CHAPTER 6

WHEN THE CRANE (OR SOMETHING ELSE) COLLAPSES: IS THERE COVERAGE?

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§ 6.01 INTRODUCTION

Most developers, owners, architects, and builders do not expect something that has been or is being built to collapse. Unfortunately, a “collapse” can be and often is one of the most catastrophic of construction-related accidents. Depending on the nature of the structure—whether a bridge, transmission tower, high (or low) rise building, or other form of construction, including a private home—a collapse will, at a minimum, significantly damage the structure and might also result in serious and perhaps fatal injuries. As a result, the outcome almost certainly will be litigation, whether brought by persons injured or their estates or by the property owner. Of course, structural collapses are not the only collapse risk that can seriously affect a construction project. As noted by the title of this article, what happens when a tower crane or smaller, mobile crane collapses during the work? What about the collapse of scaffolding or a temporary construction elevator? Collapses of improperly shored ditching for piping or other components during the early phases of a project is, unfortunately, one of the more common causes of serious, construction-related bodily injury and death. Again, the result is almost invariably litigation, sometimes preceded by thorough (and prompt) OSHA investigations that can result in imposition of significant fines that could adversely affect the outcome of the subsequent bodily injury litigation.

The title of this article is based in large part on the amazingly high number of crane collapses or near-collapses, such as the recent, dramatic footage showing a dangling tower crane at a high rise project in Manhattan that was damaged and almost knocked down by Hurricane Sandy. The property damage that might (or might not) be attributed to a crane collapse is shown by the following photograph, which depicts a crane and collapsed parking garage in Miami.

©2012 Crane Accidents
Unfortunately, the tragedy depicted in this photograph was not limited to serious property damage, including damage to an adjacent building. Rather, two construction workers were killed and a third was still missing as of October 10, 2012, when this picture was taken. According to an article in “Crane Accidents,” the CEO of the construction company, Ajax Building Co., advised that the collapse of the precast concrete structure was unexpected and occurred without warning. He also advised that while a heavy precast concrete portion of the structure was being lifted into place, it struck a support beam of the garage; but the CEO stated that this accident did not damage the beam and that the crane was inspected and put back into service. What did cause this tragedy, if not the crane? Could it have been inherent flaws in the precast concrete? A design flaw, perhaps? Or perhaps some other form of flawed construction? As illustrated by numerous articles addressing crane collapses, including a spate of serious collapses in Manhattan that killed several workers, one tourist, and injured numerous others, the fact that cranes must be and are routinely inspected is, by no means, proof that the crane is safe.

Like most construction-related problems, a tragic collapse, whether of a construction crane or of the structure itself (or a combination, as in the Miami tragedy) can and should be avoided by proper design and proper workmanship; however, errors and omissions do occur. The risks of damage and loss caused by such errors, now generally referred to under the rubric of “construction defects,” is the primary reason that contractors must have adequate insurance and that owners/developers will include mandatory insurance clauses, often requiring the owner to be named as an “additional insured,” in the project construction contract. But are such losses, whether limited to property damage or including serious bodily injury and death covered by insurance?

In this article we will discuss generally the two principal categories of collapse that can and do occur and the typical coverage issues and disputes that those collapses generate: (1) A course of construction collapse of a crane or other component used in the construction process; and (2) A collapse of the structure itself, either during construction, as was the case in the Miami tragedy, or after the project is complete. Depending on timing and policy wording, these two categories of collapse can trigger coverage under multiple policies for at least some, if not all, of the claims that arise. The article will include discussion of coverage and cases discussing coverage under professional liability policies, which can apply to both categories of collapses; coverage under CGL policies, which can

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2 In light of the numerous, serious accidents that have occurred, New York law enforcement officials attempted a crackdown that resulted in criminal indictments of several crane operators for criminal manslaughter and that charged at least one city inspector with taking bribes to falsify crane inspection reports. This year, the CEO of one crane company was acquitted following a bench trial in the Supreme Court of New York County of criminal charges that had been brought.
apply to both categories of loss, but can and should be a principal source of coverage for post-completion collapses that are covered by the policy’s product completed operations hazard (PCOH) provisions; and coverage under builders risk policies, which should be a principal source of coverage for course-of-construction collapses that damage the partially completed work. In addition, there may be circumstances, such as when criminal investigations and indictments ensue, that Directors & Officers liability policies may respond; however, coverage for such collateral proceedings is beyond the scope of this article, which will focus on the more traditional and typical sources of insurance protection for property damage caused by construction-related accidents. At the outset, we will discuss one of the leading structural collapse cases, now 20 years old, that addresses many of the basic issues that are commonly faced in dealing with collapse claims.

§ 6.02 THE “CLASSIC” COLLAPSE SCENARIO: A CASE STUDY

As noted above, the two general categories of collapse (course of construction and post-construction) can trigger very different coverages, depending in part on when the collapse occurs, what damage results, and what the claimant(s) allege. The issues are illustrated by a case, decided more than 20 years ago in Missouri, that was, in several respects, “ahead of its time” in addressing some of the cutting edge construction-related insurance issues that continue to baffle many courts today.

In 1986, the insured in Structural Systems contracted with a media company to build a 2,000-foot TV broadcast tower in Missouri. In early 1987, the insured general contractor, Structural Systems Technology, Inc. (“SST”), entered into a

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3 Contractors and others who become targets of investigations, whether criminal or civil, should not overlook the possibility of obtaining coverage under their D&O and errors and omissions (professional liability) policies for the costs that are incurred in responding to such investigations. See Edmund M. Kneisel, When the Government “Comes Calling”: Do you Have Insurance Coverage?, in 2012 CONSTRUCTION LAW UPDATE 3-1 (N. Sweeney ed., 2012). Indeed, because such policies are “claims made” programs, insureds should make sure that their carriers are advised of such investigations at the outset, for failure to do so may later be invoked by the carrier to deny coverage for any subsequent civil or criminal proceedings that might otherwise be covered by the policy. See Employers’ Fire Ins. Co. v. ProMedica Health Sys., Inc., No. 3:11 CV 923, 2011 U.S. Dist. LEXIS 150225 (N.D. Ohio Dec. 31, 2011) (barring coverage for Federal Trade Commission (“FTC”) lawsuit because an earlier FTC investigative order was a “claim” that was not reported to the carrier, as required).

4 While bodily injury is the most tragic outcome of a catastrophic collapse, the coverage controversies that arise out of such claims, which may be insured under workers compensation, general liability, and professional liability policies, differ and often are somewhat less complex than controversies regarding the many exclusions and coverage limitations that may be invoked to bar or reduce the coverage available for property damage losses, which are the focus of this article.

subcontract for specially designed, prefabricated steel supports to be used in constructing the tower; and shortly thereafter, SST agreed to redesign the tower to accommodate an FM radio station and to install additional radio antennas and transmission lines as part of the tower construction project. The TV transmission equipment was installed in September 1987, and the TV station began transmitting about two weeks later. Structural defects were ultimately discovered, which caused SST to revoke acceptance of defective steel support rods supplied by SST’s subcontractor. The steel fabrication subcontractor subsequently agreed to supply replacement steel rods to remedy the problem. The FM radio transmitter was installed in early 1988, and FM radio broadcasts began on March 1, 1988. Two months later, while the defective steel rods were being replaced, the tower collapsed, leading to lawsuits by the owners against SST for physical damage to the tower, antenna, transmission lines and associated equipment, and for lost profits and diminution in value of the TV and radio stations. The owners also sued the structural steel subcontractor in a separate proceeding.

SST’s CGL carrier, National Union Fire Insurance Company of Pittsburgh, Pennsylvania (“National Union”), denied all coverage for the owners’ claims, refused to defend those claims, and filed a declaratory judgment lawsuit seeking to be relieved of any obligation to defend or indemnify SST for any of the damages caused by collapse of the tower. SST in turn filed an action seeking a declaration that another carrier, who had issued a form of “inland floater” policy endorsed to cover the project, was obligated to defend and indemnify the contractor against the owners’ claims. Based on stipulated facts, the trial court ruled in favor of SST, the insured general contractor. The court’s rulings illustrate the typical arguments for and against coverage for construction-related collapses.

The Structural Systems court had little trouble finding that potentially covered “property damage” had occurred, but that coverage for the owners’ claims for negligent design of the tower was barred by the professional liability exclusion in the National Union CGL policy. The principal coverage issues addressed by the court involved the question of whether or not coverage for faulty construction was barred by the “works/products” exclusions (commonly known as the “business risks” exclusions) in the policy. The court concluded that the exclusion for “your product” did not apply to realty and that the tower was a “fixture” of the real property and had been taxed as such. In addition, the court found that the damaged radio antenna, transmission lines, and other associated equipment were not the “product” of the insured because they had not been “manufactured” by the insured and were not “‘sold, handled, distributed or disposed of by’ SST.”

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6 Because questions regarding faulty design leading to a collapse often overlap with questions regarding negligent construction, contractors, and especially design-build contractors, should consider obtaining appropriate professional liability coverage for possible design-related collapse claims. See discussion at § 6.04[B], infra.

7 756 F. Supp. at 1239.
Turning to the “your work” exclusion, the court began its discussion by quoting the standard form of the exclusion applicable to the “products completed operations hazard” (“PCOH”) coverage, which contains an exception “if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.”\(^8\) In considering this issue, the court focused on the question of whether or not the fabricator of the defective rods could be classified as a “subcontractor” for purposes of the exception to the exclusion or merely as a “materialman.” Noting that the policy did not define “subcontractor,” the court decided that the steel fabricator’s role was “one of a subcontractor of a major component of the tower, the steel rods” that were fabricated and delivered to the site in accord with “certain design and manufacturing specifications.”\(^9\)

Interestingly, the court addressed the policy’s PCOH coverage before considering the other basic policy exclusions, j(5) and j(6), that National Union invoked. These exclusions are commonly invoked by CGL carriers in seeking to avoid coverage in so-called construction defect cases. The court decided that the “your work” exclusion, j(5), only encompassed the repair and replacement of the defective steel rods, which was the work in progress when the tower collapsed.\(^10\) Otherwise, the installation of the antenna and transmissions systems already had been completed. The court concluded that the j(5) exclusion could not be applied to bar the carrier’s duty to defend because it could not be determined at the pleading stage whether the collapse had been caused by the defective steel rods (the completed work) or by the “actual repair operations,” noting that if it were determined that the collapse “arose out of the tower” (as a fixture to real property) that exclusion j(5) would bar coverage for damage to the tower itself.\(^11\) The court also noted, however, that the exclusion would not bar coverage for damage to the transmission lines and antenna systems, which were not “real property” subject to the exclusion. Similarly, while the tower was in the “care, custody and control” of SST, who was repairing the steel rods when the collapse occurred, the policy’s “care, custody, and control” exclusion did not apply to real property (the tower)

\(^8\) Id.
\(^9\) Id. at 1240. The court cited dictionary definitions of “subcontractor,” including Webster’s definition that a subcontractor is “one that enters into a subcontract and assumes some of the obligations of the primary contractor.” Id. at 1239.

