COLLAPSE COVERAGE: THE CONUNDRUM CONTINUES

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I. INTRODUCTION

The same word can have a different meaning depending on where you live. Ask for a "pop" in the midwest and you will receive a soda. Make the same request in the northeast, however, and you may receive something entirely different. So too, the word "collapse" has a different meaning depending on the jurisdiction. As an insurer, blind reliance on the word collapse to limit coverage could have an unintended result depending upon who's reading the menu.

In 2005, we reported on the modern trend whereby collapse coverage was being expanded by the courts.[1] We noted that for claims involving an insurance policy that did not define the term "collapse," courts had come to increasingly conclude that the term was ambiguous and construe it to mean a "substantial impairment of structural integrity" rather than an actual failure of the building. While a recent review of the case law demonstrates that the modern trend continues to gain momentum, some state courts still do adhere to a strict interpretation of the term "collapse" and require the structure to have completely caved in before coverage is triggered. Practitioners must be cognizant of the continued evolution of the jurisprudence pertaining to collapse coverage because, if the

[1] The original article was published in conjunction with DRI. Jay Barry Harris & Jason T. LaRocco, *The Collapse Conundrum: Finding Collapse Coverage When No Collapse Occurs*, For The Defense, May 2005.

question of the meaning of the term "collapse" has not been litigated recently in your jurisdiction, it is likely to be an issue that will be coming soon to a courtroom near you.

II. A COLLAPSE MAY BE SOMETHING MORE THAN JUST A COMPLETE CAVING IN OF A STRUCTURE

There continues to be a trend in the case law toward a broader interpretation of what constitutes a collapse. While courts have taken different analytical approaches, the end result is the same. Unless the term "collapse" is specifically defined in the policy the courts may interpret it to mean something less than a complete cave in of the structure.

The question of what constitutes a collapse when it is not defined within an insurance policy was address by the Pennsylvania Supreme Court in *401 Fourth St. v. Investors Ins. Group*, 879 A.2d 166 (2005). In *401 Fourth St.* the court was confronted with the interpretation of an insurance policy provision that provided coverage to an insured for "damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building . . . ." *401 Fourth St.*, 879 A.2d at 168. The policy, however, also stated that "[c]ollapse does not include settling, cracking, shrinkage, bulging or expansion." *Id.* at 169. The dispute stemmed from residential property owned by 401 Fourth St. where the tenants noticed that a parapet wall had bowed and was leaning inward. Upon inspection, Fourth St.'s engineer concluded that the "internal bonds that tied the parapet wall to the structural framing of the building had recently given way, and that a large, sudden movement had occurred." The engineer also warned that the situation was "very dangerous and must be immediately repaired." *Id.*

In contrast, an engineer retained by Investors Insurance found that the "interior steel that had been covered by the building's brickwork had corroded, and as a result of that process, had expanded in volume." Accordingly, he concluded the corrosion caused

the bricks to be jacked upwards and that it was due to a "lack of normal maintenance of the brick joints, roofing and shelf angle." *Id.* Based on the engineer's report, Investors Insurance denied 401 Fourth St.'s claim.

401 Fourth St. subsequently filed a complaint alleging breach of contract. The parties then filed cross motions for summary judgment and the trial court denied 401 Fourth St.'s motion while granting the motion held by Investors Insurance. *Id.* The trial court concluded that under Pennsylvania law the term "collapse" was interpreted to mean an actual falling down of the structure. Since the parapet wall had not collapsed, there was no coverage under the policy. On appeal, the Superior Court reversed and held that 401 Fourth St. had sustained a covered loss. *Id.* The Superior Court focused on the policy language that provided coverage for "*risks* of direct physical loss *involving* collapse" and concluded that this language was distinguishable from existing case law and therefore required a different analysis. *Id.* at 170 (emphasis in original). The Superior Court also concluded that the terms "risk" and "involving" broadened the policy's coverage to "include something less than a structure completely falling to the ground." *Id.* (quoting *401 Fourth St. v. Investors Insurance Group*, 823 A.2d 177, 179 (2003)).

