominick,* plaintiffs noticed that their home had moved approximately one inch downward and that the floor had separated from the interior walls of the home. *Dominick,* 692 A.2d at 189. A structural engineer inspected the home and found that the main beams under the home were rotting. *Id.* Plaintiffs submitted a claim to their carrier, which denied the claim concluding that the damage to the home did not constitute a collapse under the policy. *Id*

Plaintiffs' policy stated that "[w]e insure for direct physical loss to covered property involving collapse of a building or any part of a building caused by one or more of the

following… Collapse does not include settling, cracking, shrinking, bulging or expansion." *Dominick,* 692 A.2d at 191. The court noted that the Pennsylvania Supreme Court had held that the term "collapse" as used in insurance policies was not ambiguous. *Dominick,* 692 A.2d at 190 (citing *Skelly v. Fidelity and Casualty Company of New York,* 313 Pa. 202, 205 169 A. 78, 79 (1933)). In its opinion, the court stated that "[o]ur supreme court has determined that the better public policy is to require a structure to fall together or fall in to constitute a collapse." *Dominick,* 692 A.2d at 192. Therefore, the court concluded that because plaintiffs' home remained standing that the property damage did not constitute a collapse under the policy. *Id.*

Significantly, the courts in the previously cited cases held that the term collapse as used in property insurance policies was not ambiguous. Unless some part of the building physically fell in on itself, the courts found that the claim was not covered. In the 1990's, however, the courts' interpretation of a collapse began to change and with it the requirement that a building actually cave in before coverage was triggered.

THE MODERN TREND: THE SUBSTANTIAL IMPAIRMENT DOCTRINE

Despite the existing body of case law interpreting the definition of a collapse, many courts have been willing to revisit these rulings and adopt a new analytical framework representing a significant departure from their traditional analysis. Some courts have expanded coverage by finding the term collapse ambiguous and therefore interpreting the term in favor of the policyholder. In other jurisdictions, the courts have found coverage holding the policy covers both collapse and the risk of collapse. Under either analysis, the courts were no longer focusing upon whether a building had actually fallen down, but whether the alleged loss had so impaired the property to bring it within the scope of a more broadly defined collapse coverage.

A. Finding The Term "Collapse" To Be Ambiguous

Typical of these cases is the ruling in *Monroe Guaranty Ins. Co. v. Magwerks Corp.*, 796 N.E. 2d 326 (Ind. Ct. App. 2003), in which the court departed from the traditional interpretation of what constitutes a collapse by finding the term to be ambiguous. In *Monroe,* heavy rains and snow accumulating on a flat roof damaged a commercial building. *Monroe,* 796 N.E. 2d at 328. Eventually, portions of the roof collapsed damaging equipment and manufactured goods located within the building. *Monroe,* 796 N.E. 2d at 328.

The trial court granted Magwerks' (the insureds) Motion for Summary Judgment against Monroe concluding that Magwerks' building had collapsed in accordance with its policy. *Monroe,* 796 N.E. 2d at 328. *Monroe* appealed and the appellate court reversed the entry of summary judgment on other grounds, *Id.*

On appeal, Monroe argued that since the structural framing of the roof remained intact, the loss did not constitute a collapse as defined in the policy. *Monroe,* 796 N.E. 2d at 330. The Monroe policy provided that "[w]e will pay for direct physical loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building… Collapse does not include settling, cracking, shrinkage, bulging or expansion." *Monroe,* 796 N.E. 2d at 331-32. Therefore, Monroe argued that the term collapse should be interpreted as meaning a sudden event in which a structure completely disintegrates. *Monroe,* 796 N.E. 2d at 332. The appellate court rejected Monroe's argument by holding the term collapse ambiguous. Once it made that holding, the appellate court aligned itself with the modern trend to interpret the term collapse to be a "substantial impairment of the structural integrity of the building or any part of the building." *Monroe,* 796 N.E. 2d at 332 (quoting *Am. Concept Ins. Co. v. Jones,* 935 F. Supp. 1220, 1226 (D. Utah 1996)). Thus, the court concluded that a question of fact arises "in those

cases as to whether a building that has suffered some damage -- but not a complete falling down -- is in a state of 'collapse' so as to trigger coverage under the policy." *Monroe,* 796 N.E. 2d at 333.