\(^10\) Exclusion j(5) bars coverage for damage to the “particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations. . . .” Id. at 1240 (emphasis added).

\(^11\) Id. at 1241. In a subsequent decision, the court clarified this ruling by holding that if “assembly and erection of the tower by SST is found to be the sole cause of the collapse,” then in that situation “the damage [would] be considered to arise out of ‘your work’ . . . ” and the exclusion would apply. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Structural Sys. Tech., Inc., 764 F. Supp. 145, 146 (E.D. Mo. 1991) (emphasis in original). However, if the evidence at trial established that the damage was caused by the work of the steel fabrication subcontractor (the defective steel rods), the PCOH subcontractor exception would apply and the CGL carriers would have a duty to indemnify the insured for the tower collapse.
or to the damage to the transmission lines and antenna systems that SST had installed because those systems were not being repaired when the tower collapsed. The court also rejected National Union’s reliance on exclusion j(6) because that exclusion does not apply to damage within the PCOH coverage (as previously addressed). 12

Concluding its discussion of the basic CGL coverage, the court ruled, with little discussion, that the policy encompassed actual property damage, which also was defined to include “loss of use” of tangible property. The court decided that National Union’s obligation to insure “loss of use” covered the owners’ claims “for lost profits or diminution in value.” 13

In addition to the general provisions of the National Union CGL form, which was a standard form of CGL policy, the court addressed separately a specific PCOH endorsement. The endorsement barred coverage for “personal property” in the “care, custody or control” of the insured, but otherwise contained the standard form of works/products exclusion applicable to the PCOH coverage, including the “subcontractor exception” to the exclusion. As quoted above, the subcontractor exception eliminates the “your work” exclusion “if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.” 14 Citing its previous discussion of the base policy terms, the court decided that it is “clear” that the repair operations in process at the time of the collapse did not preclude PCOH coverage because “the ‘work’ of constructing the tower is deemed completed” in accord with policy’s language specifying that “work needing ‘maintenance, correction repair or replacement, but which is

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12 Exclusion j(6), which is more broadly worded than j(5), bars coverage for the “particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it”; however, “this exclusion does not apply to ‘property damage’ included in the ‘products-completed operations hazard.’” 756 F. Supp. at 1240. The court also quoted the standard CGL definition of the PCOH coverage, which is triggered when the insured’s work has been completed or “[w]hen that part of the work done at a job site has been put to its intended use by a person or organization other than another contractor or subcontractor working on the same project.” Id.


14 756 F. Supp. at 1241. See text accompanying note 8, supra. The PCOH coverage, including some of the then-leading cases construing it, are discussed in greater detail in Edmund M. Kneisel & Betsy Cooke, The Products-Completed Operations Hazard: When Coverage Exists, Just What Is Covered?, in 2009 CONSTRUCTION LAW UPDATE ch. 6 (N. Sweeney ed., 2009). The common defense that carriers often invoke (and arguments against the defense) and that some courts have accepted in ruling that damage resulting from “construction defects” is not attributable to an insured, accidental “occurrence” is discussed in Edmund M. Kneisel & Elliot A. Fuss, Liability Coverage for Defective Construction: The “No Occurrence Myth,” in 2007 CONSTRUCTION LAW UPDATE ch. 4 (N. Sweeney ed., 2007).
otherwise complete, will be treated as complete.’”15 Similarly, and again consistent with its earlier rulings, the court rejected National Union’s reliance on the “care, custody and control” exclusion and the “products” exclusion because the tower itself was real property that was not subject to either exclusion and because the “other equipment” (antennas and transmission lines) was not in the care, custody or control of the insured when the collapse occurred.

The court’s decision ends with a brief discussion of an “inland floater” policy issued by International Insurance Company. The court quoted the policy coverage, which insured “materials, supplies, machinery, equipment and fixtures to be used in or incidental to the fabrication, installation, erection or completion” of scheduled property, noting that “[t]o the extent that property damage to the tower is excluded [by other policies] . . . it can possibly be covered under this policy.”16 In contrast to the CGL policy, which covered post-completion property damage, coverage under the inland floater policy ended when the “installation or erection of the property is completed and accepted.” However, unlike the National Union policy, which specified that work that had been completed, but that required ongoing maintenance and repair, still would be considered complete, the floater policy did not define “completion.” Absent a definition, the court ruled the term “completed,” as used in the floater policy, did not encompass “work . . . which was literally not finished, or complete.”17 As a result, because repair work on the tower rods was ongoing at the time of the collapse, the court ruled that the floater policy covered the physical damage to the collapsed tower. However, the court also ruled that “other” alleged damage (to transmission lines, antennas, and for lost profits and diminution in value) would not be covered by the floater policy because all work on those components had been completed before the collapse occurred.

The Eighth Circuit Court of Appeals affirmed the trial court’s rulings in all respects. The appellate court focused principally on the appeal of International Insurance regarding coverage under the floater policy and on the question of whether or not the tower was part of the realty or merely a “trade fixture” that should be considered “personal property” for purposes of the “care, custody and control” and other exclusions invoked by both International Insurance and

15 756 F. Supp. at 1241-42. The court ruled that the tower construction work was complete because the TV and radio stations “were carrying on normal broadcasting operations at the time.” Id. at 1242 (also ruling, as it did earlier, that the “subcontractor” [the fabricator of the defective steel rods] exception to the “your work” exclusion applied). Interestingly, however, in considering coverage under an “excess” policy, the court concluded that an exclusion in that policy for “[p]roperty damage to real property . . . occupied or managed by any ‘Insured’” barred coverage for damage to the tower itself because “the tower was ‘occupied’ by [the Insured] at the time of the collapse” and because the excess policy “does not contain the subcontractor exception.” Id. at 1242-43.

16 Id. Thus, while coverage for damage to the tower was not available under the excess CGL policy because the tower was “occupied” (under repair) at the time of the collapse, see note 15, supra, the floater policy might provide such coverage.

17 Id.
National Union. Noting that the tower was 2,000 feet tall and had been annexed to the land subject to a 50-year lease and taxed as leased realty, the court of appeals agreed that the “tower constitutes real property.” The appellate court also rejected National Union’s arguments founded on the “your work” exclusions, agreeing with the trial court’s PCOH ruling finding that the fabricator of the steel rods qualified as a “subcontractor.”

In the remainder of this article, we will discuss the principal coverage issues that arise in the context of construction-related collapses (of cranes and associated components of the project work) and structural collapses that can occur and that may be attributable to multiple causes, both during and after completion of the work.

§ 6.03 CONSTRUCTION-RELATED COLLAPSES: COVERAGE UNDER PROPERTY DAMAGE POLICIES

Coverage for a “collapse” that causes significant property damage during the course of construction typically is provided by builders risk policies. The discussion here, while highlighting some of the leading cases regarding collapse incidents, will expand and differ somewhat from the discussion of the paradigm Structural Systems case, which, by necessity, focused on coverage provided by the contractor’s liability policies, including a “floater” program that had been specifically endorsed to cover the construction of the Missouri TV/Radio broadcast tower. The structural collapse occurred while some work (repair of defective steel support rods) was in progress; but the court correctly applied the primary CGL policy’s PCOH coverage provisions, which covered occurrences of property damage (the collapse) after completion of the contract work, while repair or maintenance work was in progress.

When work is not complete or when the policy’s PCOH coverage may not be available because a subcontractor was not ‘at fault,’ other sources of coverage must be found. One of the principal sources of coverage for construction-related property damage is an all risk builders risk (ARBR), sometimes referred to as a construction all risk (CAR) policy. Such policies are not liability policies, but may insure every project contractor and subcontractor against all, non-excluded risks of property damage that occur during the course of construction, including damage caused by faulty construction work that may be excluded by a CGL policy’s works/productions (business risks) exclusions. Coverage for collapse damages under such policies will be addressed in the first subpart of this section, followed

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19 Id. at 763 (citing the legal proposition that “when [an] insurance policy is open to different constructions, the construction most favorable to the insured must be adopted”) (citation omitted).
by a discussion of the “basic” question of when and under what circumstances an insured “collapse” has occurred.

[A] Collapse Coverage Under “All Risk” Policies

As noted above, the type of policy that might respond to cover sometimes catastrophic losses caused by a collapse depends in part on when the collapse occurs (as well as the caused of the collapse). Given the various “works/products” and related exclusions that might be invoked by a CGL carrier when the damage occurs while work is in progress, builders risk policies can be a principal source of coverage for property damage caused by a collapse that occurs during construction. Such policies typically cover the interests of the owners, contractors, subcontractors, and others involved in a construction project, insuring them against risks of property damage to the project during the course of construction. Because builders risk policies insure against “property damage,” such policies typically do not cover liabilities resulting from damage or negligent work that causes bodily injury. Builders risk policies are time-specific and almost always are triggered by an “occurrence,” of property damage, meaning the insured event—i.e., physical loss or damage—must happen during the policy period. The builders risk coverage period typically commences on the “start date” of the project and ends when the project is “complete.” While most builders risk policies are written or endorsed to cover a specific construction project, general contractors or developers may obtain “floater” policies to cover property damage at any project undertaken by the insured party—such projects may be and often must be identified by endorsement as a covered jobsite.

Builders risk policies often are obtained by the owner or general contractor as part of an Owner Controlled or Contractor Controlled Insurance Program (“OCIP” or “CCIP”) covering all project participants; but even absent a formal OCIP or CCIP agreement, a project-specific builders risk policy often will name the owner, the general contractor, and subcontractors of every tier as insureds, as well as mortgagees and lenders who have a financial interest in the project. By being named as an insured under a builders risk policy, all contractors and subcontractors involved in a project may avoid claims against each other and their own insurance policies, as the law of most jurisdictions will prevent an insurer who pays a loss from pursuing a subrogation claim against a party named as an insured or additional insured on the policy. Some construction contracts, including AIA contracts, will mandate ARBR coverage for all project participants as an acceptable way to minimize controversy between the owner/developer and general contractor and subcontractors by making the builders risk insurance the exclusive remedy for construction-related property damage.

