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Surfside Condo Collapse: A 360-Degree Insurance Coverage Analysis

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Abstract: The horrific and fatal collapse of Champlain Towers South in the summer of 2021 not only shook the ground in Surfside, Florida, but it brought into question the integrity of structures everywhere. If professionals in the construction, real estate, and building management industries were relaxed about signs of structural decay before, they are not anymore. The insurance industry also has reasons to worry, as potentially responsible players turn to their policies to defend or indemnify them for claims for accidents causing losses including from property damage, personal injury, or death. In this article the authors evaluate the factors that are addressed when coverage determinations are made, as well as the various types of policies that come into play.

On June 24, 2021, at approximately 1:25 a.m., Champlain Towers South, a 12-story beachfront condominium in Surfside, Florida (the "Condominium"), partially collapsed, destroying 55 of its 136 units, rendering the rest uninhabitable, and killing 98 people. The entire structure has since been demolished. This incident stunned the nation with shocking and tragic images. Its consequences are reverberating throughout the insurance industry.

The condominium's collapse has already prompted litigation and insurance claims. More will certainly have been lodged by the time this article is published. In this article, we will illustrate how different forms of insurance can be called on to address a large loss in a residential setting such as this. Some of the relevant insurance coverages include Commercial Property, Commercial General Liability, Directors and Officers Liability, Errors and Omissions (Professional) Liability, and Public Officials Liability. This article

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does not discuss excess or umbrella liability policies, which often follow the form of the underlying primary policy or policies.

The Cause of Loss

The cause of loss may take years to determine. One of the main theories is that decay in the structural elements caused the condominium to collapse. In 2018, engineer Frank Morabito provided the Champlain Towers South Condominium Association Board of Directors with a report that stated:

> Abundant cracking and spalling of varying degrees were observed in the concrete columns, beams, and walls. Several sizeable spalls were noted in both the topside of the entrance drive ramp and underside of the pool/entrance drive/planter slabs, which included instances with exposed, deteriorating rebar. Though some of this damage is minor, most of the concrete deterioration needs to be repaired in a timely fashion.

There are other theories, such as defects in the original design and construction, that may have contributed to the collapse. The cause of loss will be central to insurance coverage questions.

Commercial Property Insurance Coverage Available for the Condominium Association

Great American Insurance Company (GAIC) sold the all-risk property insurance to the Association to cover the condominium building. An all-risk policy generally covers all risks of direct physical loss unless specifically excluded. The limit of property insurance of the GAIC policy is more than $30 million. That insurance is generally applicable to pay for improvements (i.e., the building and other developments) but not for the value of the land. The land value in Sunrise greatly exceeds the insured value of the improvements. Selling the property could play a significant role in compensating the victims, and private bids have already reportedly been offered.

Although there are news reports that GAIC has offered its policy limits, the following coverage considerations would come into play under the GAIC policy. These considerations, as well as the good publicity afforded GAIC by paying the condominium policy limits, show that GAIC has made a prudent choice. As suggested by the following, GAIC and the condominium likely would otherwise have spent years in a highly publicized coverage litigation relating to the collapse, which probably would have been unable to be resolved until the cause of the collapse was determined by a court of through agreement.

Earth Movement Exclusion Likely Inapplicable

Despite being an all-risk policy, the GAIC policy includes a general exclusion for earth movement. Fortunately, the Florida Supreme Court has confirmed that the purpose of an all-risk policy is to protect against all risks except those expressly excluded. Accordingly, the earth movement exclusion only excludes damage caused by earth movement arising from natural events and does not exclude damage caused by man-made events.[1] This may be significant, given reports of possible impacts to the condominium's structural integrity from construction and renovation projects and immediately adjacent properties.

General Policy Exclusions for Decay May Be Inapplicable

The GAIC policy also includes general exclusions for:

> (1) wear and tear;
>
> (2) rust, or other corrosion, decay, deterioration, spoilage, hidden or latent defect or any quality in property that causes it to damage or destroy itself;
>
> . . .
>
> (4) settling, cracking, shrinking, or expansion.

Based on those exclusions, it might appear at first glance that any loss caused by rust, corrosion, decay, or deterioration is not covered under the GAIC policy. From that, a policyholder might assume that if decay caused the collapse, then the GAIC policy would not cover it. In addition, there is a general policy exclusion for simple "collapse."