Ultimately, the Pennsylvania Supreme Court affirmed the decision by the Superior Court, albeit on slightly different grounds. The Supreme Court opined that the policy language "risks of direct physical loss involving collapse of a building or any part of a building" was ambiguous and reasonably susceptible to different interpretations. *Id.* at 174. As such, the Pennsylvania Supreme Court construed the policy language in favor of the insured and held that that the policy provided coverage "that extends beyond the

situation in which an insured's building falls to the ground, even in light of the traditional interpretation of the term 'collapse.' It covers not only loss for a collapse, but also the *risk* of loss *involving* a collapse." *Id.* (emphasis in original).

Pennsylvania was not alone in its movement towards the modern trend. The U.S. District Court for the Western District of Washington has also addressed the issue of what constitutes a collapse. In *Dally Properties v. Truck Ins. Exchange*, the plaintiff moved for summary judgment as to the definition of a collapse and the interpretation of collapse coverage. *Dally Properties v. Truck Ins. Exch.*, No. C05-0254L, 2006 U.S. Dist. LEXIS 30524 (W.D. Wash. Apr. 5, 2006). The dispute centered around whether coverage extended to structures facing an "imminent collapse" as opposed to a "substantial impairment of structural integrity." The Court noted that the Washington Supreme Court had not defined the term collapse and therefore found it to be ambiguous. *Dally Properties,*2006 U.S. Dist. LEXIS at *3-4*; see also Royal Ins. Co. of Am. v. Liberty Corp.,* No. 6:04-1985-HFF, 2005 U.S. Dist. LEXIS 26739 (D. N.C. Nov. 1, 2005) (holding modern interpretation of term "collapse" to be ambiguous). Significantly, the Court also found that the Washington Supreme Court had interpreted the collapse provision providing coverage for "risk of direct physical loss involving collapse" as not being limited to an actual collapse. *Dally Properties,* 2006 U.S. Dist. LEXIS at *3-4. Truck Insurance, however, argued that the provision at issue was different and more limited in scope because it covered "loss due to collapse" as opposed to "*risk of* loss due to collapse." *Id.* at *5 (emphasis added). The policy's provision for additional coverage due to collapse stated "[w]e will pay for direct physical loss or damage to Covered Property, caused by collapse of a building or any part of a building . . . ." *Id.* Truck

Insurance therefore argued that coverage was at most limited to loss in which the structure is in an imminent state of collapse.

In further support of its reasoning, Truck Insurance argued that the policy at issue excluded coverage for "settling, cracking, shrinkage, bulging or expansion." *Id.* at *6. It reasoned that this language limited the term collapse to a structure in a state of "imminent collapse" and should not be expanded to include a building that suffers only a "substantial impairment of structural integrity." *Id.* Truck Insurance argued, based on prior Ninth Circuit holdings, that the excluded conditions of "settling cracking, shrinkage, bulging or expansion" equate with substantial impairment of structural integrity and therefore that condition was excluded under the policy. *Id.*

The District Court, however, held that there was no inherent contradiction between the aforementioned exclusion and an interpretation of the term collapse to mean a substantial impairment of structural integrity. *Id.* at *7-8. The Court concluded that the Washington Supreme Court would adopt the majority view and interpret the undefined term collapse to mean a substantial impairment of structural integrity. *Id.* at *8. Therefore, the Court granted Dally's Motion for summary judgment as to the definition of collapse and the interpretation of the collapse coverage provision. Nevertheless, the Court ruled that it could not find coverage as a matter of law because a jury should decide whether the efficient proximate cause of Dally's loss was covered under the policy.

