IADC COMMITTEE NEWSLETTER

INSURANCE AND REINSURANCE

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Ted DeBonis and Charles Scibetta report on the pending appeal of decision issued by a federal district court in Connecticut. Addressing an issue that could affect thousands of claims seeking insurance to repair faulty home foundations, the Second Circuit will consider the meaning of "sudden and accidental physical loss" and "collapse."

How Sudden is Sudden?

ABOUT THE AUTHORS

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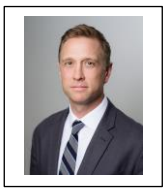

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In a case likely to affect the recovery efforts of thousands of Connecticut homeowners seeking to repair faulty residential foundations, the Second Circuit indicated last week that it may seek guidance from the Connecticut Supreme Court. In one of the many "crumbling concrete" cases currently pending in the District of Connecticut, William and Christine Valls seek coverage from Allstate under their homeowners policy. The case is *Valls v. Allstate Insurance Company*, No. 3:16-cv-01310 (D. Conn. 2017).

Seventeen years after buying their home – and more than twenty years after it was built – the Vallses began to notice horizontal and vertical cracks in the walls of their basement. Like thousands of other Connecticut homeowners, they learned that a chemical compound in the concrete used to pour the foundation of their home had begun to rust, expand, and break down.

The Vallses sought coverage under their Allstate homeowners policy. In a September 2017 decision, the District Court summarized the relevant provisions of their policy:

> The policy at issue provided for coverage of "sudden and accidental direct physical loss" to a covered building or part of a covered building. However, the policy also limited that coverage with several exclusions or exceptions. It did not cover losses caused by the "wear and tear, aging, marring, scratching, deterioration, inherent vice or latent defect." The policy excluded coverage for "faulty, inadequate or defective ... materials used in repair, construction, renovation or remodeling," as well as damage caused by the "freezing, thawing, pressure, or weight of water or ice. The policy also did not cover collapse, except as defined in the "Additional Protection" section.
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> This additional collapse provision provides coverage for the "entire collapse of a covered building structure" or part of a structure, provided it is "sudden and accidental physical loss" and the result of one of several enumerated causes.

Valls v. Allstate, 2017 WL 4286301, at *1 (D. Conn. Sept. 27, 2017). The terms "sudden" and "entire" in the policy's additional collapse provision are the subject of the parties' dispute.

In their declaratory judgment action against Allstate, the Vallses allege that "[a]t some point between the date on which the basement walls were poured and the month of October, 2015 … the basement walls suffered a substantial impairment to their structural integrity and were now at danger of falling in." *Id.* They allege that there is no way to reverse the deterioration and that, when it continues, the entire home will eventually fall into the basement.

Allstate denied the claim on the basis that the damage to the Vallses' home does not fall within the policy's additional collapse

provision. A structural engineer sent by Allstate to review the damage identified the presence of pyrrhotite in the foundation's concrete. Pyrrhotite expands when it reacts with water and air – a fact that has recently led to thousands of homeowners policy coverage actions in the state of Connecticut. The structural engineer also determined that the deterioration was minor. Because the "foundational cracking at the property [was] not sudden and accidental direct physical loss," Allstate concluded that the property did not "collapse" within the meaning of the Vallses' policy.

In a September 2017 decision on Allstate's motion to dismiss the Vallses' declaratory judgment action, the District Court agreed with Allstate, highlighting the language of the additional collapse provision to distinguish the Vallses' claim. The Vallses argued that – because "collapse" is undefined in their policy – it should have the meaning articulated by the Connecticut Supreme Court in *Beach v. Middlesex Mutual Assurance Company,* 205 Conn. 246 (1987). In *Beach*, the court held that "the term 'collapse' … includes a substantial impairment of the structural integrity of a building." *Id.* at 252. The court's "substantial impairment" language suggests that property damage that occurs slowly – or at least at a rate other than "suddenly" – could still fall within the scope of coverage for collapse. Or so the Vallses hoped.