But the GAIC policy also includes an express additional coverage for collapse that is caused by hidden decay, which states in relevant part:

> We will pay for direct physical loss or damage to Covered Property, caused by collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if the collapse is caused by one or more of the following:
>
> > . . .
> >
> > (2) decay that is hidden from view, unless the presence of such decay is known to an Insured prior to collapse. . . .

Thus, GAIC should pay for a loss due to a collapse caused by decay that is hidden from view.

In many policies this coverage is called an "*additional* coverage." It has its own insuring agreement ("We will pay for direct physical loss or damage to Covered Property . . . ."). It has its own conditions for coverage ("caused by . . . decay that is hidden from view"). This additional coverage has its own exclusions from coverage ("unless the presence of such decay is known to an insured prior to collapse"). The structure of the language of this additional coverage confirms that the coverage for collapse is not subject to the Policy's general exclusions, which otherwise expressly exclude "decay."

A question, which almost surely will be litigated, is whether the decay was known to the Condominium Association before the collapse. Courts in Florida have construed this policy language to mean that the policyholder must show that damage to the structural integrity of the property was not visible, and that the policyholder did not know nor should have known of structural damage with sufficient time for repairs before collapse occurred.[2]

Coverage for Defective Construction

The GAIC policy contains exclusions for coverage if there is

> c. Faulty, inadequate, or defective:
> (1) planning, zoning, development, surveying, siting;
> (2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
> (3) materials used in repair, construction, renovation, or remodeling; or
> (4) maintenance;
>
> of part or all of any property wherever located.

Based on the Morabito report and subsequent reports, GAIC may attempt to deny coverage by asserting that the Board knew of the decay that caused the collapse, or that it was the result of defective construction or maintenance. Many property insurance policies, while generally excluding collapse and defective construction from coverage, restore coverage where the defective construction that contributed to a collapse is accompanied by hidden decay. The GAIC policy does not appear to extend coverage for collapse where defective construction or maintenance accompanies hidden decay.

Subrogation Against Neighboring Property Owners and Developers

Concerns have been raised that construction of a high-rise building at a property neighboring the Condominium might have impacted the Condominium's integrity. The existence of such concerns indicates that if GAIC pays the loss, there is a likelihood of GAIC suing the neighboring property owner and developers in subrogation. The availability of a recovery via subrogation can increase the chance of an insurance company paying insurance coverage for a claim.

Other Possible Coverages

There may be other coverages in the GAIC policy that could apply if the loss is otherwise covered. These could include provisions involving civil authority orders precluding access to the then still-standing western portion of the Condominium resulting in incurred extra expenses. Additionally, the GAIC policy provides coverage for demolition of undamaged portions of buildings per ordinance or law.

Covering the Condominium Association's Liability

General Liability Insurance

James River Insurance Company sold the condominium a commercial general liability policy with a $2 million limit of liability to protect against third-party claims for bodily injury, death, or injury to property. James River reportedly will pay out the entire amount of those policy limits to help satisfy such third-party claims against the Condominium Association.

While James River's payment of policy limits may appear to be a positive development, ulterior motives can also be at work. The insurance company has an obligation to defend the Condominium Association against any lawsuit asserting a potentially covered claim, regardless of whether the policyholder is later found liable. Typically, the insurance company must pay for that defense without diluting the policy limits. This essentially can turn a $2 million policy into one covering many millions of dollars more of defense costs. To some policyholders, an insurance company's duty to defend can be more valuable than the policy's limits.

In this tragic circumstance, the cost to defend the Champlain Towers South against a multitude of lawsuits will likely well exceed its $2 million limit alone. Should any of those lawsuits result in liability for the Condominium Association, the James River policy's limits will likely be exhausted. At that point, James River may be able to withdraw from continued defense of the Condominium Association.

Directors and Officers Insurance

The Board of Directors of the Condominium Association likely has liability coverage for claims alleging wrongful acts in their performance as directors or officers of the Condominium Association under a Directors and Officers (D&O) insurance policy. Such alleged wrongful acts could include claims of financial mismanagement, resulting in financial losses and other liabilities for the condominium.

Unlike general liability insurance policies, D&O policies do not as commonly have a duty to defend the policyholder. D&O policies might require the policyholder to pay its defense counsel in the first instance and be reimbursed by the insurance company. Defense costs often erode the limits of liability of a D&O insurance policy, reducing the amount available to pay indemnity should the Board of Directors be found liable for any alleged wrongful acts in their performance of duties.