The District Court for the District of Oregon was also confronted with interpreting what constitutes a collapse and predicted that the Supreme Court of Oregon would interpret a "collapse" to mean something less than an actual cave in of a structure. In *Schray v. Fireman's Fund Ins. Co.*, 402 F. Supp. 2d 1212 (D. Or. 2005), the plaintiffs'

home had been sided with stucco that failed due to improper installation. The Schrays filed a claim under their homeowner's policy, which Fireman's Fund denied. *Schray*, 402 F. Supp. 2d at 1213. The Schrays subsequently filed suit against Fireman's Fund and the insurer filed a motion for summary judgment asserting that no coverage existed under the policy.

The Schrays had constructed their new home using stucco siding in 1994. *Id.* at 1214. In 2003 an inspection revealed that that the stucco siding had been improperly installed, allowing moisture into the building that required extensive repairs. *Id.* at 1215. The plaintiffs' expert opined that the home had sustained significant rotting and decay that caused a substantial impairment to the structure. The Schrays' homeowner's policy provided coverage 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: . . . hidden decay." *Id* at 1214. The policy provided that "[s]ettling, shrinking, bulging or expansion (including cracking which results) are not collapse." *Id*. The insurer's expert engineer inspected the home and concluded that the structure was not in danger of collapsing within a year after the necessary repairs were made. *Id.* at 1215. Therefore, the insurer argued that there was no coverage under the policy because the home neither collapsed nor suffered structural damages requiring the plaintiffs to evacuate it. The insurer also argued that since the plaintiffs' policy did not provide coverage for "*risks* of physical loss," the case was distinguishable from cases that have "[expanded] the definition of collapse coverage to substantial impairment of the structural integrity of the building or to imminent collapse." *Id.* at 1216. Conversely, the plaintiffs argued that the terms "collapse," "involving collapse," and "direct physical loss involving collapse" are

ambiguous and that the modern trend in the case law holds that collapse coverage provisions provide coverage if there has been a substantial impairment to the structural integrity of any part of the building.

The District Court asserted that the modern trend in the case law has broadened the interpretation of "collapse" to mean something less than an actual falling in of the structure. *Id.* at 1217. The Court did not find a distinction between policy language that provided coverage for "*risks of* physical loss" and language that provides coverage for "direct physical loss to covered property involving collapse" and held that coverage could not be precluded under policies that utilized either provision. *Id.* at 1217-18. Interestingly, the Court stated that the dispute surrounding the definition of the term "collapse" was not new and had been around for decades. *Id.* at 1217. The Court concluded that, given the lengthy history of the ongoing debate, if the insurer wanted to limit collapse coverage to an actual falling in of a structure it could have done so by now. *Id.* Therefore, the Court denied the insurer's motion for summary judgment and held that Oregon Supreme Court would follow the modern trend of finding collapse coverage if any part of the structure had sustained a substantial impairment to its structural integrity. *Id.*

III. THE TRADITIONAL AND NARROW INTERPRETATION OF A COLLAPSE IS STILL VIABLE IN SOME JURISDICTIONS

The number of jurisdictions that have held the term "collapse" to be ambiguous if it is undefined in an insurance policy continues to grow. Nevertheless, several jurisdictions still interpret collapse to mean a complete falling to the ground. Thus determining which state's laws govern the interpretation of the policy will have a significant impact on the outcome of the case. Unlike the cases in Pennsylvania,

Washington and Oregon that have held the term "collapse" to be ambiguous, New York and Maine continue to require an actual caving in of the property before collapse coverage is triggered.

A recent example of a narrow interpretation of the term "collapse" can be found in *Dalton v. Harleysville Worchester Ins. Co.*, No. 05-CV-2020, 2007 U.S. Dist. LEXIS 52960 (E.D. N.Y. July 23, 2007). The insured's property sustained a substantial impairment to the structural integrity of an "interior common party wall" that separated the property from adjacent property. *Dalton*, 2007 U.S. Dist. LEXIS 52960 at *2. The tenants in the building were eventually evacuated due to the risk that the building could collapse. Harleysville's engineer inspected the building and concluded that the structural impairment was due to "severe deterioration and rotting of a wood supporting plate placed along a level of the floor beams." *Id.* at *4-5. The Daltons' submitted a claim to Harleysville for the damage to the building and Harleysville denied the claim. *Id.* at *5. After their claim had been denied, the insureds retained their own expert engineer who concluded that the "structural failure of the Party Wall resulted from deteriorated mortar joints" and that the "failed party wall exhibited large bulging of the masonry wall . . . ." *Id.* at *5-7. The Daltons subsequently filed suit against Harleysville for breach of contract and a declaratory judgment seeking to force Harleysville to pay for the damages to the building. *Id.* at *1. In response, Harleysville filed a motion for summary judgment seeking dismissal of the Daltons' Complaint.

