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“COLLAPSE” AND FIRST PARTY PROPERTY COVERAGE

*[Ref: Homeowners Property Coverage, Para. 3.07
Commercial Property, Para. 1.08]*

Two insureds believe they are entitled to coverage for the “collapse” of an insured building under their first party coverage. The first insured had hired a contractor to re-shingle the roof of his house. During the course of the project, the contractor discovered severe structural damage that required the removal and replacement of rotted beams and walls. The unexpected repairs exceeded \$70,000, but they were necessary to avoid the collapse of the insured’s home. The insured’s homeowners policy defined collapse as “an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.” The second insured’s home had similar damage but the insured’s policy did not define collapse. Is either claim covered as a collapse?

This article will focus on how courts resolve disputes arising from the collapse or imminent collapse of an insured structure under homeowners and commercial property policies. With policies that define the term “collapse” and require an abrupt “falling down” or “caving in” of the insured structure, most courts hold there is no coverage unless the insured structure actually falls down. Money spent to avoid an imminent collapse is not covered. When collapse is not defined in the policy, however, courts are inclined to rely on a broader definition of collapse, which can include situations in which the structure has not fallen but is in imminent danger of collapse.

DEFINING COLLAPSE

Older homeowners policy forms did not define collapse or when they did, provided only a limited definition of collapse. For example, the only guidance that 1984 and 1991 ISO forms offered on the meaning of collapse was that it did not include settling, cracking, shrinking, bulging, or expansion. As a result, many courts ruled that the term “collapse” was ambiguous and held that it was not necessary for an insured structure to fall to be covered as a collapse. Courts have ruled similarly with commercial property policies that did not clearly define collapse.

ISO’s 2001 homeowners policy form revised and restricted coverage. It defines collapse to require that the insured building, or part of the building, fall and be unusable for its intended purpose. It also specifically states that collapse does not include a structure in danger of falling. ISO’s 2001 HO-3 provides:

- (1) Collapse means the abrupt falling down or caving in of a building or any part of a

building with the result that the building or part of the building cannot be occupied for its current intended purpose.

- (2) A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse.
- (3) A part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the building.
- (4) A building or any part of 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.

Some courts have said that it is unreasonable to deny coverage to an insured who spends money to repair a building in order to avoid a more costly collapse, but most courts faced with this policy language have ruled in favor of the insurer unless the insured building falls down or caves in. In *Rapp B. Properties, LLC v. RLI Insurance Company*, 885 NYS2d 283 (N.Y. App. 1st Dept. 2009), a New York appellate court strictly enforced definitions of collapse that were nearly identical to the ISO HO-3, including that the event be “abrupt.” The plaintiff sought coverage for damage to the south wall of his insured building that included severe cracking, bulging, splaying, and displacement of the exterior brick facade, arguing that the damage was caused by collapse. The insurers refused to provide coverage because the damage was caused by “wear and tear and gradual deterioration not collapse.” The court agreed:

Michael H. Rappaport, plaintiff’s managing member, testified that the building and its south wall were still standing three months after the damage was observed in July 2005. Standing alone, Rappaport’s testimony suffices to belie any claim that the wall’s collapse was “abrupt” within the meaning of the additional coverage provisions. John Paul Murray, plaintiff’s architect, observed displacement of brick masonry units and opined that there was an “imminent risk that the wall would completely collapse.” In light of subparagraph b. above, which excludes imminent collapse from the definition, Murray’s affidavit does not bring the occurrence within the coverage of the policies. In *Rector St. Food Enterprises, Ltd. v. Fire & Casualty Ins. Co. of Connecticut*, 827 NYS2d 18 (N.Y. App. 1st Dept. 2006) this Court held that a building that was “shown to have had two to three inch wide cracks in its facade and was sinking, out of plumb, and leaning” did not meet a materially identical definition of collapse. Rappaport’s affidavit is also unavailing insofar as he claims to have discovered that bricks had fallen from the inside of the wall where it was covered by sheet rock and tile. As noted above, the wall was still standing. Tellingly, Rappaport describes the condition as hidden “decay,” a phenomenon which, by definition, does not occur abruptly.

On the issue of imminent collapse, subparagraph b. in the insurance policy that the New York court referred to is identical to part 8 a. (2) of ISO’s 2001 HO-3: “A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse.” According to the New York court, a building that is in danger of collapse, even if the risk is imminent, does not meet the definition of collapse for coverage purposes. To constitute collapse, the building must cave in or fall down.