The court's decision in *Monroe* represents an important shift in judicial ideology for two reasons. First, by holding the term collapse ambiguous, the court was free to interpret it to mean something less than a complete disintegration, i.e. a substantial impairment to the structural integrity of the building. Second, by finding that the pivotal question of whether the building has suffered a substantial impairment to its structural integrity is a question of fact, the court implicitly held that a Motion for Summary Judgment cannot be granted when the court is confronted with determining when an insured's building has suffered a collapse as redefined under the policy.

The issue of interpreting the term collapse was also addressed in *American Concept Ins. Co. v. Ralph Jones,* 935 F. Supp. 1220 (D. Utah 1996). In *American Concept* the building involved was a residential home which began to exhibit signs of cracking and settling several years after it was constructed. *American Concept,* 935 F. Supp. at 1223. The insured retained an engineer to evaluate the damage who found that a faulty fitting connection to an underground sewer line had permitted water to saturate the soil underneath the home causing the damage. *American Concept,* 935 F. Supp. at 1223.

Similar to the policy language in *Dominick,* plaintiffs had a homeowners insurance policy which stated, "Collapse. We insure for direct loss to covered property involving collapse of a building or any part of a building caused by one or more of the following… Collapse does not include settling, cracking, shrinking, bulging or expansion." *American Concept,* 935 F. Supp. at 1225. American Concept moved for Summary Judgment arguing that plaintiffs had not suffered

a loss as a matter of law because the policy stated that a collapse did not mean "settling, cracking, shrinking, bulging or expansion." *American Concept,* 935 F. Supp. at 1227. As such, American Concept argued that collapse coverage only applies "if the insured building is reduced to a flatten form or rubble." *Id.*

The District Court concluded that the Utah State courts would construe the term collapse, as used in plaintiffs' policy to be ambiguous. It offered several reasons to support this holding. *Id.* First, the court noted that "although American Concept argues that collapse should be defined as being reduced to a flattened form or rubble, American Concept did not include this definition in its policy even though it certainly could have done so." *Id.* Second, although American Concept's policy stated that "collapse does not include settling, cracking, shrinking, bulging or expansion," the court found that it is virtually impossible to imagine a collapse that would not involve some of these attributes. *Id.* Third, the court noted that the dictionary definitions of collapse include definitions such as "a breakdown in vital energy, strength, or stamina" and "sudden loss of accustomed abilities," which suggested that the term collapse was susceptible to meaning a substantial impairment of structural integrity. *American Concept,* 935 F. Supp. at 1227-28. Pragmatically, the court also asserted that to require a building to fall down before providing coverage would dissuade policy holders from fulfilling their duty to mitigate damages. *American Concept,* 935 F. Supp. at 1228. Finally, the court stated that to require a home to be completely reduced to rubble before providing coverage would render coverage for accidental discharge or overflow from a plumbing system illusory because it was highly unlikely that the overflow of a plumbing system would ever flatten a home. *Id.*

After finding the term collapse ambiguous, the district court held that substantial impairment to the structural integrity of the building was the test to determine whether collapse

coverage was triggered under the American Concept policy. Since plaintiffs now only needed to show that an issue of material fact existed as to whether their home had sustained a substantial impairment to its structural integrity, the court dismissed American Concepts' Motion for Summary Judgment. *Id. See also Rankin v. Generali - U.S.,* 986 S.W.2d 237 (Tenn. Ct. App., 1998) (reversing trial court's grant of summary judgment in favor of insurance carrier since twisting of plaintiffs' basement wall could be considered a collapse under policy).

