LESSONS FROM SURFSIDE

Implications for Property and Liability Coverage

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One impact of a tragic, highly publicized event such as the collapse of the Champlain Towers South in Surfside, Florida, is to bring heightened scrutiny to a particular issue—in this case, the structural integrity of aging residential towers and the many closely related insurance and liability concerns. This publicity, coupled with the potential for insurance coverage and entitlement to attorney's fees, has the potential to spark a new wave of litigation related to collapse coverage.

Several pending lawsuits may signal the beginning of the heightened scrutiny soon to confront condo boards, property management companies, contractors, and inspectors, among others. For example, although 40-year recertification of a building is the current standard in Florida, legislators have already begun to propose laws requiring recertification of buildings after 20 to 30 years, with increased scrutiny of buildings near coastal areas. Given the concentration of condo towers in many coastal areas, it is worth considering how many of these buildings are likely to face heightened certification requirements. If a condo board has not set aside the substantial reserves to cover the repairs necessary to bring the building up to code, its members will face lawsuits from the building's condo owners. Whether such claims are covered under the condo board's liability insurance will depend in part on what the board members knew and when they knew it, as reflected within meeting minutes and other documentation. Some of these issues are already being litigated in connection with the other Champlain Towers.

Moreover, past experience has shown that property insurance coverage can be implicated not only in cases of catastrophic collapse, but also partial collapse, which overlaps with many of the issues above. For these reasons, it is worth considering the scope of collapse coverage under commonly used commercial and residential property insurance forms and a few of the most common arguments and defenses arising from such coverage.

Prior to the early 1980s, collapse was addressed under named perils coverage within many property policies as applying to "collapse of a building or any part thereof," without limitation, and without defining collapse. The rise of the concurrent causation doctrine made cases involving the old collapse language difficult to defend and led to increased exposure for insurance carriers, because the insurer

would be obligated to cover an entire claim involving a building collapse even if, for example, the collapse was caused in large part by an excluded cause, such as negligent upkeep of the building. Carriers responded in part by adopting newer policy forms, drafted by insurance organizations such as Insurance Services Office Inc. (ISO) and the American Association of Insurance Services (AAIS), with language defining and limiting the scope of collapse coverage.

Standard policy forms now used by insurance carriers often specifically exclude loss caused by collapse and then add this coverage back in as an additional coverage—but only if the collapse was caused by certain named perils, such as hidden decay of the building. This can avoid the problem of having to provide property coverage for a collapsed building where the collapse was caused in part by a non-covered cause. As with most insurance issues, then, the policy is always an important place to look in determining whether the cause of a collapse or potential collapse may fall within the scope of coverage.

But a second issue that arises in many cases and claims involving a building's collapse is whether "collapse" means collapse of the building to the ground or if it also includes a partial or imminent collapse as well. On this issue, older policy forms simply did not define the term collapse, and courts, asked to construe undefined policy terms, developed two different views. One view was that "collapse" means the complete collapse of a building to the ground. In other jurisdictions, including Florida, courts ruled that collapse meant a "material and substantial impairment" of the building's structural integrity without an actual collapse of the building being required. This latter view would often prompt a battle among the parties' experts—with one or more experts on each side opining as to whether the structure had suffered a "material and substantial impairment."

In general, insurers responded to these varying interpretations of the term "collapse" by making an effort to define the term within their standard policy forms and to include exclusions. For example, one version of the homeowners policy developed by AAIS now states that "collapse of a building or part of a building means the sudden and unexpected falling in, caving in, or giving way of the building or part of the building into a flattened form of rubble". In other policies, collapse is defined to mean "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." It is worth emphasizing that these definitions describe collapse as "sudden" or "abrupt"—in other words, an identifiable event. It is also worth noting that these definitions of collapse leave room for coverage of a *partial* collapse.

These nuances with a property policy's collapse coverage can mean that policyholders will look to their property insurance carrier to cover, for example, a balcony that has suffered some amount of concrete abruptly falling down, leaving it unsafe to be occupied for its intended purpose. An increase in inspection and safety concerns arising from the Surfside collapse will make such claims more common. Similarly, it is not uncommon for counsel of policyholders to argue that a collapse occurred across multiple policy periods, thereby triggering multiple policy limits. Nonetheless, engineering experts for either side will commonly disagree over whether deterioration of the structure can reliably be pinpointed to a particular event or series of events occurring within a particular period of time.

Establishing whether a collapse occurred, as defined within the policy, is often only half the battle. The next issue that is frequently disputed in litigation involving collapse coverage is what is the extent of the collapse (or partial collapse) and what is the appropriate associated scope of repair? Assume, for example, that a portion of a parking garage has experienced damage to its concrete structure, causing some concrete to crack, and some additional concrete to noticeably fall. Perhaps a bystander even witnessed the event. The question then arises as to the extent of the damaged concrete, whether the damaged concrete portions can be safely repaired using advanced repair techniques in localized areas, or if replacing significant portions of the structure is necessary. Given the respective cost of replacement versus localized repairs, it is common for disputes to arise over this issue, with opposing experts opining to each view. Additionally, the means and methods of any associated repair of building components (localized repair versus replacement) can have a significant impact on the extent to which the building or part of the building can/cannot be occupied for its intended purpose. In short, the extent of repairs and repair methodology opined on by the experts can be significant factors in determining whether the associated damage at/around a partial collapse qualifies for coverage.

Overall, the heightened scrutiny prompted by the Champlain Towers South tragedy will place even greater emphasis on the review of building integrity and related coverage issues. Past experience with collapse-related litigation suggests that parties should be aware that the following issues, among others, will arise in any claim or lawsuit involving a complete or partial collapse of the building: (1) Has a "collapse" occurred, either partial or complete? (2) What caused the collapse and what did the owner(s), condo board, inspector(s), or management company know about it? (3) What property or liability policies may apply to claims arising out of the collapse? (4) How does the property policy or applicable jurisdiction define the term "collapse"? (5) What policy period or periods did the collapse occur during? (6) Was notice timely furnished to all applicable insurance carriers? (7) What repairs are necessary or even possible?

Of course, each of these questions involves not only various complex legal issues, but also factual issues surrounding a building's maintenance and structural integrity. This means that meeting minutes, condition reports, emails, and property inspections should be understood as items that could potentially be used in court to establish or disprove coverage for the building or the liability of its condo board. Ultimately, the tragic events observed in Surfside, Florida, should prompt more careful and rigorous consideration of the safety of residential towers and other similar structures—from the standpoint of owners, insurance carriers and lawmakers. As these changes unfold, however, parties involved with these types of structures must anticipate the likelihood of increased scrutiny and litigation arising from the reassessment that will be demanded of aging buildings.

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