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For example, in *St. Paul Fire & Marine Insurance Co. v. Universal Builders Supply*, the owner of a project for the construction of a 48-story building located in New York City entered into a contract with Universal Builders Supply (“UBS”), as general contractor. The contract contained an insurance rider that required the owner to obtain a builders risk policy covering the risk of physical loss or damage to buildings and structures to be incorporated into the project and insuring, among others, the owner, the contractor, and all subcontractors as insured parties. The rider required that the builders risk policy must contain a clause requiring the insurer that pays a property damage claim to waive any rights of recovery, via subrogation, against all contractors and subcontractors whose interests are insured under the policy. The rider further provided that the owner, contractor, and subcontractors waived all rights against each other for damages to the project that were covered by the insurance policy. The collapse of temporary scaffolding being used for construction of the 48-story building caused $20 million in property damage losses, including physical damage to property, emergency and stabilization costs, loss of rental income, costs of construction delay, work stoppages, and extra interest.

After the builders risk insurer, St. Paul Fire & Marine Insurance Co. (“St. Paul”), paid the owner for damages caused by the scaffolding collapse, St. Paul and owner sued UBS, contending, *inter alia*, that the waiver-of-subrogation clause of the construction contract was void as against public policy. The Second Circuit affirmed denied of the subrogation claim, noting that where construction contracts require the procurement of builders risk policies and require the owner, contractor, and all other involved parties to waive all rights against each other for damages caused by risks covered by that insurance, “‘waiver of subrogation is useful... because it avoids disruption and disputes among the parties to the project. It thus eliminates the need for lawsuits, and yet protects the contracting parties from loss by bringing all property damage under the all risks builder’s property insurance.’”The Second Circuit further described such clauses as being standard and commonplace and generally upheld to bar subrogation claims against other insureds.

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22 409 F.3d at 84 (quoting Tokio Marine & Fire Ins. Co. v. Emp’rs Ins. of Wausau, 786 F.2d 101, 104 (2d Cir. 1986)).


In this case, when a grading subcontractor caused an explosion and fire that destroyed a mansion being converted into a restaurant, the owner and several ARBR carriers sued for negligence; however, the AIA project contract required the purchase of an ARBR policy covering the interests of the owner and all contractors, subcontractors and sub-subcontractors and providing that the parties waived all claims against each other “[t]o the extent covered by [the] insurance provided. ...” *Id.* at 644-45. The court ruled that the AIA contract effectively made the ARBR coverage the exclusive remedy for damage to the project and refused to allow claims by the owner or the ARBR carriers.
Builders risk policies will cover the project property at the construction site and also should include coverage for building materials, supplies, equipment, and fixtures intended to become a “permanent” part of the completed project. Such policies are typically written on an “all risks” basis and cover all risks of direct physical loss of or damage to covered property, unless specifically excluded. ARBR policies usually exclude coverage for a contractor’s tools and equipment being used for construction; therefore, coverage may not be available for the usually very expensive tower crane and similar equipment damaged by a collapse because such equipment is not intended to be a permanent part of the project itself.

For example, in Ajax Building Corp. v. Hartford Fire Insurance Co., a crane leased by a subcontractor, Ajax Building Corp. (“Ajax”), was damaged when it collapsed during an operation to lift an elevator shaft core on a county jail expansion project. Both Ajax and the general contractor for the project, Clark Construction Group, Inc. (“Clark”), were insured under a builders risk policy that contained a Difference in Conditions (“DIC”) supplement issued by Hartford Insurance Company (“Hartford”). The owner of the crane sued Ajax and Clark to recover for property damage to the crane. This lawsuit was resolved by payment of $75,000 under Clark’s “contractor’s equipment policy” and $225,000 under Ajax’s general liability policy. The CGL carrier then pursued, in the name of Ajax, a subrogation action against Hartford. Hartford denied coverage based on an exclusion in the builders risk DIC supplement barring coverage for “Machinery, tools, equipment, or other property which will not become a permanent part of the structure(s) described in the Declarations or Schedule unless the replacement cost of such property is included in the contract price and reported to us.” The trial court noted that the crane was arguably “contractor’s equipment” expressly excluded from coverage under the base terms of the builders risk policy, but relied upon the coverage provided by the DIC supplement, which insured “[p]roperty of others used or to be used in, or incidental to the construction operations, for which you may be responsible or shall, prior to any ‘loss’ for against the negligent subcontractor. Other courts have construed policies containing broad, “additional insured” clauses or endorsements naming all contractors and subcontractors of every tier as insureds to provide coverage for all parties involved in the project work and not just to contractors or subcontractors of the general contractors specifically named as additional insureds in the policy. Holden v. Connex-Metalna, No. Civ.A.98-3326, 2000 WL 1818530, at *3-4 (E.D. La. Dec. 12, 2000). The court held that the ARBR carrier could not pursue a subrogation action against its own insureds or additional insureds and that while the parties named as defendants had not entered into a contract with the general contractors on the project, “there is no merit to the argument that the subcontractors [qualifying] . . . as additional insureds under the [policy] are restricted to those under contract with named general contractors.” Id. at *4.

25 358 F.3d at 798.
which you make a claims have assumed responsibility.”

While the trial court also noted that the DIC supplement expressly excluded coverage for “machinery, tools, equipment, or other property which will not become a permanent part of the structure(s),” the court concluded this exclusion was inconsistent with the grant of coverage for “property of others,” thereby creating an ambiguity that should be construed against the insurer and in favor of coverage for the crane damage.

On appeal, the Eleventh Circuit reversed, holding that there was no ambiguity. The Eleventh Circuit concluded, considering “the nature of builder’s risk policies,” that it “makes sense to provide coverage for the damage of the property of others,” but then to exclude coverage for any portion of such property that “will not become a permanent part of the structure.” As explained by the Eleventh Circuit, the purpose of a builders risk policy is to provide protection for the structure under construction, not for contractors’ equipment:

[B]uilder’s risk policies are used to insure the building while it is in the process of being built. In addition to insuring the structure itself, these policies also typically include building materials, machinery, and equipment on the premises that are awaiting installation. This kind of machinery and equipment is clearly different from a contractor’s machinery and equipment that is used in the construction process, such as the damaged crane.

Because the damaged crane was not the type of property that becomes a permanent part of a structure, the appellate court reversed and remanded with instructions to enter final summary judgment in favor of the insurer.

If the damage to the crane itself is not covered property damage, what about damage to the work in progress on the structure, which, after all, is the principal reason for purchasing builders risk coverage? Questions regarding the scope of such coverage must be resolved by considering which of the other, typical ARBR exclusions may bar or limit the coverage available. As many, if not most collapses, are caused by flaws in the design or the work of the project contractors and subcontractors, one of the most common exclusions carriers will invoke is the exclusion for “defective or faulty workmanship.” For instance, in 1765 First Associates, LLC v. Continental Casualty Co., the Southern District of New York recently examined the scope of a faulty workmanship exclusion that read as follows:

26 2002 WL 34419997, at *2 (emphasis in original).
27 Id. (quotation marks and citation omitted). Because the insureds had leased the crane from a third party, they had assumed responsibility for the crane equipment.
28 358 F.3d at 799.
29 Id. (internal citations omitted).
Unless otherwise provided for . . . , this Policy does *not* insure against physical loss or damage caused by or resulting from the following; however, if physical loss or damage from a peril not excluded herein ensues, then this policy shall cover only for such ensuing loss or damage:

a. Errors or defects in design or specification, errors in processing or manufacture, faulty workmanship or faulty materials; coverage for damage from an ensuing peril not otherwise excluded, shall apply to covered property other than the work or construction of the Insured.\(^{31}\)

On May 30, 2008, a tower crane operated by a subcontractor at the construction site collapsed, causing damage to the building under construction, construction delays, damage to nearby properties, and death. Relying on the faulty workmanship exclusion, the insurer refused to pay any costs attributable to construction delays caused by the collapse. The insured argued that the exclusion should be limited to errors or defects in the subject of construction itself—the Azure Cooperative building—and not to damage caused by the crane collapse, *i.e.*, equipment failure on the construction site that do not cause ensuing loss to the insured property as completed.

The New York court agreed with the insured, concluding, based on review of other New York state decisions construing similar faulty workmanship provisions, that the exclusion refers to “work done by the insured or its agents to the insured property itself, not work done by the manufacturer of tools or equipment used on the premises.”\(^{32}\) Further, the court indicated that similar provisions have been interpreted to exclude only losses arising from defects after construction is completed. The court held that the exclusion, “as it is most naturally read, does not apply to losses related to accidents or equipment malfunctions during construction.”\(^{33}\) Accordingly, the court held that the exclusion applied to losses attributable to defects in materials used in the construction, not to losses caused by a crane collapse.\(^{34}\)

Distinguishing between the cause of the loss (crane equipment failure) and the purpose of the exclusion is one way to obtain coverage for construction-related collapses; but what if equipment failure is not involved? As quoted above, perhaps the most important phrase included in the typical exclusion for faulty workmanship or design is the clause providing for an exception to the exclusion if “physical loss or damage from a peril not excluded herein ensues. . . .” This so-called “ensuing” or “resulting loss” exception applies to the faulty workmanship exclusion and several of the other common exclusions found in ARBR polices including, but not limited to, the exclusion for “settlement.” The ensuing

\(^{31}\) *Id.* at 375.

\(^{32}\) *Id.* at 376.

\(^{33}\) *Id.*

\(^{34}\) *Id.*
loss exception to these exclusions is one of the more important and usually controversial issues that arise in considering coverage provided by ARBR policies in collapse cases.\textsuperscript{35}

Two cases, decided the same day, May 17, 2012, by the Washington Supreme Court illustrate the complexities (and disagreements) that may arise in considering “ensuing loss” clauses in collapse cases. In one, all nine justices of the court decided that a collapse of a concrete slab during construction of a condominium project was an ensuing or resulting loss covered by an ARBR policy.\textsuperscript{36} In the other, by a 5-4 vote, the same court concluded that the structural impairment of decks caused by rot and decay was not covered by an “all risks” homeowner’s policy.\textsuperscript{37} Can these two cases be reconciled by the nature of the policies involved or perhaps by the distinctions between an “actual” collapse and the risk of structural impairment that may or may not be a covered peril under an all risk policy?

