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# Insurance Coverage for Crumbling Concrete Foundations: A Summary of the Issues

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## Issue

Explain homeowners insurance coverage of crumbling concrete foundations.

## Summary

This report:

1. lists certain actions taken by the Connecticut General Assembly and the Connecticut Insurance Department regulating homeowners insurance in response to crumbling concrete foundations and

2. summarizes the current litigation about homeowners insurance coverage of crumbling concrete foundations.

The Office of Legislative Research is not authorized to give legal opinions and this report should not be considered one.

Generally, homeowners insurance covers a house's sudden collapse. However, many homeowners insurance policies have not been providing coverage for concrete foundations that are deteriorating due to pyrrhotite (i.e., "crumbling foundations"), in part because such deterioration is excluded from the policy's definition of "collapse." In response, several homeowners have sued insurers, arguing that the deterioration of a foundation meets the coverage definitions.

Coverage may also be denied because such damage is excluded under another provision. For example, policies may exclude coverage for losses due to (1) settling, shrinking, bulging, or expansion of certain structural elements, including foundations, floors, walls, and ceilings or (2) hidden defects and any defective material or methods used in construction. Many of these exclusions are also being litigated.

Insurance coverage for any loss depends on a homeowner's specific policy language, including any conditions and exclusions. Specific policy forms may be searched on SERFF, a multistate system for searching and filing insurance forms.

In coordination with the Legislative Library, OLR identified at least 42 instances of active or recently closed cases filed in the Second District Federal Court in which a homeowner with a crumbling concrete foundation sued his or her insurer over a coverage denial or cases with a similar fact pattern. In addition, according to the decision in *Roy* v. *Liberty Mut. Fire Ins. Co.*, (Conn. Super. Ct. Feb. 22, 2017), at least forty more crumbling concrete cases were pending in state court in 2017 (Tolland Judicial District). The Connecticut Supreme Court will also hear three crumbling concrete cases on December 18, 2018: *Karas* v. *Liberty Insurance Corp*, *Jemiola* v. *Hartford Casualty Insurance Company* and *Vera* v. *Liberty Mutual Fire Ins. Co.* At dispute in each case are the issues of "substantial impairment" and "collapse" under homeowners insurance policies.

## Homeowners Insurance Policies and Recent Insurance Regulation

As the extent of the crumbling concrete foundation issue became apparent, the Connecticut General Assembly and the Connecticut Insurance Department took certain steps related to homeowners insurance coverage of crumbling concrete foundations.

For more information on Connecticut legislative actions in response to crumbling concrete foundations, see OLR Report 2018-R-0239, "Crumbling Concrete Foundations in Connecticut."

### *Cancellations and Nonrenewals*

In October 2015, the Connecticut Insurance Department prohibited insurers from cancelling or refusing to renew a homeowners policy due to a crumbling or deteriorating foundation. Any non-renewal action taken by an insurer must be in accordance with underwriting guidelines and rules filed with and recorded effective by the department.

### *Limitation Periods on Lawsuits*

Under state law, a person who wants to sue his or her insurance carrier over a property loss claim denial must generally file suit within 24 months after the inception of the loss (CGS §§ 38a-307 & 38a-308). State law also prohibits an insurer from setting a time limitation on suits that is less than one year from when the insured loss occurs (CGS § 38a-290). However, homeowners are not always aware of the date of loss, especially when damage occurs over time. As a result, on January 9, 2017, the insurance commissioner issued Bulletin IC-37, which directs insurance carriers to disclose in each claim denial letter the deadline for bringing suit.

Additionally, for crumbling concrete foundations, the law requires personal risk insurance policies (e.g., homeowners insurance) and certain condominium master and property insurance policies to allow suit against insurers for up to one year after the date the insured receives a written denial for all or any part of a claim under a property coverage provision for a crumbling concrete foundation (PA 17-2, June Special Session, § 341).

### *Policy Language Changes*

Homeowners have argued that insurers changed policy language to exclude crumbling foundations and other risks without appropriate notice. As of October 1, 2017, insurers generally must notify insureds of policy language changes. Specifically, an insurer renewing a personal or commercial risk insurance policy with terms less favorable than an insured's current policy must notify the insured and clearly identify any reduced coverage (PA 17-198, § 6).

## Crumbling Concrete Insurance Coverage Litigation

### *The Beach Standard*

Standard homeowners insurance policies generally cover a collapse caused by a sudden and accidental occurrence (unless the policyholder was aware of decay or deterioration before the collapse). According to the department, standard policies define "collapse" as an abrupt falling down or caving in of a building or any part of a building with the result that it cannot be occupied for its intended purpose.

One of the most commonly cited Connecticut Supreme Court cases regarding "collapse" is *Beach* v. *Middlesex Mut. Assur. Co*. (205 Conn 246 (1987)). In this case, a homeowner sought reimbursement under a homeowners policy for a settling and cracked foundation. The insurer contested the claim, asserting that the cracked foundation did not meet the definition of "collapse" covered under the policy. The Court held that the policy did not "unambiguously limit policy

coverage to collapse of sudden and catastrophic nature, but… included substantial impairment of structural integrity of building." As a result, the insurer was required to cover the claim. However, the cracked and settling foundation in *Beach* was not due to pyrrhotite.