D&O policies tend to contain exclusions for bodily harm and property damage, as such claims are often insured against under a general liability policy. As such, the Board of Directors' D&O policy would probably not assist in the defense of lawsuits claiming such injuries. This insurance would be more directed to financial liabilities as a result of the Board's decisions.

Covering the Contractors' Liability

Various contractors involved in work on Champlain Towers South might also face liability, and are likely to encounter some insurance entanglements. Contractors carry general liability policies, which defend and indemnify against claims that the contractor's negligence caused bodily injury, death, or property damage. Such claims might be triggered for otherwise completed work under the Products and Completed Operations Hazard provision in the policy.

Construction and maintenance contracts commonly include requirements to protect those in contracting levels above the hired party, such as the property owner (here, the Condominium Association) or the general contractor. The hired party must indemnify them from liabilities caused by the hired party and name them as an additional insured to the hired party's general liability coverage. Following a large loss, there is often a bit of crossfire among the parties involved, and it can spawn litigation over the indemnification and insurance requirements of the various construction contracts involved. Depending on the priority of coverage, the Condominium Association could be entitled to defense coverage as an additional insured, irrespective of whether its own James River policy has been exhausted.

Covering the Design Professionals' Liability

Design professionals involved in work with Champlain Towers South might look to their errors and omissions (E&O) professional liability policies for insurance. That includes claims against engineers who were involved with inspections and work on the Condominium.

E&O policies tend to apply to claims against professionals and their businesses for negligent acts that cause financial loss. E&O policies, like D&O coverage, typically include payment of defense costs as part of the policy's limit of liability, thereby lessening the limits in the event of a finding of liability against the professional.

The economic loss rule is a defense that can protect a design professional from liability for purely economic loss. That rule prevents tort theories of recovery (negligence) from being used for contract-type claims. Because the Champlain Towers South loss involved bodily injury and death, tort theories of recovery are appropriate and so the economic loss rule would not be available as a defense.

E&O policies commonly exclude bodily injury claims. Meanwhile, general liability policies commonly exclude professional liability claims. For this reason, some design professionals also carry general liability insurance.

Finally, E&O policies usually have a retroactive date, the earliest date that a wrongful act can have taken place for the policy to cover a claim brought on the basis of that wrongful act. Losses due to wrongful acts before the retroactive date will not usually be covered. Accordingly, the timing of when a design professional performed the work in question, and whether it is a continuation or is otherwise related to work previously performed, might be an important consideration for E&O coverage.

Covering the Property Manager's Liability

Property managers also typically carry an E&O policy as well as a general liability policy. Allegations against the property manager of Champlain Towers South are likely to concern claims of wrongful acts, errors, or omissions in performing the manager's duties. The same alleged act or omission of the property manager could qualify as an occurrence under a general liability policy, triggering coverage for resulting bodily injury or property damage.

Covering the Municipality's Liability

News reports have also suggested that claims may be brought against the local government of Surfside, Florida, including its buildings department, for negligent oversight of the condominium. There are also reports that beach restoration projects to the immediate north of the Condominium involved the use of heavy trucks that might have affected the stability of the Condominium.

The municipality's general liability insurance and some form of a Public Officials Liability (POL) policy are likely to be implicated. A POL policy is akin to an E&O policy, in that it covers wrongful acts or omissions of a public official in the performance of his or her duties (which tends to include administrative arms of a municipality and directly employed professionals like engineers, architects, and lawyers). Like E&O policies, POL policies tend to exclude claims for bodily injury, death, or property damage unless an exception carves them back into the POL policy. Such claims otherwise are covered by general liability policies. Unlike the typical E&O policy, some POL policies have a duty to defend outside the limits of liability, thereby avoiding the erosion of those policy limits by the cost of defense.

Conclusion

Coverage issues will continue to emerge from this tragic event. It will be some time before engineers and analysts determine the cause of the collapse of the building, if the cause is ever determined with certainty. In the meantime, insurance claims, disputes, and litigation are sure to ensue.

Notes

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1. *Fayad v. Clarendon Nat. Ins. Co.*, 899 So.2d 1082, 1086-87 (Fla. 2005).

2. *See S.O. Beach Corp. v. Great Am. Ins. Co. of N.Y.*, 305 F. Supp. 3d 1359, 1367 (S.D. Fla. 2018); *Sandalwood Condo. Ass'n at Wildwood, Inc. v. Allstate Ins. Co.*, 294 F. Supp. 2d 1315, 1318-19 (M.D. Fla. 2003).