Vision One is a classic form of course-of-construction collapse case in which the faulty shoring work of a sub-subcontractor caused what apparently was the first floor of a condominium project to collapse into a lower parking garage floor, resulting in damage requiring the cleanup of the collapsed (and hardened) concrete and reconstruction of the collapsed floor. The ARBR carrier denied all coverage, asserting that the loss (including construction delay) “was a sole and indirect result of the marginal shoring design and faulty installation of the shoring” and that while the policy covered “resulting loss caused by another insured event . . . , the only peril, which caused the loss, was defective design and faulty workmanship . . . .”\textsuperscript{38} Washington’s intermediate appellate court had reversed the trial court’s ruling in favor of coverage, applying the “efficient proximate cause” rule. The lower appellate court held that because the parties disagreed regarding which of “three possible perils was the efficient proximate cause of the loss—faulty equipment [the shoring support] (covered peril), defective design (excluded peril), or faulty workmanship (excluded peril subject to resulting loss clause) . . . .”—the jury should determine which of these was the efficient, proximate cause of the loss.\textsuperscript{39}

\textsuperscript{35} As discussed below, the concept of “resulting” or “ensuing” loss also may be an important issue in determining coverage under CGL policies, as courts often rule that such policies will not cover the costs of repairing the faulty workmanship itself, but that coverage will be available if that faulty workmanship causes damage to other, “non-defective” portions of the project.


\textsuperscript{38} 276 P.3d at 303 (quoting the carrier’s denial letter).

\textsuperscript{39} Id. at 305. The efficient proximate cause doctrine is both complex and uncertain in its application, which may vary widely from case to case and jurisdiction to jurisdiction. The Vision One case discussed the doctrine at some length, but concluded that it did not apply and hence that no question of fact was presented because the carrier had relied on the proposition that the loss was caused “directly and solely” by excluded risks (both faulty design and faulty construction) and not by a combination of covered and excluded perils. The court also decided that the carrier could not
The Washington Supreme Court disagreed with the lower appellate court, concluding that the trial court, in upholding coverage as a matter of law, had correctly relied on the “resulting loss” exception to the exclusion for faulty workmanship. The exception, which applied to the faulty workmanship exclusion, but not the defective design exclusion, provided that “[i]f loss or damage by a Covered Cause of Loss results, [Philadelphia] will pay for the loss or damage caused by that Covered Cause of Loss.”

Discussing rulings regarding the scope of all risks coverage, the court ruled that because “collapse” was not an excluded peril, that “collapse damages are a covered ensuing loss under the policy,” noting also that the carrier had not argued that “collapse was a risk beyond the reasonable contemplation of the policy.” In reaching this result, the court rejected the lower court of appeal’s ruling that the collapse was a “loss” and had not triggered a “secondary covered peril,” such as a fire, concluding that characterizing “collapse as the loss, rather than the peril, rests on a semantic distinction without a difference and ignores the policy’s coverage for all risks.”

While the outcome in Vision One provides a road map for obtaining coverage under ARBR policies in a wide variety of construction collapse cases, in a closely divided (5-4) companion ruling in Sprague, the Washington Supreme Court concluded that not all “collapses” constitute a covered, ensuing loss. In Sprague, a homeowner incurred significant costs in repairing a deck system, which had “rotted out due to improper construction techniques” causing the decks to deteriorate to the extent that they “were in a state of imminent collapse due to impairment of the structural integrity of the system.” The state supreme court rejected the insured’s argument (accepted by the interim court of appeals) that the imminent collapse/impairment of structural integrity was an ensuing loss covered by the policy. The five-justice majority concluded that a ruling denying coverage was consistent with the outcome in Vision One because in that case, the shoring failure had caused a collapse of the slab flooring, leading to loss of the “floor slab, reconstruction of that slab, and clean-up costs,” but that the “cost of the shoring work was not covered due to the faulty workmanship and defective design exclusions.”

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abandon its contention that faulty construction had caused or contributed to the loss, thereby raising the issue of whether or not the exclusion was subject to the exception for a resulting loss.

40 Id. at 303.

41 Id. at 308. The court had noted earlier that some ARBR polices refer to resulting loss and some to “ensuing loss,” concluding that this was “simply a matter of different wording . . . [with] no legal significance to using one phrase over the other.” Id. at 306 n.6.

42 Id. at 308. The court cited the testimony of the carrier’s “coverage expert,” who had testified that “there is no meaningful difference between a fire loss and a collapse loss under the ensuing loss clause.” Id.

43 276 P.3d at 1270-71.

44 Id. at 1273. The Sprague court majority cited the portion of the unanimous ruling in Vision One in which the court noted that “[b]ecause the wet concrete, rebar, and framing were separate
to the fin walls—an injury to a person hurt by the collapse or property damage by the deck failure—coverage would have existed under the ensuing loss provisions of the policy.”

The majority did not decide whether an “actual collapse,” like the collapse of the first floor slab in Vision One, was necessary to trigger the “ensuing loss” exception to the exclusions to the all risk property damage policy at issue in Sprague. One justice, in a separate concurring decision, agreed with the insurer’s position that an actual “collapse,” including falling “into a jumbled or flattened mass” (as defined in Webster’s) was required. The four dissenters disagreed, concluding that the ensuing loss exception had been triggered because (a) the policy was an “all risks” policy; (b) the policy did not contain a collapse exclusion; and (c) “[r]equiring the insured to await an actual collapse would not only be economically wasteful, but would also conflict with the insured’s contractual and common law duty to mitigate damages.” Thus, the dissenters decided that a “more liberal standard, ‘substantial impairment of structural integrity,’” should be applied in determining whether or not a collapse had occurred that would trigger the ensuing loss exception to the exclusions the carrier had invoked.

The concurring and dissenting opinions in the Sprague case led to a more recent decision by a federal court, applying Washington law in deciding whether or not a “collapse” has occurred. The issue of whether a collapse has occurred can present an outcome-determinative coverage question, as discussed in the next section of this article.

[B] When Has a Covered Collapse Occurred?

An ARBR policy that does not expressly exclude coverage for collapse, as in Vision One, may be construed to cover a collapse as an insured peril and a

from the faulty shoring installation, the trial court held that damages to the concrete, rebar and framing constitute resulting losses.” 276 P.3d at 304. However, the Vision One court did not discuss this any further or provide a breakdown of what was included or excluded from the $251,023 in damages awarded for “losses associated with repairing and reconstructing the collapsed portion of the floor,” in addition to the $724,605 in damages awarded by the jury for “delay expenses.” The balance of the $1,148,428 awarded as damages in Vision One apparently was for bad faith and “violations of the Consumer Protection Act.” Id. at 305.

45 276 P.3d at 1273.
46 Id. at 1276 (Alexander, J. concurring).
47 Id. at 1274 (Stephens, J., dissenting) (quoting Beach v. Middlesex Mut. Assurance Co., 532 A.2d 1297, 1301 n.2 (Conn. 1987)).
48 Id. at 1274 (quoting Mercer Place Condo. Ass’n v. State Farm Fire & Cas. Co., 17 P.3d 626, 629 n.1 (Wash. Ct. App. 2000)). In particular, the dissent cited the policy exclusion (which is typical) for “settling and cracking,” noting that while the policy “may exclude ‘mere settling or cracking,’ . . . it does not exclude ‘settling or cracking that results in substantial impairment of a home’s structural integrity.’” Id. (quoting Am. Concept Ins. Co. v. Jones, 935 F. Supp. 1220, 1227 (D. Utah 1996)).
“covered cause of loss.” The same concept would apply to an all risk property damage policy issued to the project owner. Indeed, many, but not all homeowners policies and some commercial property damage policies will include a separate “collapse hazard” coverage, which may or may not expressly define and hence limit the scope of the “collapse hazard” coverage. In Sprague, the Washington Supreme Court left open the question of whether or not an “actual collapse” of a portion of the structure had to occur to trigger the property damage coverage; however, it did not take long for another Washington court to take up this issue.

In Queen Anne Park Homeowners Association v. State Farm Fire & Casualty Co., a federal court considered this issue in light of the rulings in Vision One and Sprague. In Queen Anne Park, the court addressed coverage provided for a condominium association under a property policy that included coverage for collapse caused by six listed perils, but that excluded “‘settling, cracking, shrinking, bulging or expansion.’” The court noted at the outset that “[t]he extent to which similar insurance contracts provide coverage has long been the subject of debate. See Annotation, What constitutes ‘collapse’ of a building within coverage of property insurance policy, 71 ALR.3d 1072 (originally published 1976).” The Queen Anne Park court noted that the issue had not been resolved in the two recent Washington Supreme Court cases, but concluded that the “majority” of courts have ruled that “in addition to actual collapse, imminent collapse is covered,” while a “minority of courts have used a strict ‘rubble-on-the-ground’ standard.” The court reviewed two forensic reports that apparently did not address the “imminence” of a possible collapse, but that differed on the question of whether or not there had been a “substantial impairment” of the structural integrity of the condominium building. The court concluded that while an “imminent collapse has frequently been described as occurring when structural integrity is materially or substantially impaired, Washington courts are unlikely to consider

50 Id. at *2. The policy also contained an exclusion for deterioration, wear and tear, decay, or “any quality in property that causes it to damage or destroy itself” with an exception for ensuing loss. Id. at *2-3 & n.1. Courts commonly rule that coverage is barred by these exclusions when “natural phenomena” causes a collapse, but not when a collapse is caused by faulty workmanship or design. See Holy Angels Acad. v. Hartford Ins. Grp., 487 N.Y.S.2d 1005 (Sup. Ct. 1985). Accord Tastee Treats, Inc. v. United States Fid. & Guar. Co., 474 Fed. Appx. 101 (4th Cir. 2012).
52 Id. at *8-9. The court cited rulings from eight jurisdictions (Nebraska, New Jersey, Alaska, Florida, New York, South Carolina, South Dakota, and Tennessee) as examples of the more liberal standard, citing cases from Missouri, California, and a federal court decision in South Carolina applying the stricter standard. Id. at nn.1-2.
the two states equivalent” and that the more “stringent” imminent collapse standard should be applied. While the Queen Anne Park court did not decide the issue in its ruling, it questioned whether the insured association could produce evidence of an “imminent” collapse, noting that it would be questionable whether a “collapse” could be deemed “imminent for over thirteen (13) years, which is the period of time since State Farm’s polices were in effect.”

