RECENT DEVELOPMENTS

"COLLAPSE" HELD TO INCLUDE "CRACKING AND BREAKING"

Rogers v. Maryland Casualty Company
252 Iowa 1096, 109 N.W.2d 435 (1961)

Rogers sued to recover on an insurance policy which insured against loss by "collapse of the building or any part thereof." Cracks had begun to develop in the cement block and mortar walls of plaintiff's basement. The cracks got wider, the walls bulged in, the mortar at the end of each block gave way, and each crack resembled a stairway from the first layer above the footing to the basement ceiling. From a judgment for the plaintiff in the district court, the insurer appealed. The Supreme Court of Iowa, affirming the judgment of the district court, held that there was a "collapse of the building" within the terms of the policy.[1]

Insuring clauses such as that in *Rogers* are relatively new and were probably first incorporated into property damage insurance policies in 1954.[2] Prior to such clauses, the only decisions construing "collapse" of buildings dealt with the standard fire or accident policies. The standard fire insurance policy contains a clause which terminates fire coverage upon the "falling" of the building, except as the result of a fire.[3] The intent of this type of provision is to terminate the insurance on a building when it falls abruptly into such an irregular mass that there is no longer an insurable interest. Accident policies insure against injury to person or personalty incurred by flying fragments of a collapsing building, wall or ceiling.[4] The courts in construing the intention of the contracting parties in both of these types of coverage have held that the definition of "collapse" connotes a sudden occurrence resulting in a falling, dropping or caving in. Thus, courts in these earlier cases used a strict dictionary definition of collapse.[5]

Since the appearance of clauses in property damage policies similar to that in *Rogers*, a split of authority has developed as to the construction of the term "collapse." The first court[6] to construe the clauses held that

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[1] Rogers v. Maryland Cas. Co., 252 Iowa 1096, 109 N.W.2d 435 (1961).

[2] Nugent v. General Ins. Co. of America, 253 F.2d 800, 802 (8th Cir. 1958).

[3] Annot., 56 A.L.R. 1068 (1928).

[4] Skelly v. Fid. & Cas. Co., 313 Pa. 202, 169 Atl. 78 (1933); Great Eastern Cas. Co. v. Blackwelder, 21 Ga. App. 586, 94 S.E. 843 (1918); Rubenstein v. Fireman's Fund Ins. Co., 339 Ill. App. 404, 90 N.E.2d 289 (1950).

[5] II Oxford English Dictionary 614: "To fall together, as the sides of a hollow body, or the body itself, by external pressure or withdrawal of the contents, as when an inflated bladder is pierced; to fall into a confused mass or into a flattened form by loss of rigidity or support; to break down, give way, fall in, cave in; to shrink suddenly into a small volume, contract."

[6] Nugent v. General Ins. Co., *supra* note 2. It was not the contention of the plaintiff,

the policy did not cover loss due to settling or sinking of the footings which supported the dwelling walls. In *Central Mutual Insurance Co. v. Royal*,[7] the Supreme Court of Alabama stated "the 'collapse of a building or any part thereof' seems to be a clear and unambiguous statement . . ."[8] and that "the plain and ordinary sense of the word collapse cannot be so altered or warped to include within its meaning a movement of a structural part of a building. . . ."[9] All of the courts which have ruled "collapse" unambiguous have adopted strict dictionary constructions of the term and have cited as authority earlier decisions regarding fire and accident insurance provisions. Such clauses are unambiguous in the sense that they are intended by the contracting parties to connote a sudden falling or crumbling which results in injury to objects contained in or near the building. Such an intent *may not* exist when the contracting parties are insuring the building itself against injury from "collapse."

The majority view was first set out in *Travelers Fire Insurance Co. v. Whaley*.[10] The court distinguished a more liberal construction of "collapse" in home owners' insurance protection from the strict dictionary definition used in other types of coverage. The *Whaley* court ruled that where an insurance contract does not specifically express the intent of the collapse clause, the most realistic approach is to construe the terms in such a contract as connoting a sinking, bulging or pulling away of the wall which impairs its function as a supporting structure and destroys its efficiency as a habitation.[11] The liberal construction in *Whaley* has been followed by the supreme courts of five states.[12] The Supreme Court of Kansas altered the test in holding that "the settling, falling, cracking, bulging, or breaking of the insured building or any part thereof in such a

Nugent, that the building as a whole had collapsed, but rather that the supporting footings were a part of the building and that a settling of these constituted a "collapse of a part thereof" within the meaning of the policy.

7 269 Ala. 372, 113 So. 2d 680 (1959).

8 *Id.* at 372, 113 So. 2d at 681. It must be noted that only where a contract is ambiguous and its language susceptible of different meanings do rules of construction apply. See, *e.g.*, Travelers Fire Ins. Co. v. Whaley, 272 F.2d 288 (10th Cir. 1959); Nugent v. General Ins. Co. of America, *supra* note 2; Rogers v. Maryland Cas. Co., *supra* note 1; Jenkins v. United States Fire Ins. Co., 185 Kan. 665, 347 P.2d 417 (1959); Anderson v. Indiana Lumberman's Mut. Ins. Co., 127 So. 2d 304 (La. 1961); Morton v. Travelers Indem. Co., 171 Neb. 433, 106 N.W.2d 710 (1960); Gage v. Union Mut. Fire Ins. Co., 122 Vt. 246, 169 A.2d 29 (1961); Bradish v. British Am. Assur. Co., 9 Wis. 2d 601, 101 N.W.2d 814 (1960); Annot., 72 A.L.R.2d 1283 (1960).