There is also precedent, however, for differentiating between the kind of collapse contemplated by the *Beach* decision and the kind of collapse covered by the Vallses' homeowners policy. In another crumbling concrete case in Connecticut federal court, Allstate successfully argued that the "sudden and accidental direct physical loss" provision in its homeowner policies distinguished its coverage from other carriers' coverage that might apply to the type of *Beach* "substantial impairment" suffered by homeowners in the crumbling concrete cases.

In *Metsack v. Liberty Mutual Fire Insurance Company*, Civil Action No. 3:14-CV-706599 (D. Conn.), homeowners Stephen and Gail Metsack sued their carriers Liberty Mutual and Allstate for coverage for damage to the concrete walls of their basement. On summary judgment, Liberty Mutual argued that "the definition of 'collapse' set forth in *Beach v. Middlesex Mut. Assur. Co.*, 205 Conn. 246, 253 (1987)—a 'substantial impairment to structural integrity'—is itself insufficiently defined, and asks the Court to certify a question to the Connecticut Supreme Court to resolve the resulting ambiguity." *Metsack v. Liberty Mutual Fire Insurance Company,* 2017 WL 706599, at *5 (D. Conn. Feb. 21, 2017).

Allstate also offered argument relating to the *Beach* decision's "substantial impairment" standard; however, it was another aspect of Allstate's coverage that compelled the District Court to conclude that the Metsacks had no coverage:

> Unlike Liberty Mutual, however, the "collapse" provision of the Allstate Policy requires that a covered collapse

> be "a sudden and accidental direct physical loss." While Beach and the numerous JJ Mottes concrete cases that have been heard in this district have held that a collapse need not be "sudden" to be covered, none of the policies evaluated included the word "sudden" within their "collapse" provisions. *See, e.g., Belz*, 2016 WL 4599892, at *2; *Karas*, 33 F. Supp. 3d at 114; *Bacewicz v. NGM Ins. Co.*, No. 3:08-CV-1530 (JCH), 2010 WL 3023882, at *3 (D. Conn. Aug. 2, 2010); *Beach*, 205 Conn. 246, 251 (1987).
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> …
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> Because the parties do not dispute that the Metsacks' basement walls deteriorated over time, rather than "suddenly," and that the effects of the condition which has compromised the structure was observable to the homeowners many years before the basement walls were opined to be substantially impaired, the Allstate Policy excludes coverage for their loss irrespective of the definition of the term "collapse."

Id. at *7-*8.

Now, Allstate has tried to apply the distinguishing characteristics of its homeowners policy to exclude coverage in other crumbling concrete cases, including in the *Valls* case. *Valls* is the first concrete case to reach the federal appellate courts, although many nearly identical cases are currently pending in Connecticut state and lower federal courts. Three groups of homeowners whose appeals were consolidated for oral argument on January 30 face up to $250,000 to fix the foundations of their homes. They have argued that Allstate, despite the "sudden" and "entire" requirements of its collapse coverage, should foot the bill. At oral argument before Judges Leval and Parker, seeking reversal of the district court decision, the homeowners contended that the gradual destruction of their faulty foundations meets the *Beach* court's definition of collapse and that the terms "sudden" and "entire" in the Allstate policy are ambiguous and should be interpreted against the insurer.

Allstate repeated its argument that the "sudden" and "entire" modifiers in the collapse provision require that the home collapse instantaneously and completely for coverage to be triggered. The carrier pointed out the fundamental logic that a standing, habitable building has not suffered an "entire collapse" – never mind a sudden collapse – and that the gradual deterioration of the homes at issue could be remedied. Allstate's policy, the company's attorney argued, does not offer protection against every calamity that can befall a homeowner.

The homeowners' attorney disputed that full collapse is required under *Beach* and pointed out that the walls will eventually deteriorate to the point of full collapse. Judge Leval asked the parties if they would oppose certifying the terms "sudden" and "entire" to the Connecticut Supreme Court.

The homeowners' attorney was in favor of certification; Allstate's counsel said Allstate would oppose certification. The issues on certification would be the meaning of sudden and entire collapse, as could determine the availability of coverage for thousands of home repair projects throughout Connecticut.

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