In *Miller v. First Liberty Insurance Corporation*, 2008 U.S. Dist. LEXIS 47550 (E.D. Pa. 2008), a court applied policy language nearly identical to the 2001 ISO HO-3 to facts that were similar to the *Rapp B. Properties* case. The *Miller* case involved a homeowner who voluntarily removed the roof and walls of an addition to his home because of structural damage caused by termite infestation. Like

the New York court in *Rapp B. Properties*, the court ruled that unless the insured building suddenly falls down or caves in there is no collapse. Under the policy language, a building that is in danger of falling down or caving in is not considered to be in a state of collapse. The *Miller* court also noted that, in addition to the unambiguous policy language, the Pennsylvania Supreme Court had already interpreted the term “collapse” to require that the insured structure fall down suddenly: “Though it did not consider the precise meaning of the term ‘collapse’ in *401 Fourth Street v. Investors Insurance Group*, 879 A2d 166 (Pa. 2005), the Pennsylvania Supreme Court noted that ‘historically, our Court has considered the policy term ‘collapse’ to require the sudden falling together of a structure.’”

To qualify as a collapse, the Pennsylvania Supreme Court requires a “sudden falling together of a structure.” The court’s warning that interpreting policy language to cover substantial impairment of structural integrity as collapse would convert the policy to a “maintenance agreement” is the reason often cited by other courts that rule the same way.

COLLAPSE NOT CLEARLY DEFINED BY POLICY

In general, when collapse is not defined by the policy or the policy has a limited definition such as with the older HO policies, most courts hold that collapse is ambiguous and rely on an expansive definition that allows coverage even if the insured building did not fall down. In *Rankin v. Generali*, 986 SW2d 237 (Tenn. 1998), Rankin Sign Company argued that damages to its building were covered under the collapse provision of its commercial insurance policy. The insured alleged that unknown persons parked heavy machinery in a parking area next to the front of its building. The machinery exerted pressure on the parking lot, causing the basement wall of the insured’s building to rotate inward and the same wall to rotate outward in an upper office area. The insured’s policy did not define collapse, but stated in the Additional Coverage section:

We will pay 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 caused by one or more of the following:

4. weight of people or personal property;

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

The trial court determined that the insured’s building did not collapse within the meaning of the policy and said that “for the loss of the wall to be covered, there must be in ordinary language a complete falling down of the wall into a mass or disorganized condition.” The insured appealed and the Tennessee appellate court adopted the “modern” definition of collapse:

Some courts have held that “collapse” is an unambiguous term “which denotes a falling in, loss of shape, or reduction to flattened form or rubble.” Under the majority view, however, the term collapse does not require complete destruction or falling in of the building. Thus, the clear modern trend is to hold that collapse coverage provisions, which define collapse as not including cracking and settling, provide coverage if there is substantial impairment of the structural integrity of the building or any part of the building.

The court, ruling for the insured, quoted a district court’s rationale for the majority view:

In *American Concept Ins. Co. v. Jones*, 935 F. Supp. 1220 (D. Utah 1996), the Court summarized several policies underlying the majority view: (1) if the insurer had intended to define collapse as meaning reduced to a flattened form or rubble, it could

have done so in the contract; (2) although the policy stated that collapse did not include settling, cracking, shrinking, bulging, or expansion, it was difficult to imagine a collapse that would not include some of these attributes; thus, the term could be interpreted as not including mere settling or cracking, but that which results in “substantial impairment of the home’s structural integrity”; (3) some dictionary definitions of “collapse” suggest that the term means a substantial impairment of the structure’s integrity; (4) to require a building to fall down before allowing coverage would be unreasonable in light of the insured’s duty to mitigate damages and would be economically unsound.

Even when the court follows the modern definition of collapse, the insured must still prove substantial impairment to the building’s structural integrity. In *Monroe Guaranty Insurance Company v. Magwerks Corporation*, 829 NE2d 968 (Ind. 2005), the insured manufacturer, Magwerks, suffered water damage to several pieces of equipment when parts of its roof fell due to heavy rain and snow. The insurance policy, issued by Monroe Guaranty Insurance Company, excluded collapse in one section of the policy, while providing coverage for collapse in limited circumstances in another section of the policy. Collapse, however, was not defined by the policy. The insurer, without addressing the issue of collapse, denied coverage concluding that the damage was caused by wear and tear, decay, deterioration, and defective design. Magwerks sued for breach of the insurance contract. The Indiana Supreme Court adopted the modern definition of collapse.

What constitutes collapse has been the subject of articles and treatises. Under the traditional definition, a “collapse” is limited to an event that occurs suddenly and results in complete disintegration. This definition typically disallows coverage under an insurance policy where only “part of a part” of a building falls. In short, under the traditional view, collapse coverage applies only if an insured building is reduced to flattened form or rubble. By contrast, the broader and so-called modern definition, which is followed by a majority of jurisdictions, defines “collapse” as a “substantial impairment of the structural integrity of the building or any part of a building.”