9 Central Mutual Ins. Co. v. Royal, *supra* note 7, at 373, 113 So. 2d at 681. In a recent decision, Gage v. Union Mut. Fire Ins., *supra* note 8, the Supreme Court of Vermont adopted the conclusions of the earlier cases.

10 Travelers Fire Ins. Co. v. Whaley, *supra* note 8.

11 *Id.* at 290.

12 Rogers v. Maryland Cas. Co., *supra* note 1; Jenkins v. United States Fire Ins. Co., *supra* note 8; Anderson v. Indiana Lumberman's Mut. Ins. Co., *supra* note 8; Morton v. Travelers Indem. Co., *supra* note 8; Bradish v. British Am. Assur. Co., *supra* note 8.

manner as to materially impair the basic structure or substantial integrity of the building is to be regarded as a collapse of the building within such clauses of the policy."[13]

The Iowa court in *Rogers* had to resolve two basic issues: first, whether the term "collapse" is ambiguous and thus susceptible of more than one meaning; and second, if the term is ambiguous, whether the construction of the term "collapse" as alleged by the plaintiff (*i.e.*, a cracking, bulging, and crumbling) falls within the range of constructions which might reasonably constitute a "collapse" at law.

The court in *Rogers* correctly refused to adopt the narrow meaning given "collapse" in the minority decisions.[14] The test of whether a term is ambiguous is *not* based on what the *insurer* intended the words to mean, but upon what a reasonable person in the position of the *insured* would understand them to mean.[15] Jurisdictions which have ruled that "collapse of the building or any part thereof" is not ambiguous lose cognizance of the reasonable intent of a person who has purchased such insurance protection. It is unreasonable to assume that the insured understood such a phrase to provide coverage if and only if his home, or at least part thereof, falls in an irregular mass or flattened form.[16] The reasonable intent of a person purchasing such coverage is to insure against loss sustained when a breaking or bulging substantially impairs the structure of his home. When this intent is not recognized by the courts, the home owner purchases little added protection. In only an extremely small number of cases would a home fall into mere ruin unless catastrophes such as explosion, earth movement, impact by an airplane or automobile, wind storm or fire occurred. Such catastrophes are usually insured against in other provisions of the home owner's policy. Therefore, when "collapse" is termed unambiguous and construed strictly, the clause offers protection only in rare cases when a complete falling in is not caused by a catastrophe.

Although insurance contracts written in Ohio insure against the "collapse of the building or any part thereof," there has been no decision construing the collapse clause of a home protection insurance policy. The Supreme Court of Ohio has ruled that courts should adopt a construction favorable to the insured in the case of genuine ambiguity as to language in an insurance policy.[17] Yet, the Ohio court further concluded "that this

[13] Jenkins v. United States Fire Ins. Co., *supra* note 8, at 671-72, 347 P.2d at 422-23. The Kansas court specifically attacked the approach which adopts the "so as to render the building unsuitable for use as a dwelling" test of collapse. The approach of the Jenkins and subsequent cases also appears contrary to the "loss of distinctive character as a building" test noted in 72 A.L.R.2d 1287 (1960).

[14] Rogers v. Maryland Cas. Co., *supra* note 1, at 439: "We are not disposed to disagree with five jurisdictions (including two that adjoin this state) which have recently decided the question presented to us since the Alabama decision was filed. We too think these precedents are sound, well reasoned, and should be followed."

[15] Jenkins v. United States Fire Ins. Co., *supra* note 8.

[16] Morton v. Travelers Indem. Co., *supra* note 8.

[17] Lessak v. Metropolitan Cas. Ins. Co., 168 Ohio St. 153, 151 N.E.2d 730 (1958).

does not mean there should be a straining of meaning of language in order to bind the insurer, or that, where there is no ambiguity, one should be invented in order to bind the insurer."[18] The Ohio courts will undoubtedly be faced with the issue of construing "collapse" clauses in property damage insurance policies. It is suggested that the Ohio courts adopt a broad construction of the "collapse" clause which will promote the reasonable expectation of the insured.

To recover under the policy when a home's walls cracked or bulged "in such a manner as to materially impair the basic structure," the insured would have to allow the conditions to worsen to the point where the house would actually cave in. Such economic waste is not within the intention of the parties and should not be encouraged by the courts. It is in the insurance company's interest to assume a smaller liability as in the case of substantial cracking or bulging rather than the burden of indemnifying for the eventual destruction of an insured home. It should be noted that in the face of the prevailing authority,[19] insurance companies intending that the word "collapse" be given a strict dictionary definition should expressly define the term within any property damage insurance contract they issue. If such a clear definition is not present in the contract, it appears likely that courts should assert the broad construction of "collapse."

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[18] *Id.* at 158, 151 N.E.2d at 734.

[19] Jenkins v. United States Fire Ins. Co., *supra* note 8; Travelers Fire Ins. Co. v. Whaley, *supra* note 7.