The court in *Guyther v. Nationwide Mutual Fire Ins. Co.,*109 N.C. App. 506, 428 S.E. 2d 238 (1993) also was confronted with the interpretation of the term collapse as a matter of first impression under North Carolina law. Plaintiffs noticed a drop of several inches in their house after a significant snow fall. *Guyther,*109 N.C. App. at 509, 428 N.E. 2d at 240. A claim was submitted to Nationwide which was denied. *Id.* Plaintiffs subsequently filed a complaint against Nationwide to recover the cost of the repairs. *Id.* The trial court found in favor of plaintiffs. *Guyther,* 109 N.C. App. at 509, 428 N.E. 2d at 239. On appeal, the court affirmed. *Guyther,* 109 N.C. App. at 518, 428 N.E. 2d at 245.

Again, the policy language was similar to that in *Dominic*. Plaintiffs' policy stated, "[c]ollapse. 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… Collapse does not include settling, cracking, shrinking, bulging or expansion." *Guyther,* 109 N.C. App. at 510, 428 N.E. 2d at 240. Nationwide argued that the term collapse was unambiguous and should be interpreted to mean a structure which is flattened or reduced to rubble. *Guyther,* 109 N.C. App. at 511, 428 N.E. 2d at 241. The court, however, held that the term was ambiguous and was susceptible to being interpreted as a sudden material impairment of the structural integrity of the building. *Guyther,* 109 N.C. App. at 512-13, 428 N.E. 2d at 241-42.

It is clear from the growing trend of judicial opinions that many jurisdictions, when presented with the opportunity, are interpreting the term collapse to be ambiguous. Having ruled the term collapse to be ambiguous, the courts are then expanding the coverage to encompass greater risk than originally contemplated by the insurers. Faced with this approach, insurers, where applicable, must be prepared to argue that the damaged structure has not suffered a sudden and substantial impairment to its structural integrity rather than rely on the traditional interpretation of the term collapse.

Ultimately, insurance companies can no longer rely on defining a collapse by what it does not include (e.g. settling, cracking, shrinkage, bulging, or expansion). If insurers are going to take the position that the term collapse means to completely flatten or reduce to rubble, then their policies must be rewritten to affirmatively define it as such. Otherwise, carriers run the risk that the courts will continue to consider the term collapse as being ambiguous and interpret it more broadly than anticipated.

B. "Risks of Direct Physical Loss Involving Collapse"

Other courts have also addressed this issue and expanded coverage but utilized a different line of reasoning. Rather than simply focusing on the word collapse, some courts have examined the context of the phrase in which collapse is mentioned, such as "the risk of direct physical loss involving collapse." By utilizing this approach, the courts focus upon the "risk" of a collapse rather than whether an actual collapse has occurred. If a risk of collapse exists, then there is coverage. This analysis presents insurers with an additional challenge in defining the intent of collapse coverage.

In *Richardson v. Travelers Property Cas. Ins. Co., No. 03-1185-HA,* 2004 U.S. Dist. LEXIS 10091 (D. Or. May 25, 2004), the court focused upon the risk of collapse language within

the policy in determining whether collapse coverage was triggered. In *Richardson,* plaintiffs, owners of a commercial building, discovered construction defects that had permitted water to damage the building's structural framing. *Richardson,* 2004 U.S. Dist. LEXIS at *3. Plaintiffs' policy provided coverage for damage "caused by or resulting from risks of direct physical loss involving collapse or a building or any part of a building… Collapse does not include settling, cracking, shrinkage, bulging or expansion." *Id.* Travelers argued that since the structure never actually collapsed, that coverage was not warranted under the policy. *Id.* at 6.