Although the Indiana Supreme Court applied the modern definition of collapse and did not require the insured building to fall down for the event to be covered, the court also ruled that it was not clear that there was a “substantial impairment” of the building’s structural integrity. The supreme court’s decision was based on conflicting affidavits submitted by Magwerks’ engineering expert and the insurer’s adjuster. The supreme court said that while the roof “may have been compromised,” there was a genuine fact dispute about whether there was a “substantial impairment” of its structural integrity.

Some first party policies do provide coverage for structures in “imminent” danger of collapse. In *Ciampa v. USAA Property and Casualty Insurance Co.*, 2009 Mass. App. Unpub. LEXIS 542 (Mass. App. 2009), a contractor hired to replace the roof of the insured’s house discovered rotted walls and significant structural damage. The insured, however, continued to live in the house while the repairs were being completed. USAA’s homeowners policy defined collapse as:

- a. a sudden falling or caving in;
- b. a sudden breaking apart or deformation such that the building or part of a building is in imminent peril of falling or caving in and is not fit for its intended use.

The policy also stated:

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

decay that is hidden from view, meaning damage that is unknown prior to collapse or that does not result from a failure to reasonably maintain the property.

The Massachusetts appellate court, relying on the fact that the alleged structural damage never forced the insured to live outside his home, ruled that there was never an imminent danger of collapse. There was also no evidence of a sudden breaking apart or deformation, necessary elements of imminent collapse under the USAA policy.

Sometimes courts disagree over what “imminent” means. In *Buczek v. Continental Casualty Insurance Company*, 378 F3d 284 (3rd Cir. N.J. 2004), the Third Circuit Court of Appeals rejected a district court’s definition of imminent collapse and ruled in favor of the insurer. This case involved rotting wood pilings in the foundation of a condominium. The insured determined that there was a problem when the building was swaying in high winds, argued that collapse coverage applied, and claimed that the replacement cost of the pilings was \$103,634. The policy did not define collapse and the district court judge, interpreting “imminent” broadly, ruled for the insured:

After mulling parameters of what would be considered “imminent,” the District Court made two pivotal findings. First, he accepted testimony that ninety mile-per-hour winds would cause the building to collapse, and second, he took judicial notice that ninety mile-per-hour winds sometimes hit the New Jersey shore. The District Judge concluded, “I’m holding that even a risk that might be a one in ten, or one in twenty year risk, is still a very serious and imminent risk. The fact the event may or may not occur in any given point in time doesn’t mean the risk is not imminent. In short, the District Court concluded that the house’s vulnerability to ninety mile-per-hour winds, which may occur once in twenty years, constituted “imminent collapse.”

The Third Circuit disagreed based on dictionary definitions of “imminent” and prior New Jersey case law:

“Imminent” is defined as “ready to take place: near at hand,” ... and “likely to occur at any moment,” ... As one court observed, “imminent” means collapse “likely will happen without delay.”

The District Court’s findings on the “imminent” threat to the structural integrity of the condominium contrast with the findings of imminence relied upon by this Court in *Ercolani v. Excelsior Insurance Co.*, 830 F2d 31 (3rd Cir. 1987), and by the New Jersey Appellate Division in *Fantis Foods v. North River Insurance Co.*, 753 A2d 175 (N.J. App. 2000). Here, the District Court noted, “there was no observable damage to the house ... drywall wasn’t flying apart. Flashing wasn’t coming apart. The walls weren’t bulging or cracking which sometimes happen when the house becomes out of whack. ...” However, in *Ercolani*, the policyholder “heard loud moaning and shrieking noises emanating from the south basement wall, noticed a crack in it, and observed it move and bulge inward.” Likewise, in *Fantis Foods*, the masonry consultant who inspected the damaged property noted, “the main cause of the parapet walls displacement and imminent collapse is hidden decay of steel beams and lintels which are located or behind the brick masonry walls” and that the “north wall parapet has the emergency condition.”

In short, the District Court’s interpretation of “imminent” wrenched it from any reasonable definition of the word.

Under a policy covering imminent collapse, courts usually require evidence that the threat was such that the collapse was likely to occur without delay.

CONCLUSION

Generally, courts uphold first party property coverage language that requires an insured building to cave in or fall down in order for the insured to recover for collapse. If the policy does not define collapse, or defines it only as not including settling, cracking, shrinkage, bulging, or expansion, most courts apply the modern definition, which does not require the insured to prove an actual collapse to recover under the policy. Keep in mind, however, that the insured must still prove that there was a substantial impairment of the building's structural integrity.

Courts apply a similar analysis to determine whether to provide coverage for a structure in imminent peril of collapse. They will uphold a policy's definition of collapse that includes a structure in imminent peril of falling if it is clear and unambiguous. If it is not clear from a policy definition what is meant by "imminent peril of falling," the court will consider its case law and, if there is no case law on this issue, the court can consult a dictionary definition of the term to reach a decision on coverage.