The Queen Anne Park court suggested that there were two principal lines of authority regarding “collapse” coverage: (1) the fall down into rubble cases and (2) the “imminent collapse” cases. However, the court also noted that several courts had applied an even “less stringent” basis for allowing coverage, i.e., coverage is available when the evidence shows that there has been a sufficient, “substantial impairment” of the structural integrity of the project that the resulting repair costs, whether characterized as the repair of damage or mitigation of an impending loss, should be insured. The Queen Anne Park case illustrates that consideration of the case authority in the particular jurisdiction where the loss occurred or where the policy issued may be essential in determining coverage for the loss.

Courts in the “rubble” (actual collapse) jurisdictions typically conclude that the term “collapse” is plain and unambiguous. Whether based on policy language or reference to dictionary definitions, those courts define “collapse” to include the falling down, loss of shape, complete falling in, or reduction of a structure to a flattened form or rubble. For example, in Sherman v. Safeco Insurance Co. of America, the court held that the word “collapse” is not ambiguous because it has a generally accepted and well understood meaning, requiring “falling or shrinking together; falling into a flattened mass or disorganized state; breaking-down or falling into an irregular mass or flattened form, through loss of firm connection or rigidity and support of the parts.” Similarly in Heintz v. United States Fidelity & Guaranty Co., a homeowner testified that some of the studding, sheathing, and lath in the east and west walls of his home had deteriorated to the extent that they were likely to collapse and filed a claim with his homeowner’s insurance. The court agreed with the insurance company’s position denying coverage, concluding that the policy required that “there must have been a falling down or

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53 Id. at *13. Interestingly, the court cited a Washington Court of Appeals ruling in which the court, after noting that either standard (substantial impairment or imminent collapse) might be sufficient to establish coverage, ruled that in light of the “unsettled case law” and given lack of sufficient record evidence to reach a decision, that the matter should be remanded to the trial court to obtain expert testimony on the subject. Id. at *13 n.5.

54 Id. at *16.


56 Id. at 17.

57 730 S.W.2d 268 (Mo. Ct. App. 1987).
collapse of a part of a building. A condition of impending collapse is insufficient. While admitting that the decay of the interior supporting structure of the wall may lead to the collapse of the wall, the court found that because the home had not yet actually collapsed, there was no coverage.

While errors in foundation or structural work that cause cracks or water intrusion damage to other parts of the project may result in coverage under some policies, in “actual collapse” jurisdictions, evidence of such ensuing damage may not be sufficient. For instance, in Central Mutual Insurance Co. v. E. C. Royal, the court held that a building did not suffer a covered “collapse” where “some of the walls appeared to have cracks in them and in two or more places the concrete footing contained cracks,” but “[t]here was no falling in, no loss of shape, no reduction to flattened form or rubble of the building or any part thereof” and the building was “still in its original form and condition with the exception of a few cracks, the building had not collapsed and there was no coverage.”

Even in “actual collapse” jurisdictions, courts do not always require the entire building to collapse to trigger the collapse coverage. Depending on the specific policy language, a partial collapse may be sufficient. Thus, in Sherman, supra, the court concluded that the term “collapse” required a “falling” together or “falling into an irregular mass or flattened form,” but also ruled that where the policy provided coverage for “collapse of buildings or any part thereof,” a collapse of only part of the building was enough to trigger coverage. Likewise, in Fidelity & Casualty Co. of New York v. Mitchell, the court held that where the policy provides coverage for “collapse of a building or any part of a building,” the falling in of the stairway several inches from the primary walls and the falling in of the floor as a result of termite damage constituted a partial collapse covered under the policy.

As noted by the Queen Anne Park case in Washington, courts applying the “actual collapse” into rubble analysis are now in the minority, as the modern trend adopted by a majority of courts is that when undefined in the policy, the term “collapse” is ambiguous and only requires a “substantial impairment of structural integrity,” not a physical falling in or flattening of a structure, to trigger the policy coverage. For example, in Beach v. Middlesex Mutual Assurance Co., (cited in the Sprague case dissent), a policyholder sought insurance coverage for damage

58 Id. at 269.
59 113 So. 2d 680 (Ala. 1959).
60 Id. at 683. See also Dominick v. Statesman Ins. Co., 692 A.2d 188, 192 (Pa. 1997), in which there were cracks in the walls and floors; the first floor of the policyholder’s home had moved downward and separated from the interior walls of the home; and the wood beam used to support the center portion of the house had lost its structural properties due to decay. Nevertheless, the court ruled that there was not a covered collapse because the house was still standing and a covered collapse required the home to “fall together or fall in.”
62 532 A.2d 1297, 1298 (Conn. 1987).
to his home arising from cracks in the foundation, separation of the top of the foundation wall from the bottom of the building, and a cracked patio floor that had fallen in. The insurance company denied coverage, arguing that there was no collapse under the policy as there had been no “sudden and complete falling in of the structure.” The Connecticut Supreme Court disagreed, ruling that the term “collapse” is susceptible to several different definitions and, therefore, is ambiguous and must be construed in favor of the policyholders. The court defined a “collapse” to include a “material impairment of the basic structure of a building” which is in “imminent danger of falling over.” Using this definition, the court concluded that the insurance company was liable for the damage to the home even though there was “no actual caving-in and the structure was not rendered completely uninhabitable.”

The court in *American Concept Insurance Co. v. Jones*, summarized several of the rules of policy interpretation supporting the modern trend to define “collapse” broadly. First, while insurance companies may argue that the term “collapse” should be defined as “reduced to a flattened form or rubble,” the insurance company in *Jones* (and in many other cases) did not include this limiting definition in the policy, even though it could have done so. Second, although the policy at issue stated that “collapse” did not include settling, cracking, shrinking, bulging, or expansion, it is impossible to imagine a collapse that does not involve some of these attributes; therefore the term could be interpreted to include “settling or cracking that results in substantial impairment of a home’s structural integrity.” Third, some dictionary definitions of “collapse” include “breakdown in vital energy, strength or stamina” and “sudden loss of accustomed abilities,” suggesting that collapse means a “substantial impairment of a structure’s integrity.” Finally, to require a building to completely fall down to trigger the collapse coverage would be “unreasonable in light of an insured’s duty to mitigate damages and would be economically unsound.”

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63 Id. at 1299.
64 Id. at 1299.
65 Id. at 1301.
67 Thus, as noted above, the “settling” exclusion typically includes an “ensuing loss” exception that would be triggered to provide coverage if the damage occurring qualifies as an insured collapse.
68 Id. at 1228. Courts around the country continue to adopt the more expansive definition of “collapse” that only requires a substantial impairment to structural integrity to trigger the collapse coverage. *See* Guyther v. Nationwide Mut. Fire Ins. Co., 428 S.E.2d 238, 241-42 (N.C. Ct. App. 1993) (holding that the term “collapse” was ambiguous and did not require a total destruction of the structure, only a substantial impairment of structural integrity); Auto Owners Ins. Co. v. Allen, 362 So. 2d 176, 177-178 (Fla. Dist. Ct. App. 1978) (“Because the provision is ambiguous, . . . we must determine the intent of the parties to the policy, and the policy will be construed in favor of the insured. The more reasonable construction of the term collapse is material and substantial impairment of its basic structure.”); Nationwide Mut. Fire Ins. Co. v. Tomlin, 352 S.E.2d 612, 615 (Ga. 2013 CONSTRUCTION LAW UPDATE § 6.03[B] 6-22
While there is certainly no unanimity in approach, the strong trend of authority is that absent a more restrictive definition, the term “collapse” is ambiguous and only requires a showing of a “substantial impairment to structural integrity” to trigger coverage. As illustrated by the recent Queen Anne Park ruling, some courts have adopted a more “stringent” view and rule that to establish coverage, the insured must produce some evidence that the collapse is imminent or inevitable, relying on the “risks of direct physical loss involving collapse” language found in many policies. Thus, in Doheny West Homeowners’ Association v. American Guarantee & Liability Insurance Co., a policyholder sought coverage for the draining and maintenance of a rooftop pool of a condominium parking deck after a structural engineer observed substantial cracking of the girders, columns, and walls of the parking structure in the area around the pool vault. In determining what constitutes a covered collapse under the policy, the court looked at the entire coverage clause, which insured against “loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building.” The court concluded that use of the phrases “risk of loss” and “involving collapse” broadened the coverage to include, not only loss resulting from an actual collapse, but also loss “involving collapse.” Stopping short of construing a “collapse” to include the “substantial impairment of structural integrity,” the court adopted the more “stringent” position requiring either an actual or an imminent collapse to trigger the coverage. The court explained that this construction of the policy “avoid[s] both the absurdity of requiring an insured to wait for a seriously damaged building to fall and the improper extension of coverage beyond the terms of the policy, and is consistent with the policy language and the reasonable expectations of the insured.”

Likewise, in Ocean Winds Council of Co-Owners v. Auto-Owner Insurance Co., following the reasoning set forth in Doheny West, the South Carolina Supreme Court held that a policy that insures against “risks of direct physical loss involving collapse” requires proof of an imminent collapse for coverage to be triggered. The court explained that “to construe the phrase ‘risks of direct physical loss and involving collapse,’ as requiring actual collapse is too narrow an interpretation,” concluding that limiting coverage to an actual collapse would encourage policyholders “to neglect repairs and allow a building to fall, which is economically unsound and contrary to the insured’s duty to mitigate damages.”

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69 70 Cal. Rptr. 2d 260, 261 (Ct. App. 1997).
70 Id. at 261, 263 (emphasis added).
71 Id. at 264.
73 Id. at 308. See also Beach, as discussed at note 62 and accompanying text, supra, in which the Connecticut Supreme Court applied a similar analysis.
The court further explained that requiring an “imminent collapse is the most reasonable construction of the policy clause covering ‘risks of direct physical loss involving collapse,’” as this construction protects the policyholder “without distorting the purpose of the clause to protect against damage from collapse.”

As illustrated by the foregoing cases, the availability of coverage for property damage under an ARBR policy or another “all risks” property policy for collapse damage depends on varied circumstances, including careful analysis of the policy language and various “ensuing loss” exceptions to exclusions that the carriers commonly invoke. Of course, review of forensic evidence showing whether or not an “actual” or “imminent” collapse has occurred or at least whether the structural integrity of the project has been significantly impaired may be critical in obtaining coverage for the loss. Also, as discussed in the concluding section of this article, any claim for collapse damage, whether under an ARBR or other property insurance policy or a policy governing legal liability for collapse damage, would be aided by evidence of actual damage to the property in question—whether cracks in walls and foundations, out of plumb windows and doors, damage to other fixtures, and buckling and physical damage to flooring that might constitute sufficient ensuing or resulting loss to trigger the policy’s coverage.

