



Alerts

"Loss of Use" Property Damage Does Not Mean Permanent Loss

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Insurance Coverage Alert

A little-noticed decision by a panel of the California Court of Appeal, Fourth District, provides some clarity about what “loss of use” means in a typical commercial general liability policy that defines property damage as both: (1) “physical injury to tangible property, including all resulting loss of use of that property;” and (2) “loss of use of tangible property that is not physically injured.” *Advanced Network, Inc. v. Peerless Ins. Co.*, 190 Cal. App. 4th 1054 (Dec. 10, 2010). The insured made a claim seeking defense of an equitable subrogation lawsuit arising from the theft of nearly \$2 million by one of the insured’s employees from cash machines maintained by the insured under contract. The insurer disclaimed, finding that the first prong of the “property damage” definition was not met because money is not tangible property and because the theft was not accidental and therefore not an “occurrence.” In the subsequent coverage litigation, the trial court ruled for the insured, finding that the second prong of the property damage definition applied because the insured’s client “did sustain a ‘loss of use’ of the bills.”

The court of appeals reversed. Citing *Collin v. American Empire Ins. Co.*, 21 Cal. App. 4th 787 (1994), and subsequent cases, the court found that a loss of use must be temporary to fall within the definition of “property damage.” The court stated, “[T]he terms ‘loss of use’ and ‘loss’ are not interchangeable for insurance purposes. If we were to hold otherwise, we would have to ignore the words ‘of use’ in the term ‘loss of use.’” Thus, such coverage does not apply where a claimant seeks “replacement value” of property. Most significantly, the court made clear that while the “loss of use” prong of the definition of property damages does not expressly include “the term ‘temporary,’ the impermanent nature of ‘loss of use’ damages is implicit.” Finally, the court found that the insurer was not estopped from relying on the lack of coverage under this second prong of the definition even though it did not address it in its disclaimer to the insured.

Practice Note

The decision in *Advanced Network* helps reinforce that permanent losses are not insured under a commercial general liability policy’s “loss of use” provision, and that the coverage has a specific and more narrow application.

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