



## SECURING COVERAGE FOR BOSTON'S BIG DIG COLLAPSE

Failed epoxy makes the case for continuous trigger of insurance policies

By **TRACY ALAN SAXE** and  
**RYAN M. SUERTH**

In the late evening of July 10, 2006, a spotlight was again cast on Boston's infamous Big Dig project when cement ceiling panels fell from the tunnel roof, crushing the passenger side of a vehicle traveling to Logan International Airport. The vehicle was occupied by Angel Del Valle and his 38-year old wife, Milena. Angel, the driver, escaped with only minor injuries, but Milena was killed.

At the time of the ceiling collapse, the Big Dig was already the center of local attention due to repeated delays and ever-increasing costs. The Big Dig was primarily intended to replace the elevated highway cutting through Boston with an underground highway, hence the nickname. The original price-tag for the Big Dig was approximately \$3 billion, but the final number was closer to \$15 billion. The ceiling collapse and the death of Milena Del Valle generated lawsuits targeting a multitude of contractors, one criminal indictment and an intensified level of public scrutiny. The potential liability for the wrongful death action brought by the family of Milena Del Valle, in which the first settling defendant paid \$6 million, left defendants scrambling for insurance coverage.

### COMMONWEALTH DAMAGES

The liability faced for the death of Milena Del Valle, however, paled in comparison to that related to the property damage alleged by the Commonwealth

of Massachusetts, which at one point included an astronomical claim for the diminution in value of the entire Big Dig project. Furthermore, the insurance coverage issues in the Commonwealth action were far more complicated than in the Del Valle action; other than a claim for punitive damages, coverage for the death of Milena Del Valle was clear, whereas the Commonwealth action posed great risk to defendants for uninsured exposure. To secure enough coverage to protect against potential liability to the Commonwealth, defendants needed to look beyond policies in effect at the time of the collapse and assert rights under co-defendants' policies as additional insureds, and most importantly, under past policies. Interestingly, the very nature of the cause of the ceiling collapse enabled defendants to argue for coverage under eight continuous years of primary and excess insurance policies.

### 'CREEP' EFFECT

An investigation performed by the National Transportation Safety Board (NTSB) found that the cause of the ceiling collapse was the failure of the ceiling hanger system suspending the cement ceiling panels high above the roadway where Milena Del Valle was killed. Spe-

Tracy Alan Saxe



Ryan M. Suerth



C  
O  
N  
S  
T  
R  
U  
C  
T  
I  
O  
N  
L  
A  
W

Tracy Alan Saxe is a partner at Saxe Doernberger & Vita, P.C. in Hamden. He has extensive experience in complex commercial litigation, specializing in insurance coverage issues. Ryan M. Suerth is an associate with the firm and focuses on a variety of insurance coverage-based litigation on behalf of policyholders. Both acted as policyholder counsel for parties in the Big Dig litigation.

# Construction Law



cifically, the NTSB found that the cause of the ceiling collapse was something called “creep.” The ceiling hanger system was anchored to the tunnel roof with bolts held by epoxy, a strong adhesive not unlike glue. Upon application in 1999, when the bolts were placed in the tunnel roof, the epoxy began to slowly deteriorate, a process known as “creep.” Over the course of eight years, “creep” caused the bolts to slowly pull free from the ceiling, resulting in the failure of the entire hanger system at the exact time Angel and Milena Del Valle were traveling through the tunnel in 2006. The NTSB ultimately determined that the wrong type of epoxy was used.

## STANDARD CGL POLICY

Under the standard commercial general liability (CGL) insurance policy, the two primary conditions that must be met to trigger coverage for a property damage claim are: 1) the property damage must be caused by an occurrence, and 2) the property damage must occur during the policy period. The first condition is the topic of much debate between contractors and insurers; specifically, whether defective construction constitutes an occurrence under the standard CGL policy in which an occurrence is defined as an accident. Neither Connecticut

nor Massachusetts, the jurisdiction whose law would potentially apply in any Big Dig coverage litigation, have addressed this issue, but the trend in recent court decisions in other jurisdictions is that construction defects constitute an occurrence under a CGL policy. See, e.g., *U. S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007).

## CONTINUOUS TRIGGER

As to the second condition, that the property damage must occur during the policy period, it is obvious that property damage occurred when the ceiling collapsed, triggering the policies then in effect; however, a year’s worth of policies may not have been enough to adequately protect defendants against the Commonwealth’s claims. Fortunately, the NTSB’s explanation of “creep” gave defendants an argument utilized in many jurisdictions, including Connecticut, in environmental and asbestos-related claims where property damage or bodily injury is spread over a period of years. The continuous trigger theory allows policyholders to tap successive policies so long as some injury occurs during each policy period. See *Se-*

*curity Ins. Co. of Hartford v. Lumbermens Mutual Casualty Co.*, 264 Conn. 688 (2003). Massachusetts law is unclear as to whether a continuous trigger would apply in the context of the ceiling collapse; however, precedent lays a promising foundation for its application. See *Continental Cas. Co. v. Gilbane Bldg. Co.*, 391 Mass. 143 (1984); *Trustees of Tufts Univ. v. Commercial Union Ins. Co.*, 415 Mass. 844 (1993). While the actual ceiling collapse could only trigger one policy year, the progressive deterioration of the epoxy (“creep”) established a strong factual basis for a continuous trigger of policies. Therefore, it is likely that all CGL policies insuring defendants from the date of the installation of the bolts in 1999 to the date of the collapse in 2006 were triggered.

## LOOK TO THE PAST

Policyholders who find themselves facing severe liability, as in the Big Dig litigation, should be open-minded when evaluating their potential insurance coverage. Not every claim lends itself to the trigger of successive insurance policies, but it is always good practice to safeguard copies of past policies, because policyholders may be surprised to find that an old policy may provide coverage for a new claim. ■