§ 6.04 WHEN IS LIABILITY COVERAGE AVAILABLE FOR COLLAPSE CLAIMS?

Not all construction-related collapses occur during the course of construction; therefore, ARBR or other time-specific property damage coverage may not be available. If the collapse damage occurs post-completion, a broad, “all risk” property damage policy may apply; but the property damage insurer, if it pays the loss, may then pursue a subrogation action against the contractor, subcontractor, structural or geotechnical engineer, architect, or other party responsible for the

74 Id. See also Thornwell v. Indiana Lumbermens Mut. Ins. Co., 147 N.W.2d 317, 320 (Wis. 1967) (holding that “if the condition of the part of the building claimed to be in a state of collapse is such that the basic structure or substantial integrity of the part is materially impaired so that it cannot perform its structural function as a part of the building and is in immediate danger of disintegrating, then it can be said to be in a state of collapse within the meaning of the extended coverage of the policy”) (emphasis added); Whispering Creek Condo. Owner Ass’n v. Alaska Nat’l Ins. Co., 774 P.2d 176, 180 (Ala. 1989) (holding that there was collapse coverage where there was “imminent danger of collapse” of the condominium roof); Hilton Head Resort Four Seasons Centre Horizontal Prop. Regime Counsel of Co-Owners, Inc. v. General Star Indem., 357 F. Supp. 2d 885, 887 (D.S.C. 2005) (“[W]e find a requirement of imminent collapse is the most reasonable construction of the policy language covering ‘risks of direct physical loss involving collapse.’”); Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia, 379 F.3d 557, 563 (9th Cir. 2004) (holding that collapse coverage extends to actual and imminent collapse because “even if the district court properly defined the word ‘collapse’ to mean ‘a sudden falling down,’ it erred in ending the inquiry there; the court should have then considered the rest of the clause’s language to ascertain its practical and reasonable interpretation”).

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collapse. Of course, absent other coverage or when the property damage coverage is inadequate, the owner or other person harmed by a collapse may file a liability action against the responsible party. Coverage for collapse claims under liability policies also generates considerable controversy; but such coverage may be essential to protect contractors, including design-build contractors and engineers, from the potentially huge damages that may arise when a catastrophic collapse occurs.

CGL policies exclude coverage for damage to the “particular part” of the work that is in progress when the damage occurs, but several courts have recognized that the language of the standard “your work” exclusion does not bar coverage for damage to other property that is damaged by “your work.” This is, in effect, similar to the “ensuing” or “resulting loss” scenarios discussed above that may be essential to establishing coverage under property damage policies. It is uncertain whether the “particular part” language should be considered to be a limitation on the exclusion if the only damage is to the project itself and if the insured is the general contractor of the project whose “work” is the entire project and not merely the portion of the project that actually collapsed. However, even if the entire project is not complete, CGL insurance may cover a “collapse” under the PCOH coverage if the work of the insured contractor is complete and if the collapse was caused by the negligence of a subcontractor. In the first subpart of this section, we will discuss the CGL coverage for property damage caused by construction-related collapses. Such policies also are the principal source of coverage for liability arising out of collapses that cause bodily injury; but fewer controversies arise regarding such coverage, which as noted above, is beyond the scope of this article.

The second subpart of this section concludes with a discussion of professional liability coverage, which was lacking in the Structural Systems case discussed in § 6.02 above. Thus, if the evidence in that case established that the

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75 The same broad interpretation of the undefined term “subcontractor” that triggered the PCOH coverage in Structural Systems, supra, also should apply to a sub-subcontractor of an insured subcontractor whose contract “work” is complete. Like the Missouri courts in Structural Systems, courts in several jurisdictions (probably the majority of courts) have concluded that suppliers of components that are specially fabricated for a particular project qualify as “subcontractors” for purposes of the PCOH coverage. See Limbach Co., LLC v. Zurich Am. Ins. Co., 396 F.3d 358, 365 (4th Cir. 2005) (supplier who “custom manufactured . . . steam pipe in accordance with the shop drawings and project specifications, and . . . provided on-site installation instructions” qualifies as a subcontractor of the insured). See also Mosser Constr., Inc. v. Travelers Indem. Co., 430 Fed. Appx. 417, 420-25 (6th Cir. 2011) (“the circumstances of this case are enough to nudge [a supplier of #57 coarse aggregate for use as backfill] over the line separating mere material suppliers from subcontractors”).

76 See note 4, supra.
cause of the tower collapse was negligent design of the structure (or maybe negli-
gent design of the defective steel support rods), then it is possible that the only
coverage available to the insured would be the coverage provided under the CGL
policy for defense costs because the policy did not cover any liability for damage
caused by defective design.\textsuperscript{77} Thus, absent appropriate insurance covering negli-
gent design, a contractor could face a significant gap in needed insurance cover-
age when a collapse occurs.

[A] \textbf{Commercial General Liability Coverage for Construction-Related
Collapses}

CGL policies protect insured contractors and subcontractors from losses
associated with third-party liability claims for “property damage” and “bodily
injury.” The Coverage A section of standard CGL policies sets forth the insurance
company’s obligation to defend and pay third-party claims against the insured for
covered property damage and bodily injury.\textsuperscript{78} A typical form of insuring
agreement for Coverage A covers the insured for its liability to pay:

\begin{quote}
all sums which the insured shall become legally obligated to pay as damages
because of . . . property damage to which this insurance applies, caused by an
occurrence, and the company shall have the right and duty to defend any suit
against the insured seeking damages on account of such . . . property
damage. . . .
\end{quote}

CGL policies generally define “property damage” to include both: (1) physical
injury to property, including all resulting loss of use of that property; and
(2) loss of use of tangible property that is not physically injured.\textsuperscript{80} The word

\textsuperscript{77} In Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241 (Fla. 2008), the Florida
Supreme Court ruled, in answering a certified question from the Eleventh Circuit, that the PCOH
coverage insured a general contractor against liability for damage to custom windows (your work)
caused by negligent work of the subcontractor who installed them, but not if the damage was caused
by defects in the windows themselves. This ruling arguably is inconsistent with the decision in
\textit{Structural Systems, supra}, holding that PCOH coverage is triggered if the tower collapse was caused
by the subcontractor’s defective steel rods. \textit{See also} E. Kneisel & Betsy Cooke, \textit{The Products-
Completed Operations Hazard: When Coverage Exists, Just What Is Covered?}, \textit{supra} note 14, at
\$ 6.05[B] (the “subcontractor exception does not require proof of a negligent act by the subcontractor,
but simply evidence that the resulting unexpected and unintended damage to the insured’s work
was caused by the ‘work’ of a subcontractor”).

\textsuperscript{78} CGL policies also provide coverage for personal injury and advertising injury claims (Cov-
erage B). This coverage is generally not implicated in cases involving construction accidents.

\textsuperscript{79} See \textit{COMMERCIAL LIABILITY INSURANCE} at IV.T.19 (International Risk Management Institute, Inc.
2012). The International Risk Management Institute, Inc. publishes a treatise and commentary
containing an excellent discussion of the evolution of the CGL policy form over the years.

\textsuperscript{80} See id. at VI.L.207. As discussed below, “loss of use” coverage can be construed to include
certain economic loss caused by shutdowns/lack of access caused by collapses and in at least one
“occurrence” is commonly defined as an “accident”; and while some policies define “accident,” courts often conclude that an “accident” has occurred if consequences resulting from the act causing injury or damage are neither “‘expected nor intended from the standpoint of the insured.’”

As indicated in the discussion of Structural Systems, CGL policies issued to construction contractors should include PCOH coverage and may contain a separate limit of liability for such coverage, as follows:

The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of “bodily injury” and “property damage” included in the “products-completed operations hazard.”

PCOH coverage protects insured contractors and subcontractors against losses from liability for bodily injury or property damage that occurs after a project is complete.

CGL policies include so-called “business risk” exclusions for damages attributable to “your work” or “your product” that insurance companies argue are so closely tied to an insured’s construction business that they are not appropriate for coverage. Insurance companies generally contend that those exclusions reinforce the principle that CGL insurance is not intended to cover the costs of poor performance or faulty workmanship. As illustrated in Structural Systems, insurance companies often invoke the business risk exclusions, including Exclusion j(5) (the “Ongoing Operations” Exclusion), Exclusion j(6) (the “Faulty Workmanship” Exclusion), and Exclusion l (the “Your Work” Exclusion applicable specifically to the PCOH coverage), to deny coverage in construction defects cases.

As noted, if a collapse occurs during the course of construction, Exclusion j(5) may apply to exclude coverage entirely. Universal Builders Supply, supra,

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81 U.S. Fire Ins. Co. v. J.S.U.B., 979 So. 2d 871, 883 (Fla. 2007) (quoting State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1076 (Fla. 1998)). See Lyerla v. AMCO Ins. Co., 536 F.3d 684, 688-89 (7th Cir. 2008). In J.S.U.B., its seminal case rejecting the insurance industries’ “no occurrence” defense in a PCOH case, the Florida Supreme Court distinguished the “unexpected and unintended” formulation that it and arguably the majority of courts have applied in deciding whether or not an accident has occurred from the more restrictive definitions of “accident” applied in some jurisdictions. 979 So. 2d at 885-86.


83 As discussed in Section 6.02, supra, CGL policies also contain a “Your Product” exclusion that is similar to the “Your Work” exclusion. It is generally (but not universally) recognized that the “Your Product” exclusion is intended to apply only to manufacturers and other entities that produce
primarily concerned whether St. Paul, which had issued a builders risk policy to the developer covering the construction site at issue, could recover from UBS, the general contractor, approximately $20 million that St. Paul had paid to the owners of the project to cover damages to a 48-story building caused by the collapse of the temporary scaffolding/hoist structure for which UBS was responsible. In addition to deciding whether or not St. Paul could seek subrogation from UBS (also insured under the St. Paul policy), the case addressed UBS’s third-party complaint against three liability insurers—TIG Insurance Company (“TIG”), AIU Insurance Company (“AIU”), and Royal Insurance Company of America (“Royal”—each of whom had issued policies naming UBS as an insured. In its third-party complaint, UBS sought to have the liability insurers defend and indemnify it against St. Paul’s subrogation claim. Each carrier moved to dismiss the third-party complaint based on exclusions in their respective policies, such as TIG’s broad exclusion barring coverage “for any property damage to, or other loss of use, or destruction of . . . [a]ny part of the wrap-up project(s) at the site- . . . [and] any part of the building being constructed. . . .” 84 AIU’s policy contained the standard exclusion for property damage to “that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the property damage arises out of those operations.” 85 Royal’s excess liability policy contained an identically worded exclusion for damage to work in progress.