Unlike the *Monroe* court, which found the same policy language to be ambiguous, the *Richardson* court focused its attention on the entire collapse provision of the policy. Specifically, the court noted that Travelers' "reliance upon the ordinary meaning of 'collapse' is eclipsed by the inclusion of the phrase *risks of direct physical loss involving collapse* in the Additional Coverage portion of the policy. *Id.* at *8 (emphasis in original). The court held that the terms "collapse" and "risks of direct physical loss involving collapse" were both ambiguous and should be construed against the carrier. *Id.* Moreover, the court stated that plaintiffs' purchase of additional coverage for risk of direct physical loss involving collapse "broadened the policy coverage and expanded that coverage for something more than merely the ordinary meaning of 'collapse.'" *Id.* at *9-10. *See also Assurance Co. of America v. Wall & Assoc.,* 379 F.3d 557, (Ninth Cir. 2004) (stating that term "collapse" does not appear by itself but is qualified by terms *"risks of direct physical loss"* and *"involving"*) (emphasis added). Therefore, as in *Monroe, American Concept and Guyther,* the court concluded that this language could be interpreted as meaning a substantial impairment to the structural integrity of a building and denied Travelers' Motion for Summary Judgment. *Id.* at *10.

The court in *401 Fourth St. Inc. v. Investors Ins. Group,* was also confronted with the same policy language as in *Richardson*. *401 Fourth St. Inc. v. Investors Ins. Group,* 823 A.2d 177 (Pa. Super. 2003), *appeal filed* 576 Pa. 713, 839 A.2d 352 (2003). In *401 Fourth St.,* plaintiff owned a building in which a parapet wall began to bow. *401 Fourth St.,* 823 A.2d at 178. Plaintiff's engineer concluded that the wall was in danger of collapsing and needed repairs. *Id.* Investors Insurance refused to provide coverage because the wall had not actually fallen to the ground. *Id.* The trial court, relying on *Dominic,* granted Investors Insurance's Motion for Summary Judgment holding that since the building did not actually fall to the ground, there was no coverage under the policy. *401 Fourth St.,* 823 A.2d at 179. On appeal, however, the Superior Court of Pennsylvania reversed. *401 Fourth St.,* 823 A.2d at 178.

The court noted that plaintiff's policy provided coverage for not only a "collapse" but also against "risks of direct physical loss involving collapse." *401Fourth St.,* 823 A.2d at 179. Specifically distinguishing the case from *Dominick*, the court stated that the terms "risks" and "involving" served to expand the policy's coverage to include something less than a building that has been reduced to rubble. *Id.* The court, however, was also persuaded by the fact that engineers from both parties concluded that the parapet wall would completely collapse if repairs were not immediately made. *Id.*

This expansive view of coverage is particularly troubling. Insurance by definition addresses risks and insurers are in the risk business. As Justice Melvin stated in his dissent in *401 Fourth St.,* the addition of the term "risk" does not serve to expand the policy's coverage since "all insurance is meant to cover risks." *401 Fourth St.,* 823 A.2d at 180. In essence, the courts reasoning would mean that insurers not only insure specific perils but also the risk of those perils occurring.

RESPONDING TO THE CONUNDRUM

Those courts that have expanded collapse beyond the traditional view that a building had to be virtually reduced to rubble to constitute a collapse, have taken advantage of perceived ambiguities in the policy. To address these concerns, insurers must be more specific in defining collapse coverage. For example, some policies provide that "[w]e insure only for direct physical loss to covered property involving the sudden, entire collapse of a building or any part of a building" and the term "collapse" is defined as "actually fallen down or fallen into pieces."

Without these limitations, it is clear that more courts are willing to trigger collapse coverage where there is a substantial impairment of property. By either finding the term collapse to be ambiguous or finding that collapse coverage includes the risk of collapse, the courts are interpreting collapse to mean something substantially less than a building which has been reduced to rubble. Regardless of the two different approaches used by the courts, the end result is the same.

Practitioners confronted with this issue should first review the case law from their jurisdiction to determine whether the court will follow the modern and more expansive interpretation of what constitutes a collapse or the historically more narrow definition requiring an actual falling down of the building. If the jurisdiction does follow the modern interpretation of a collapse, then it will be critical for attorneys to retain experts who will be able to determine if the structural integrity of the building has been substantially impaired. Clearly, the trend is to expand collapse coverage beyond its original boundaries. No longer can insurers merely rely upon collapse to limit coverage. If they do, they will be caught in the vortex of the collapse conundrum.