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Surfside: The Historic Settlement and the Legislative Response

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Within one year of the infamous Surfside collapse, insurers agreed to pay more than $1 billion to settle bodily injury and property damage losses. Florida thereafter enacted a tidal wave of insurance regulations, supposedly to avoid due process concerns in any future catastrophe. The state's legislative response presents an interesting case study on government efforts to curb the impact of bad faith laws as a result of lessons learned from this tragedy.

Miami Beach, FL, USA – June 24, 2021: news media covering the collapse of Champlain Towers in Surfside leaving dozens injured as rescue teams search for survivors.

The Losses and Settlement

On June 24, 2021, Champlain Towers South in Surfside, Florida collapsed, killing 98 individuals and leading to the total destruction of the condominium, including 136 individual homes. A class action ensued. On June 24, 2022, it was announced that the action settled for $1.2 billion. The fund consisted of $120 million from the sale of the beach-front land on which Champlain once stood. About $1.1billion was provided by settlements with insurers for the benefit of their insureds/alleged tortfeasors, some of which were named defendants in the class action but most of which were not. In fact, the largest sum, approximately $517 million, was paid on behalf of Securitas Security Services, Champlain's security firm, which was not a party to the action.

The Investigation of Cause

Destructive testing by experts for the defendants to determine the cause of the collapse was stopped soon after it began due to the scheduling of mandatory mediation and subsequent swift settlement. However, the U.S. government charged the National Construction Safety Team (NCST) division of the National Institute of Standards and Technology (NIST) to determine the cause of the collapse. This work began immediately and continues to this day.

In reporting to Congress, NIST stated:

In contrast to prior NCST investigations, the cause of the Champlain Towers South failure will not be known until completion of the investigations, since there was not an obvious extraordinary initiating event. This complexity is important for the public to understand as families and other community members wait for answers. Many of the projects underway by NIST will not be able to provide solid answers until they reach near completion.

See **https://www.nist.gov/news-events/news/2022/02/feb-18-2022-update-nist-champlain-towers-south-investigation-adds-new.** Last visited on May 5, 2023.

The investigation involves 40 NIST employees, 600-plus evidence specimens, 24-plus failure hypotheses, 15-plus local and federal agencies, 12-plus work orders and contracts awarded, and 3-plus terabytes of photos and videos. NCST only finished the physical testing of the site and remnants in September 2022, months after the settlement of the class action. Their technical work is not anticipated to be finished until April 2024 and the complete final report is not scheduled to be finished before April 2025.

Given that there will not be any conclusions about the cause of the collapse for at least two years, some may wonder why insurers so quickly paid approximately $1.1 billion. The answer likely lies in Florida's law on bad faith discussed below.

Bad Faith Law

Florida's bad faith law likely led insurers, often at the insistence of their insureds, to abandon sustainable coverage positions and accept time-limited policy limit demands without any evidence that their insureds caused or contributed to the collapse. The controlling concepts under Florida law that allow recovery in excess of policy limits are:

In the event of clear liability and excess exposure to their insured, failure to tender policy limits is an act of bad faith. *Goheagan v. American Vehicle Insurance,* 107 So.3d 433 (Fla. 4th DCA 2012), rev denied, *American Vehicle Insurance v. Goheagan,* 130 So. 3d 1275 (Fla. 2013);

If an insurer has the opportunity to settle within policy limits and does not, the insurer may be liable for any subsequent excess verdict against their insured, *Powell v. Prudential Property Casualty,* 584 So.2d 12 (Fla. 3d DCA 1991); and

Where there are multiple claimants and limited insurance funds, an insurer must make the best educated guess as to allocation, i.e., decide which claimant poses the greatest risk of exposure to their insured and settle with that higher exposure claimant over others. *Farinas v. Florida Farm Bureau,* 850 So.2d 555 (Fla. 4th DCA 2003), rev denied, *Florida Farm Bureau v. Farinas*, 871 So.2d 872 (Fla. 2004).

Some of the claimants' demands only gave insurers mere days to tender millions of dollars in policy limits to secure releases and avoid what the court identified as a potential $1 billion exposure. The Florida legislature has since stepped in and passed a flurry of changes that, had they been in effect at the time of the collapse, would likely have led to a very different conclusion. These changes have brought liability and other factors into account when making decisions about insurance proceeds in response to time-limited policy limit demands. These include:

Tendering of Limits: Florida's bad faith statute, Florida Statute Section 624.155, has

been amended to state that a liability insurer will not have committed bad faith if it tenders the lesser of policy limits or the amount demanded by the claimant within 90 days of actual notice of a claim that is accompanied by sufficient evidence to support the amount of the claim. Existing case law supported a finding of bad faith with as little as 11 days from notice of a claim to tendering limits (e.g., *Goheagan*). Now, eleven days will no longer be considered reasonable, nor will withholding of evidence be acceptable. Further, the statute states that if the claimant or claimant's attorney did not act in good faith in presenting information to the insurer for contemplation of a policy limit tender, such evidence can be used against the claimant in any subsequent bad faith trial against an insurer.

Comparative Negligence: Three years before the collapse, the residents of Champlain Towers South were advised by engineers that $15 million in structural repairs were needed. The residents did not pay heed to the recommendations. Faced with time-limited policy limit demands, insurers were essentially forced to accept demands without taking into account the liability of any claimant or decedent for failing to approve the repairs suggested by the engineers. In fact, the insurers for the very engineers who advised residents to fix the building settled for $16 million, and the lawyers who represented the Champlain Towers South Condominium Association at the time the engineering firm provided their advice settled for $31 million for their alleged failure to convince their client to follow the engineer's recommendations. Under the new law, if a plaintiff is found to be more than 50% at fault, they cannot obtain any recovery. Prior to the changes, if the defendant was only 30% negligent versus 70% ascribed to the plaintiff, the defendant would have been responsible for $300 million in a $1billion case. Now, the plaintiff would not recover.

Bad Faith Standard: In a departure from existing Florida case law, negligence alone is no longer evidence of bad faith. Thus, insurers will no longer face bad faith damages for simple negligence.

Interpleader: Facing multiple claimants and excess exposure, insurers had been forced to allocate their limits among numerous claimants, and if a trier of fact deemed the allocation to be incorrect, the insurer would be considered to have acted in bad faith regardless of whether the allocation had evidentiary support. With the new law, insurers can file interpleader actions when there are multiple claimants and excess exposure and the court or trier of fact will determine who shares in the policy limits.

Only time and the next catastrophic event will tell us how effective Florida's attempt to level the bad faith playing field has been, but it is probably safe to say that it will mitigate, at least to some extent, future extravagant payouts prior to any evidence of liability.

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