Without addressing whether the collapse constituted covered property damage caused by an occurrence, the court held that the “your work” exclusions in the policies barred coverage. Applying the New York rule of contract construction that an insurer seeking to avoid a duty to defend must demonstrate that the exclusion is subject to only one reasonable interpretation, the court held that the exclusions could only be interpreted as barring coverage because the collapse occurred during the course of construction. 86 According to the court, the exclusions in the liability policies barred coverage because losses during the course of construction should be covered under builders risk insurance. The court did not consider whether or not the “particular part” language of the “your work” exclusions in the AIU and Royal policies limited their scope.

A different outcome was reached in Acuity v. Society Insurance, 87 which involved the collapse of an engine room building owned by VPP Group, LLC

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84 317 F. Supp. 2d at 343 (quotation marks and citation omitted).
85 Id. (quotation marks and citations omitted).
86 Id. (noting that the policies all contained similar exclusions because they were designed not to overlap with builders risk coverage).
87 810 N.W.2d 812 (Wis. Ct. App. 2012).
VPP’s (“VPP”) stemming from construction work being performed by contractors on a portion of the building. VPP and two contractors entered into a contract to remove and reinstall a concrete wall on the south side of VPP’s engine room building that provided refrigeration and necessary utility services to VPP’s animal processing plant. The project was to include shoring up that section of the building and “related work.” During the excavation of a trench adjacent to the south wall site, the soil began to erode from under the building’s concrete slab. As a result, the first floor slab, on which shoring columns had been placed, cracked and buckled, resulting in the collapse of the second floor and roof structures and damage to equipment and an adjacent building. Because the utility service to the rest of the plant was disrupted, VPP incurred additional expenses in the amount of approximately $380,000. VPP repaired the engine room by replacing the portion of the slab that cracked, jacked up the second floor, and fixed the portions of the roof that had cracked.

VPP sought coverage from its liability insurer, Acuity, which paid for the damages relating to repairs to the building and the $380,000 in expenses VPP incurred, but not the costs incurred to replace the south wall. Acuity then brought a subrogation action against the contractors and their CGL insurer, Society Insurance, which had issued policies containing standard definitions of “property damage” and “occurrence” and the typical “business risk” exclusions, denominated as k(5) (ongoing operations) and k(6) (faulty workmanship).

The trial court held that the Society Insurance policies did not insure the contractors because their faulty workmanship did not qualify as an “occurrence” within the meaning of the policies. The appellate court reversed. Relying on the Wisconsin Supreme Court’s decision in American Family Mutual Insurance Co. v. American Girl, Inc., the Acuity court held that damage to the engine room, the roof, and resulting damage to equipment constituted “property damage” caused by an accidental occurrence. Focusing on the “[t]hat particular part” language in exclusions k(5) and k(6), the court rejected the insurer’s arguments that those exclusions applied because the contractors worked in and had control of the entire engine room building. Concluding that the scope of the contractors’ work was limited to the south wall, the court ruled that consequential damage to the second floor, roof, and related structures and machines caused by erosion attributable to the work on the south wall was damage to property other than “that particular part” on which the work was being performed. To the extent that the

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88 673 N.W.2d 65, 70 (Wis. 2004).
89 810 N.W.2d at 817-18 (noting that the contractor was in the process of excavating a trench when the unexpected and unintended erosion occurred).
91 Id. at 824-25.
When a collapse occurs after a project is complete, the exclusions for damage to your work should not apply; but controversies still exist regarding coverage under the PCOH provisions of liability policies. As noted above, carriers will typically argue that “defective construction” is not an accidental “occurrence” that triggers the CGL coverage. The authors submit that such arguments are bogus and are not a legitimate excuse for denying coverage for unintended and unexpected events not caused by purposeful misconduct (sabotage, for example) of the insured.92 Courts are most likely to find that PCOH coverage exists for an insured contractor when “other” property is damaged by a collapse caused by the negligent work of a subcontractor.

For instance, in *Lexicon, Inc. v. ACE American Insurance Co.*,93 a subcontractor’s negligent welding work caused a silo to collapse. Lexicon, the insured general contractor alleged that its insurers had a duty to indemnify it for property damage caused by the subcontractor’s faulty work. The incident occurred in connection with the relocation of a direct reduced iron (“DRI”) plant from Louisiana to Trinidad, West Indies, which included the dismantling, shipment, and re-erection of the plant, including the fabrication and erection of six new silo storage bins in Trinidad. Lexicon subcontracted the work involving fabrication and erection of the new silos to another party. Months after this work was completed, one of the silos collapsed because of faulty welding by Lexicon’s subcontractor, resulting in millions of dollars in property damage, including damage to the silo and to nearby equipment, such as the conveyors that the owner of the project used to load and unload the DRI. Thousands of tons of DRI also were damaged because, when exposed to the atmosphere, DRI oxidizes and becomes less useful in steelmaking.

On the parties cross motions for summary judgment, the district court granted summary judgment in favor of Lexicon’s CGL insurers, holding that property damage resulting from the faulty work of a subcontractor was not an insured “occurrence.”94 On appeal, the Eighth Circuit reversed, ruling that while it was foreseeable that the subcontractor’s faulty welding work on a silo would damage the silo itself, it was not foreseeable that the faulty welding work would cause millions of dollars in collateral damage upon the silo’s collapse. Although

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92 See authorities cited at notes 77 and 83 supra.
93 634 F.3d 423 (8th Cir. 2011).
94 Id. at 425. The district court relied on Essex Insurance Co. v. Holder, 261 S.W.3d 456 (Ark. 2008), in which the Arkansas Supreme Court, in answer to a certified question, had ruled that “defective workmanship standing alone—resulting in damages only to the work product itself—is not an occurrence under a CGL policy such as the one at issue here.” Id. at 460.
the court determined that damage to the silo was not an “occurrence” that triggered coverage for damage to the silo; damage to nearby equipment and to the DRI that had been stored in the silo and was lost in the collapse were covered “occurrences” that the insurers were obligated to cover. The Eighth Circuit held that the district court had overstated the Arkansas Supreme Court’s ruling in Holder, concluding that as properly understood, Holder justified the insurers’ decisions to deny Lexicon’s claims of coverage for damage to the silo, but not the consequential damage to other property:

The exclusion disclaims coverage for property damage incurred as a result of “[w]ork or operations performed by [Lexicon] or on [Lexicon’s] behalf” and “[m]aterials, parts, or equipment furnished in connection with such work or operations.” But each policy also contains an exception to the your work exclusion, preserving coverage for “damaged work or the work out of which the damage arises” that is “performed on [Lexicon’s] behalf by a subcontractor.” This subcontractor exception to the your work exclusion in each policy affords coverage for certain property damage resulting from faulty subcontractor work. This interpretation, which we predict the Arkansas Supreme Court would adopt, harmonizes all of the related language in the CGL policies.\footnote{Id. at 427. This ruling actually illustrates a common error of many courts that refuse to allow coverage for the “damaged work” of a subcontractor, thereby emphasizing the “your work” exclusion in the first part of the exclusion, while ignoring the true breadth of the “subcontractor” exception, which not only applies when there is damage to “other property,” but also applies when the “damaged work or the work out of which the damage arises . . . is performed by a subcontractor.” (emphasis added), As effectively recognized by the Florida Supreme Court in Pozzi Window, the exception is not limited to situations in which damage “arises” from (i.e., resulting damage) the negligent work of a subcontractor, but also when the “damaged work” is the work that has been performed negligently by a subcontractor. See note 77, supra; E. Kneisel & Betsy Cooke, The Products-Completed Operations Hazard: When Coverage Exists, Just What Is Covered?, in 2009 Construction Law Update ch. 6. See also Structural Systems, supra.}

While PCOH coverage may be an important add-on to all risk property damage coverage for construction-related collapses, an appropriately rounded construction risk management program should include, where appropriate, professional liability coverage, as discussed in the concluding subpart of this article.

[B] Professional Liability Coverage for Construction-Related Collapses

As discussed above, construction-related collapses may be “sudden and accidental” or more gradually developing. However, when an actual collapse or material impairment of the structure tantamount to a collapse occurs, both all-risk

\footnote{Id. at 427. This ruling actually illustrates a common error of many courts that refuse to allow coverage for the “damaged work” of a subcontractor, thereby emphasizing the “your work” exclusion in the first part of the exclusion, while ignoring the true breadth of the “subcontractor” exception, which not only applies when there is damage to “other property,” but also applies when the “damaged work or the work out of which the damage arises . . . is performed by a subcontractor.” (emphasis added), As effectively recognized by the Florida Supreme Court in Pozzi Window, the exception is not limited to situations in which damage “arises” from (i.e., resulting damage) the negligent work of a subcontractor, but also when the “damaged work” is the work that has been performed negligently by a subcontractor. See note 77, supra; E. Kneisel & Betsy Cooke, The Products-Completed Operations Hazard: When Coverage Exists, Just What Is Covered?, in 2009 Construction Law Update ch. 6. See also Structural Systems, supra.}
property damage and general liability coverages may provide coverage for the loss. Unfortunately, however, the cause of a collapse is often uncertain and could be attributable to negligent work of the contractor or subcontractor, such as negligence while operating a crane or other construction equipment; installation of a defective component, such as the steel rods supplied by the subcontractor in the Structural Systems case; or by inherent design flaws attributable to the professional negligence of the project architect, the structural engineer, the geotechnical engineer, or a subcontractor responsible for the design of the foundation of the structure. As was the case in Structural Systems, supra, most CGL policies will contain an express exclusion for damage attributable to professional negligence; and as discussed above, most ARBR policies also will bar coverage for design flaws, subject perhaps to an ensuing or resulting loss exception to the exclusion.96 As a result, when a design flaw is the cause or a contributing cause of a collapse, the responsible party, whether a general contractor with design/build responsibility or the design subcontractor, should make sure that appropriate professional liability insurance is available to cover any gap in coverage under a ARBR or CGL policies that might otherwise apply.

