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## Collapse Exclusion Upheld by Appellate Division

In *Rapp B. Properties, LLC vs. RLI Insurance Company*, 1st Dept., September 15, 2009, the plaintiff sought coverage under its insurers' policies for damage to its building's south wall resulting from alleged collapse. The complaint alleged damage resulting from "severe cracking, bulging, splaying and displacement of the exterior brick façade" of the building. The insurers disclaimed coverage on the ground that the damage was caused by wear and tear and gradual deterioration. The policies at issue defined collapse as follows:

- a. Collapse means 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;
- b. 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;
- c. 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;
- d. A building that is standing 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.

The lower court denied motions for summary judgment by the plaintiff and defendants. On appeal, the Appellate Division modified the lower court's decision, and granted summary judgment to the defendant insurers.

The Court noted that the plaintiff's managing member testified that the south wall of the building was still standing three months after the damage was first observed in July, 2005. This belied any claim that the collapse was "abrupt" within the policy definition. The Court also observed that the plaintiff's architect alleged displacement of brick masonry units, and opined that there was "imminent risk that the wall would completely collapse." However, the Court pointed out that the policy excluded imminent collapse from the definition.

The Court cited its 2006 decision in *Rector Street Food Enterprises, Ltd. vs. Fire & Casualty Insurance Company of Connecticut*, 35 A.D.3d 177 (1st Dept. 2006) which held that a building that was "shown to have had two 2-to-3-inch-wide cracks in its façade and was sinking, out of plumb and leaning" did not come within a "materially identical definition of collapse." The Court rejected the plaintiff's claim that bricks had fallen from the inside of the wall where it had been covered by sheetrock and tile, also noting that the wall was still standing.

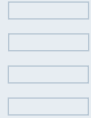
This decision is another interpretation of the recent amendment to the collapse coverage definitions under some policies in which the term collapse is specifically defined as set forth above. Under those situations, the First Department has consistently upheld the application of the exclusion in circumstances where the building, or a portion thereof, is standing, but in danger of collapse. ■

## Appellate Division Construes Work-Product Exclusion

Homeowners sued Camelot Associates Corporation, a builder, for breach of the housing merchant warranty, alleging that their homes were built at an insufficient elevation in relation to the seasonal high groundwater, causing dampness in their basements. *J. Lucarelli & Sons, Inc. v. Mountain Valley Indemnity Company*, 64 A.D.3d 856 (3d Dep't. 2009). J. Lucarelli & Sons ("Lucarelli") was brought in as a third party to the underlying action along

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with the engineer and another contractor. Camelot Associates sought contribution and indemnification on negligence, breach of contract and breach of warranty theories. The engineer then commenced a fourth party action against J. Lucarelli & Sons seeking indemnification and contribution for negligence.

Mountain Valley Indemnity Company, ("Mountain Valley"), which insured Lucarelli, disclaimed coverage on the third party claim, and did not defend on the fourth-party claim although they did not disclaim coverage.

Lucarelli then brought a declaratory judgment action against Mountain Valley. Both parties moved for summary judgment. Supreme Court granted Mountain Valley's cross-motion for summary judgment, holding that there was no coverage under the policy because the homeowners' claims were within the work-product exclusion, which excluded damage to "[t]hat particular part of real property on which you are performing operations, if the 'property damage' arises out of those operations; or....[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it."

"Your work" was defined as "[w]ork or operations performed by you or on your behalf," [including] "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work.'"

The Third Department affirmed Supreme Court's order, holding that the causes of action against the contractor arose out of "excavation work allegedly performed by plaintiff in connection with the building of the homes, and seek[s] damages for faulty workmanship" and were within the work-product exclusion. The Court restated the principle that commercial general liability policies are to provide coverage for "tort liability for physical damage to others and not for... economic loss because the product... is not what the damaged [party] bargained for."

Lucarelli argued that Mountain Valley had a duty to defend because the underlying complaints included allegations of negligence and that the insurer must defend whenever the allegations suggest a reasonable possibility of coverage. The Court rejected this argument because the underlying facts alleged only a violation of the housing warranty. The Court found that the negligence claim was based on contract, not tort, and was "solely and entirely within the policy's exclusion."

Lucarelli also asserted estoppel with respect to the fourth-party claim as Mountain Valley did not disclaim coverage. The Court rejected this argument, noting that the plaintiff was relying on Insurance law §3420(d) which applies to "death and bodily injury" claims. The Court noted further that "requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed."

This case stands for the proposition that there is no duty to defend and indemnify when the underlying cause of action arises from a work-product claim, even when the allegations sound in tort and the work-product exclusion will extend to third and fourth party claims seeking indemnification and contribution. ■

## Superintendent Of Insurance May Not Accept Service of Subpoena Upon Authorized Insurers

The General Counsel of the Insurance Department recently issued an opinion regarding whether the Superintendent may accept service of a subpoena on an authorized insurer when the insurer is not a defendant in the underlying legal action in which the subpoena arises (a/k/a a third party subpoena). The Insurance Department concludes that the Superintendent may not after analyzing the provisions of Insurance Law § 1212, and its predecessors, as well as several older cases. The Insurance Department concludes that the Superintendent may only accept lawful process associated with an action against the authorized insurer. OGC OP No 09-08-02 (August 5, 2009). ■

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