Damage to an Underground Storage Tank is Not a Covered Risk

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In the recent decision entitled *Tustin Field Gas & Food v. Mid-Century Ins. Co.* (2017 WL 2839139) the Second District Court of Appeals ruled a split in an underground storage tank, caused by the tank sitting on a rock for years, was not a covered "collapse" as a matter of law.

Background:

Tustin Field Gas & Food, Inc. ("Tustin") owned a gas station and minimart in Palm Springs, California. The station stores the gas dispensed by its pumps in two underground 15,000-gallon tanks. The tanks are located approximately 30 feet from the minimart, and are buried beneath a six or seven-inch concrete slab and five or six feet of dirt. The tanks themselves are cylinders approximately 30 feet long and nine feet in diameter, and are double-walled: They have an inner wall made of steel, wrapped in a synthetic honeycomb, and then sheathed with an outer wall made of "fragile" fiberglass. The tanks are connected to the pumps through pipes carrying the fuel and are connected to the minimart with electrical conduit.

When these tanks were originally placed underground in 1997, the installer did not follow the tank manufacturer's instructions to bury them in pea gravel or crushed rock. Instead, the installer just dug a hole, placed the tanks into that hole, and then covered them with "native soil" containing rocks, boulders, chunks of asphalt, rusted pipes, and other debris. The first tank was set atop a boulder with a nine-inch diameter as well as atop pockets of air.

The tanks were double-walled, steel with a fiberglass sheath. Sixteen years after installation, testing revealed that the fiberglass sheath on one tank was no longer intact. The tank was excavated and the fiberglass sheath was found to be cracked from the tank sitting on a nine-inch boulder. Tustin paid to have the crack repaired and made a claim for the cost of excavating and repairing the tank.

Tustin had an insurance policy (the Policy) covering property damage with defendant Mid-Century Insurance Company ("Mid-Century"). Tustin presented a claim for the cost of excavating and repairing of the tank.

However, the subject Mid-Century policy generally excluded collapse, but provided "Additional Coverage for Collapse" as follows:

> *"[Mid-Century] will pay for direct physical loss or damage to Covered Property, caused by a collapse of a building or any part of a building insured under this policy, if the collapse is caused by one or more of the following:… (b) Hidden decay;…(d) Weight of people or personal property;… (f) Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation. However, if the collapse occurs after construction, remodeling or renovation is complete and is caused in part by [an enumerated] cause of loss…, [Mid-Century] will pay for the loss or damage even if use of defective material or methods in construction, remodeling or renovation, contributes to the collapse."*

The subsection also specified that "*Collapse does not include settling, cracking, shrinkage, bulging or expansion.*"

In a letter, Mid-Century denied Tustin's demand for coverage on two grounds: (1) the damage to UST-1 did not qualify as "damage to a building or any part of a building"; and (2) "it does not appear that the efficient proximate cause [of that damage] is Collapse."

In the following bad faith lawsuit, the trial court granted summary judgment to the Mid-Century while denying Tustin's cross-motion for summary judgment. The trial court concluded there was no covered cause of loss because there had been no "collapse."

The court ruled the insured had to show an "actual" collapse, but had failed to submit evidence the tank "suffered a complete change in structure and lost its distinctive character as an underground storage tank." The insured had shown, at most, the tank was no longer usable under storage tank law because its outer sheath had been breached, but "a mere impairment of [the tank's] structural integrity did not constitute an actual collapse."

Ruling:

In deciding the matter, the Court of Appeal looked at whether Tustin's entitlement to coverage under the Policy turns on whether Tustin could show:

(1) the tank suffered "direct physical loss or damage ... caused by collapse"; and
(2) that collapse was "caused by" (a) "[h]idden decay," (b) the "[w]eight of people or personal property," or (c) the "[u]se of defective material or methods in construction" "if the collapse occurs after construction" and was "caused in part" by either (a) or (b).
This was Tustin's burden because the Policy excludes any collapse from coverage, but another section countermands that exclusion to the extent of the exception outlined above. Consequently, the threshold question is what the Policy means by the term "collapse."

The Court of Appeal affirmed the trial court's ruling. The Court of Appeal rejected the argument if a structure is not usable it has necessarily collapsed. (*Sabella v. Wisler* (1963) 59 Cal.2d 21 and *Doheny West Homeowners' Assn. v. American Guarantee & Liability Ins. Co.* (1997) 60 Cal.App.4th 400). The Court of Appeal also rejected the argument "substantial impairment of structural integrity" of a building constitutes collapse:

> *"This is incorrect…. California law specifically holds to the contrary, at least where, as here, a policy excludes from collapse 'settling' and the like." (Doheny West, supra, and Stamm Theatres, Inc. v. Hartford Casualty Ins. Co. (2001) 93 Cal.App.4th 531.)*

The Court of Appeal distinguished *Doheny West, supra, Stamm Theatres, supra*, and *Panico v. Truck Ins. Exchange* (2001) 90 Cal.App.4th 1294, as all involving a broader meaning of "collapse." The Court of Appeal also went on to reject Tustin's claim that ambiguity from the lack of a specific definition for collapse in the policy mandated interpretation in the policyholder's favor, as well as rejecting Tustin's appeal to public policy.

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