Professional liability insurance (PLI), commonly referred to as “errors and omissions” insurance, is designed to protect insureds against liability incurred as a result of “professional negligence,” which often is broadly defined to include a variety of errors or omissions in performing a professional act or service, including engineering design and sometimes negligent “construction management.” A professional act or service typically arises out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill. PLI policies are not intended to replace CGL, ARBR, or property damage insurance. Instead, PLI coverage provides needed protection against possible design-related collapse claims that often are not be covered under any other type of policy. A PLI policy can protect against liability for damages caused by construction-related design flaws, as well as damage caused by the installation of defective components, including damage to the “work” of the insured design/build contractor or subcontractor. As such, PLI coverage can help to fill in the gaps left uninsured by CGL, ARBR, and property damage policies that exclude coverage if the cause of collapse is identified as a design flaw or other form of negligent “professional service”.

96 See Wimberly Allison Tong & Goo, Inc. v. Travelers Prop. Cas. Co. of Am., 352 Fed. Appx. 642, 647-48 (3d Cir. 2009) (holding professional services exclusion, providing that coverage does not apply for property damage arising out of the failure to render any professional services by or for the insured, in CGL and excess insurance policies of architecture firm barred coverage arising out of collapse of parking garage while under construction because allegations in the underlying complaints focused on insured’s professional services, such as design, specification, inspection, supervision, and quality control of work); Harbor Cmtys., LLC v. Landmark Am. Ins. Co., No. 07-14336-CIV., 2008 WL 2986424, at *5-6 (S.D. Fla. Aug. 4, 2008) (addressing design defect exclusion in ARBR policy).
A typical PLI insurance policy will contain a broad coverage grant similar to the following:

The Company will pay on behalf of the Insured all sums in excess of the Self-Insured Retention that the Insured shall become legally obligated to pay as damages because of claims first made against the Insured and reported to the Company during the policy period of this Policy. This Policy applies to actual or alleged negligent acts, errors or omissions arising out of the rendering or failure to render professional services for others.

Under the plain language of such a policy, all risks of liability are covered claims, unless the claim is specifically excluded from coverage. Many PLI policies provide coverage for “wrongful acts,” which typically are so broadly defined as to effectively insure against “all risks” arising from any “error, omission or other act that causes liability in the performance of professional services for others by you.” Similarly, the definition of what is a “professional services” is often broadly worded to include “architecture, engineering, design, consulting, training, surveying, construction management, laboratory testing and analysis and other related professional services.”

It also is important to note that PLI coverage is virtually always “claims made and reported” coverage. In contrast to an “occurrence” (the collapse itself) that would trigger CGL or ARBR coverage, the event that gives rise to PLI coverage is the making of a “claim” by a third party, which usually is defined as a written “demand” for money or services, including, but not limited to the filing of a lawsuit or arbitration demand. When any such “demand” is made, the policyholder should immediately notify the carrier, as such policies usually bar all coverage if a claim is made, but not timely reported before the end of the policy period or during a short grace period for reporting claims after the policy coverage period expires.

Years after the catastrophic collapse of the broadcast tower in Missouri, SST found itself involved in another collapse case involving a 1,965-foot tall television transmission tower in Hemingford, Nebraska. In this case, SST contracted, to design, furnish, and install redundant horizontal members and stronger diagonal members on the Hemingford tower. In turn, SST contracted with Mid-Central Tower Company (“Mid-Central”) for the labor, tools, and equipment for the installation. In the underlying lawsuit, the court ruled, among other things, that property damage to the television tower had been caused by Mid-Central’s negligence while performing repair and maintenance work on the tower and that Mid-Central’s negligence could be imputed to SST.

Five policies arguably provided coverage to SST for its liability for the tower collapse; however, all five insurance carriers denied coverage for various reasons.

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98 Id. at 1014-15.
While professional liability coverage was lacking in the *Structural Systems* case discussed at the outset of this article, SST had obtained PLI coverage, issued by Lloyd’s of London, covering the Nebraska tower collapse. The policy provided “claims made and reported” coverage for:

“CLAIMS FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD” for “those sums which the insured shall become legally obligated to pay as damages by reason of any negligent act or error or omission in professional services rendered . . . arising out of the conduct of the named insured’s business as described in the Declarations.”

The Declarations described SST’s business as “the performance of structural design and analysis services related to radio and TV towers.” If the court in the underlying action had found that the collapse was due to SST’s faulty design work instead of its subcontractor’s faulty workmanship, coverage would have been triggered under the policy; however, apparently there was no evidence that negligence in design caused the collapse. As a result, the Lloyd’s insurance policy did not cover the collapse.

The court in *Great West Steel Industries, Ltd. v. Northbrook Insurance Co.* also addressed PLI coverage in connection with a collapse possibly caused by a design-build subcontractor. Great West Steel Industries, Ltd. (“Great West”) entered into a subcontract with a general contractor, to design, engineer, and erect the structural steel framework of a warehouse to be built for General Motors Corporation. A portion of the warehouse roof collapsed on February 22, 1976. In the fall of 1976, while the collapse was being investigated, Great West applied for a new PLI policy from Northbrook Insurance Co. (“Northbrook”). Northbrook issued the new policy on October 23, 1976; and on January 2, 1977, a second portion of the roof collapsed. The policy contained the typical “all sums” coverage clause quoted above, with a caveat providing that the insured “has no knowledge of [an] act, error, or omission” that would trigger the coverage as of the effective

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99 SST was also named under a PLI claims-made form policy issued by Zurich Insurance for the period January 1, 2003 to January 1, 2004. However, SST applied for the Zurich Insurance policy on January 6, 2003, without disclosing the tower collapse in its application, which was fatal to its claim of coverage under the Zurich policy. *Id.* at 1029.

100 *Id.* at 1021 (citation omitted).

101 *Id.* (citation omitted).

102 *Id.* at 1029. Of course, such a policy could have covered the structural collapse of the Missouri tower, if, as discussed above, the trial evidence established that the collapse had been caused by faulty design. See note 6, *supra*, and accompanying text.

date of the new policy. The policy application also inquired whether Great West was “aware of any circumstances that may result in any claim. . . .”

Northbrook argued that the claim for the second collapse was barred because Great West had knowledge that a design error had caused the first roof collapse. The court disagreed, concluding that to bar coverage, Northbrook had to establish that the second roof collapse had been caused by “the same design errors which had caused the first roof collapse.” The evidence showed that an independent structural engineering firm had concluded that a design defect had caused the first collapse; however, the court concluded that this firm “adhered to a different design philosophy with regard to distribution of snow load . . . than Great West’s structural engineers. . . .” and accordingly that Northbrook had “failed to sustain its burden of proof” that the second collapse had been caused by the same design defects as the first collapse. The court also ruled that Great West had not made “material misrepresentations” in the policy application that would support voiding the policy “ab initio,” concluding that because it was “Great West’s professional judgment . . . that the first roof collapse was not the result of an error of design, but instead of fabrication and construction,” that Great West’s submissions in its application for coverage did not amount to “misrepresentations” regarding the first collapse.

As illustrated by the Structural Systems cases and the Great West case, professional liability coverage can be an essential adjunct to the types of policies (CGL and ARBR policies) that usually are invoked when claims arise as a result of construction-related collapses. PLI policies will cover both bodily injury and property damage liability arising out of a catastrophic collapse; therefore, such policies should be considered as an important component of any risk management program for a contractor who assumes design/build or design responsibility for a construction project. Of course, as illustrated by these cases, the coverage considerations that often create the most controversy under PLI policies may be more “procedural” than substantive. To preserve the available coverage for collapse (or other) construction-related professional negligence claims, policyholders should make sure that collapse claims are timely reported and that all other conditions to PLI coverage, including policy conditions requiring full

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104 Id. at 849.
105 Id. at 849-50. Documents submitted with the application stated that the first roof collapse had been caused by a faulty weld.
106 Id. at 852.
107 Id. at 852-53. A dissenting judge disagreed, noting that the consulting structural engineers (retained by the general contractor) had concluded that Great West’s design was deficient under the governing Canadian building code and that Great West and the general contractor had discussed “remedial work” to strengthen the roof in light of the approaching snow season. As a result, the dissenting judge concluded that the “design philosophy” of the consulting firm should not be “completely disregarded” and that the trial court’s decision denying coverage should be affirmed. Id. at 857-58 (Jiganti, J., dissenting).
108 Id. at 853.
disclosure in any application or other required submission of events that may give rise to claims, are satisfied.

§ 6.05 CONCLUSION

The following are the key points regarding coverage for construction-related collapses that are illustrated by the rulings in *Structural Systems* and the other cases discussed above:

- Some collapses (a falling down into “rubble”) are both obvious and tragic, but in many jurisdictions, a construction-related flaw that causes substantial impairment of the structural integrity of the project may be sufficient to trigger coverage, especially if an actual collapse is imminent.

- Because collapse claims often will trigger multiple policies, including all risks property damage coverage, coverage for “defective construction” under CGL programs and coverage for negligent design under professional liability policies, design-build contractors should carefully consider what types of coverage are available.

- Consider whether the damaged property is “real property” subject to the “your work” exclusion or “personal property” subject to the “care, custody or control exclusion” or “your product” subject to the exclusion for damage to “your product . . . or any part of it.”

- Causation and timing are important considerations: Was the collapse caused by faulty workmanship or by negligent design and did the collapse occur while work was in progress, or after completion or partial completion, thereby possibly triggering the PCOH coverage of the contractor’s CGL policy?

- If a collapse occurs during construction, carefully review the coverage provided by an all risk builders risk (ARBR) policy, which may be considered the best source of recovery for course of construction collapse property damage.

- If the collapse occurred after work was complete, was it possibly caused by a negligent “subcontractor,” including an off-site fabricator of specially designed components, such as the steel fabricator whose work qualified for the “subcontractor exception” that triggered coverage under the PCOH provisions of the CGL policy in *Structural Systems*?

- Remember, under the standard definition applicable to PCOH coverage, that work undergoing maintenance and repair, but that otherwise has been completed and accepted, will be deemed “complete” for purposes of the coverage.
• Be careful that differing policy language, such as the “occupied” language used in the excess policy at issue in Structural Systems, does not lead to unexpected gaps in coverage that could be avoided by making sure that the excess or umbrella coverage is at least as extensive as the underlying, primary coverage.

• Additional coverage or gaps in available coverage can be avoided or limited by coverage provided by “floater” policies or perhaps by project-specific ARBR policies that may insure against property damage or liability resulting from course-of-construction collapses.

• Whenever a collapse occurs, contractors should carefully consider what coverages may be available and take prompt action to preserve such coverage, by timely notifying all potential insurance carriers of the incident.