The Dalton's insurance policy provided coverage for "loss or damage caused by or resulting from risk of direct physical loss involving collapse of a building or any part of a building." *Id.* at *9. The policy also provided that "[c]ollapse does not include

settling, cracking, shrinking, bulging or expansion." *Id.* The policy specifically excluded coverage for damages stemming from "settling, cracking, shrinking or expansion." *Id.*

The Daltons argued that the undefined term "collapse" should be liberally construed to "encompass any condition which creates a 'substantial impairment of the structural integrity of a building.'" *Id.* at *10 (citing *Royal Indem. Co. v. Grunberg*, 553 N.Y.S.2d 527 (N.Y. App. Div. 1990)). Harleysville, conversely, argued that the policy specifically excludes coverage caused by "bulging" and that as a matter of New York law, the term "collapse" is narrowly construed by its plain meaning of "total or near total destruction." Dalton, 2007U.S. Dist. LEXIS 52960 at *11 (citing *Graffeo v. U.S. Fidelity & Guaranty Co.*, 246 N.Y.S.2d 258 (N.Y. App. Div. 1964)).

The Court held that the Daltons' policy "insured them against collapse of the [p]roperty, but not the causes of collapse." The Court stated that the Daltons "purchased an insurance policy which insured them against a collapse caused by 'hidden decay' but explicitly did not insure them against bulging caused by hidden decay, which is what the Daltons' own expert reported was the cause of the structural impairment." Interestingly the Court stated that it was "sympathetic to the Daltons' argument that public policy considerations weigh in favor of forcing insurers to pay for imminent collapse, thus preventing the insured from deferring necessary maintenance." *Dalton*, 2007 U.S. Dist LEXIS 52960 at *11, N.4. The Court, however, asserted that it was "confident that any responsible insured would not risk total destruction of the insured property and death or injury of its occupants – and the substantial potential liability – simply to collect on an insurance policy." *Id.*

The Superior Court of Maine also continues to adhere to the traditional narrow interpretation of what constitutes a collapse. In *Middlesex Mut. Assurance Co. v. Riverside Condominium Assoc.,* No. CV-06-108, 2007 Me. Super. LEXIS 85 (Sup. Ct. Me. May 11, 2007), the Court was also confronted with interpreting the undefined term "collapse." Middlesex Mutual issued a business owners property insurance policy to the Riverside Condominium Association. The insured subsequently discovered rotted timber columns that required extensive repairs and submitted a claim to Middlesex Mutual, which was denied. *Middlesex Mutual Assurance Co.*, 2007 Me. Super. LEXIS 85 at *1. Middlesex Mutual filed a declaratory judgment against Riverside Condominium Association and a motion for summary judgment seeking a ruling on whether the damages were covered under the policy. *Id.* at *2.

The policy provided coverage for "direct physical loss or damage to Covered Property, caused by collapse of a building or any part of a building . . . Collapse does not include settling, cracking, shrinkage, bulging or expansion." *Id.* at * 2-3. The Court stated that "[w]hile there might some day have been a 'collapse' in this case, a 'collapse' did not occur." *Id.* at *4; *see also Driscoll v. Providence Mutual Fire Ins. Co.*, 867 N.E. 2d 806 (Mass. App. Ct. 2007) (holding that collapse included "both a temporal element of suddenness… and a visual element of altered appearance that comprises a structural collapse, distinct from the degenerative process causing the collapse . . . There are no degrees of collapse."). The Court noted that the policy provided coverage if a collapse was caused by "hidden decay, hidden insect or vermin damage, weight of people or personal property or weight of rain that collects on the roof" and concluded that these covered collapses indicate that the term "collapse" should be given its ordinary meaning

