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## Federal Court Finds New York Law “Unsettled” as to Collapse Coverage

Harleysville Worcester Mutual Insurance Company (Harleysville) issued an all risk policy of insurance to Irma and Blanche Dalton (the Daltons) covering their three-story town house located at 39 Sidney Place, Brooklyn, New York. In February, 2004, damage to an interior common party wall between the Daltons’ building and an adjacent building, was discovered and Harleysville was notified of the condition. Harleysville disclaimed coverage on the grounds that the damage fell within its policy exclusions relating to collapse.

The policy provided that Harleysville would pay for “direct physical loss of or damage...caused by or resulting from any Covered Cause of Loss.” The policy excluded coverage for “decay, deterioration....or any quality in [the] property that causes it to damage or destroy itself.” The policy further excluded coverage for “[s]ettling, cracking, shrinking or expansion” and for “[c]ollapse, except as provided in the Additional Coverage for Collapse.” Additional Coverage for Collapse provided that the Company would pay for loss resulting from “risks of direct physical loss involving collapse of a building or any part of a building caused by [h]idden decay.” Further, collapse does not include “settling, cracking, shrinking, bulging or expansion.”

The Daltons brought suit in Eastern District Federal Court. Harleysville moved for summary judgment, which was granted by the District Court which relied upon an engineer’s report (Lavon report) in finding that the loss was caused by “bulging” and excluded by the terms of the Additional Coverage for Collapse provisions. The Court also interpreted prior New York Appellate Court decisions which held that “collapse” coverage applies only to total or near total destruction of the property. The Court found that the plaintiffs’ building was not destroyed, but merely structurally unsound.

On appeal, the Second Circuit Court of Appeals reversed. *Irma Dalton, Blanche Dalton d/b/a Sidney 39, Ltd. v Harleysville Worcester Mutual Insurance Company*, United States District Court of Appeals for the Second Circuit, 557 F.3d 88 (2d Cir. 2009). The Court of Appeals rejected the lower court’s finding that the Lavon report attributed the collapse to bulging. The Court noted that the report also described deteriorated mortar joints hidden from view, and attributed that condition as a cause of the collapse, emphasizing that the policy specifically covers loss caused by hidden decay.

The Court also rejected the District Court’s ruling that the term “collapse” in an insurance policy requires a total or near total destruction of the property, and is not satisfied by “substantial impairment of the structural integrity of a building.” The Court noted a conflict between New York Appellate Courts on the interpretation of the meaning of the term “collapse.” In *Royal Indemnity Insurance Company v. Grunberg*, 155 A.D.2d 187 (3d Dep’t 1990), the Court held that “substantial impairment of the structural integrity” is

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sufficient to constitute a collapse, and that total or near total destruction was not required. In contrast, *Graffeo v U. S. Fidelity & Guaranty Company*, 20 A.D.2d 643 (2d Dep't 1964), lv. to app. den., 14 N.Y.2d 685 (1964) and *Rector St. Food Enterprise Ltd. v. Fire & Casualty Insurance Company of Connecticut*, 35 A.D.3d 177 (1st Dep't 2006), required a total or near total destruction of the property for collapse coverage to apply. The Appellate Court concluded that New York law provides no clear answer as to whether coverage for "collapse" caused by "hidden decay" covers a building whose structural integrity is impaired by deteriorated mortar joints hidden from view, or whether the building must sustain a total or near total destruction.

The Court also found that there is no requirement that the "collapse" occur suddenly. The Appellate Court found that the policy at issue covered hidden decay and hidden insect or vermin damage which, by its nature, would occur slowly "and not as a sudden destructive force. Even if the *Grunberg and Bailey* opinions should be read to mean that the term 'collapse,' without further explanation, requires a sudden destructive force, that is surely not the case where the policy in question defines collapse in a manner which expressly includes conditions that occur only slowly."

The Court further stated:

We conclude that the plain text of Harleysville's policy is 'ambiguous and susceptible of two reasonable interpretations,'\*\*\*. The policy language, read as a whole, does not resolve the question of whether 'total or near total destruction' is required, and the case law in New York does not supply a clear definition of 'collapse' that might clarify the ambiguity. We also note that other insurers in New York have used forms that speak much more directly to the dispute involved here. E.g., *Rector St.*, 827 N.Y.S.2d at 18 (construing policy language 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').

The Court concluded that ambiguities in an insurance policy are resolved in favor of the insured, and vacated the District Court's dismissal of the action.

While this decision is a Federal Court's interpretation of New York law, it draws attention to the current status of first-party coverage for collapse losses in New York. The Harleysville policy utilized standard collapse provisions. As noted by the Court, some insurers have incorporated additional language under the collapse coverage to specifically define what is and is not a collapse, *i.e.*, that a collapse is "an abrupt falling down or caving in" and that "a building that is standing is not considered to be in a state of collapse, even if it shows evidence of cracking, bulging, .... or expansion." Nevertheless, as pointed out by the Second Circuit Court of Appeals, "there remains a split of authority in New York's lower courts, which has not been resolved by New York's highest court." ■

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