The standard set in *Beach* is contested by several insurers across multiple cases, including *Metsack* v. *Liberty Mutual Fire Insurance Company and Jemiola* v. *Hartford Casualty Company,* as described below. Generally, such insurers argue that *Beach* is not binding and not applicable to the current policy language and circumstances.

***Metsack.*** In *Metsack* v. *Liberty Mutual Fire Insurance Company* (2017 WL 706599 (D. Conn. Feb. 21, 2017)), the Metsacks lived in Ashford and first noticed cracking concrete in their basement between 2008 and 2009. Later, in 2014, after receiving advice from a friend and noticing water coming in from the basement, the Metsacks believed their foundation contained defective concrete and filed an insurance claim against two insurers: Allstate, which insured the property until 2009, and Liberty Mutual, which insured the property since then.

Each insurer moved for summary judgment. Allstate's motion was granted, but Liberty Mutual's was denied. (This is due in part to the policy language definitions and the timeliness of the claim.) Generally, the court agreed that the crumbling concrete was observable significantly prior to when the foundation was substantially impaired, and the Allstate policy language required a collapse to be sudden. The Liberty Mutual policy, however, did not clearly define "collapse" as it relates to coverage or "foundation" for the purposes of exclusions. As a result, the claim was allowed to move forward. In March 2017, Liberty Mutual and the Metsacks settled.

***Jemiola.*** In *Jemiola* v. *Hartford Casualty Insurance Company* (2017 WL 1258778 (Conn. Super. Ct. Mar. 2, 2017)), the homeowner and her now ex-husband bought a house in Willington in 1986. In 2006, the homeowner found cracking in her basement and, believing it was normal, hired contractors to fix the problem. In 2014, following additional problems, the homeowner received a second opinion and was informed by a contractor that the problem may be related to faulty concrete. At this point, the homeowner filed an insurance claim.

Prior to 2005, the homeowners insurance policy did not define "collapse." However, the court agreed that the loss, as identified by the homeowner, occurred after the 2005 policy change, and the newer policy language should be applied. The court noted that the new policy defined collapse as an "abrupt falling down or caving in" and specifically excluded from the definition any part of a building that "is in danger of falling down or caving in," even if it "shows evidence of cracking, bulging, sagging, bending, leaning, settling shrinkage or expansion." According to the court:

> By using the phrase 'abrupt falling down or caving in of a building or part of a building' this language appears to be a response to the *Beach* Court's suggestion that the defendant insurance company define the term "collapse," in that it clarifies that a "collapse" requires a sudden and catastrophic type event.

The court granted the defendant's motion for summary judgment and dismissed the claims. The case has been appealed to the Connecticut Supreme Court.

## *Karas and the Certified Question*

In *Karas* v*. Liberty Insurance Corp.*, Gail and Steve Karas removed sheetrock in their basement in a mold abatement effort and found horizontal and vertical cracks. Subsequent investigation determined that the cracking was due to a chemical compound found in basement walls with concrete most likely from J.J. Mottes Concrete Company (the company at the center of the pyrrhotite scandal). Their home is located in Vernon and was built in 1984. According to the complaint, the basement walls will fail at some point in the future without appropriate remedy, causing the house to collapse into the basement.

The Karases submitted a claim for insurance in accordance with their policy. Liberty Mutual denied it, stating the policy excludes coverage from (1) wear and tear and deterioration and (2) water damage, including damage from water exerting pressure on, or seeping through, a foundation.

The Karases sued, accusing Liberty Mutual of: breach of contract, breach of good faith, and Connecticut Unfair Trade and Insurance Practices Acts violations (i.e., CUTPA and CUIPA claims). On December 14, 2017, the court granted Liberty Mutual's request for summary judgment for two of these complaints, dismissing the breach of good faith and CUTPA and CUIPA claims.

One of the major questions in the breach of contract complaint is the extent to which the *Beach* standard applies to foundations deteriorating due to pyrrhotite. As such, Liberty Mutual asked Judge Underhill to certify three questions to the Connecticut Supreme Court. Certification is the process by which one court asks another to issue a legal opinion on a specific question. In this circumstance, Liberty Mutual requested the judge certify the following questions:

1. Is "substantial impairment of structural integrity" the applicable standard for "collapse" under the provision at issue?

2. If the answer to question one is yes, then what constitutes "substantial impairment of structural integrity" for purposes of applying the "collapse" provision of this homeowners' insurance policy?

3. Under Connecticut law, do the terms "foundation" and/or "retaining wall" in a homeowners' insurance policy unambiguously include basement walls? If not, and if those terms are ambiguous, should extrinsic evidence as to the meaning of "foundation" and/or "retaining wall" be considered?

In April 2018, Judge Underhill certified the second question. In declining to certify questions one and three, Judge Underhill wrote:

> I conclude that only the second question merits certification. With respect to the first question, there is no dispute that the insurance policy in this case does not define "collapse," which means that *Beach* clearly provides the relevant standard… With respect to the third question, Connecticut courts have "consistently rejected" insurers' arguments concerning the term "foundation," have "determined that th[ose] policy terms were ambiguous," and have "construed them against" the insurers.

Several cases ultimately depend on the Connecticut Supreme Court's response to the certified question or its decision in other concrete cases, such as *Jemiola*. The Court will hear *Jemiola, Karas,* and *Vera* v. *Liberty Mutual Fire Ins. Co.,* on December 18, 2018.

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