of a "total break down caused by a sudden failure or hidden circumstances." *Middlesex Mutual Assurance Co,* 2007 Me.Super. LEXIS at *4. Since the building did not fall down, the Court held that there was no coverage for the loss and granted Middlesex Mutual's motion for summary judgment. *Id.* at *4-5.

When defined in the policy, courts do not hesitate to interpret the term collapse narrowly. In *Rector St. Food Enterprises v. Fire & Cas. Ins. Co. of Conn.*, 35 A.D.3d 177 (N.Y. App Div. 2006), the policy specifically defined a collapse as "an abrupt falling down or caving in" and added that "[a] building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion." *Rector St.,*35 A.D.3d at 177-178. At trial, the evidence demonstrated that the insured's building had significant cracks in its "façade and was sinking, out of plumb, and leaning." *Id.* at 178. The deterioration was so severe that City of New York declared the building an immediate emergency. *Id.* The building was eventually demolished. *Id.* Yet despite the fact that the damage to the building was severe enough to require demolition, because the insured's policy specifically defined the term collapse, the court held that the policy language was unambiguous and that since the building was standing before it was demolished the loss was not covered. *Id.* As in *Dalton v. Harleysville Worchester Ins. Co.*, the Court also rejected the insured's argument that the policy language violated public policy by encouraging property owners to risk injury or death by waiting until a building literally collapses so as to ensure coverage for the loss. *Id.*

IV. NAVIGATING THE SCHISM

The trend toward a broader interpretation of the term "collapse" when it is not affirmatively defined in an insurance policy is continuing. It is clear that in many states, including Pennsylvania, Washington and Oregon, it is no longer sufficient to define a "collapse" as not including "settling, cracking, shrinkage, bulging or expansion." Unless affirmatively defined, many courts interpret the term collapse to be ambiguous and construe it broadly. Practitioners are encouraged to carefully examine the latest trends in their jurisdiction's case law before rendering a decision as to whether a claim is covered under a policy as a collapse. If litigation has already begun, the question of how your jurisdiction interprets the term "collapse" will be central to your case. If it is broadly construed, the insured's burden is greatly reduced and the testimony of expert engineers will be pivotal to the jury's assessment of whether the building has sustained a substantial impairment to its structural integrity. Circumstantial evidence such as whether tenants were forced to evacuate the building or whether any repairs have been made to the building will also be important, as it will serve as evidence that the structure had significant damage and was an immediate threat to public safety.

If your jurisdiction continues to adhere to the more narrow interpretation of a collapse the issues are much clearer. Unless the building suddenly caved in, there will be no coverage under the policy. Nevertheless, practitioners are cautioned that if the issue has not been recently addressed in their jurisdiction, they should be prepared for arguments seeking to expand the traditional interpretation of the term "collapse" and may have an issue that is destined to go beyond the trial court level. Counsel should also consider that they may be on the cusp of creating new law in their state.

It is imperative that if an insurer's intent is to provide collapse coverage in those instances when the building has actually fallen to the ground, that they affirmatively define the term in the policy as meaning a complete and abrupt falling down or caving in of the structure. Since this issue has been litigated for years, other courts can be expected to observe that an insurance carrier's continued adherence to language that does not affirmatively define a "collapse" serves as tacit acceptance of its broader interpretation. Conversely, when defined in the policy, courts have given the term "collapse" its ordinary meaning and required the building to completely cave in before holding that collapse coverage has been triggered. Armed with knowledge of these issues, underwriters, insureds and practitioners can avoid perceived ambiguities in insurance policies and protracted litigation. Otherwise when requesting a "pop" off the menu you may receive a puzzled look from the wait staff. . . or even worse.