The Coverage Fun House Mirror: When Things Are Not What They Seem

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When it comes to commercial general liability coverage, sometimes things are not what they seem. Some policy language looks like it has a clear meaning. But it turns out that there is more than meets the eye. To see this, you need not look further than the first page of the commercial general liability form. Take its insuring agreement. Its words are by now etched in stone tablets. But even so.

Any potential coverage is tied, in part, to damages because of "bodily injury." Everyone knows what "bodily injury" is. The blood and broken bones are hard to miss. But is emotional injury bodily injury? Or what about hair loss, weight loss, fragile fingernails, loss of sleep, crying or a knot in your stomach? Courts have been required to address whether all of these are "bodily injury."

And was that "bodily injury" caused by an "occurrence?" as required by the CGL insuring agreement? An "occurrence" is defined as an accident. Of course everyone knows what an accident is. Then why is it the oldest and most litigated coverage question of them all, with courts struggling with it for about 150 years?

Whether there has been "property damage," to trigger the CGL insuring agreement, can also be subject to a fun house mirror effect. Property damage. Sure, we know what that is. Broken and leaking windows, contaminated property, a wrecked car. If property is damaged, and needs to be fixed, then it's "property damage." This is who's buried in Grant's tomb-stuff.

But take a look at the definition of "property damage" in the ISO Commercial General Liability form. In relevant part it is 65 words. But a mere five of them solely address physical injury to property. The other 60 address "property damage" in the form of "loss of use" of property.

Last week's Southern District of California decision, in *La Roca Christian Communities International v. Church Mutual Insurance Company*, No. 20-1324 (S.D. Calif. Nov. 12, 2020), demonstrates that "property damage" can be something that does not need a hammer and nails to fix.

At issue in *La Roca Christian Communities* was coverage for damages caused by a breach of a lease. La Roca Christian Communities (La Roca) ran a church. La Roca and Pacific Coast Christian Prep (PCCP) entered into a lease for the purpose of PCCP opening and operating a primary school on La Roca's premises. The lease required tenant improvements – some paid for by La Roca and others by PCCP.

Specifically, La Roca had the job of preparing the property to make it code-compliant to be used as a school. PCCP "also made improvements to the property, including installing IT equipment, cable, phones, speakers, projectors, internal wiring, power outlets, doors, smartboards, and other school-specific items."

Things did not go well. The improvements were not completed by the start of the school year. PCCP was forced to move its school operation to another location and suffered damages from loss of its tenant improvements and other personal property.

You know what happened next. PCCP filed a demand for arbitration and was ultimately awarded $337,000 from La Roca. La Roca had sought coverage from the outset from its general liability insurer, Church Mutual, which had denied a defense and indemnity.

As Church Mutual saw it, the demand for arbitration sought "lost tuition and lost tenant improvements and equipment," which was not covered "property damage." [Church Mutual also argued no "occurrence." Interesting issue, but beyond the scope here.]

La Roca filed an action for declaratory judgment, breach of contract, bad faith, etc.

The policy's definition of "property was" was as follows [standard ISO stuff]:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
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> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

La Roca argued that the damages sought from it by PCCP were "property damage," as they were for "loss of use of tangible property that is not physically injured."

The court agreed: "[T]he underlying action involves loss of use of PCCP's own personal property left at, and improvements to, the leased property, including IT and other school-related equipment and improvements, e.g., wiring, plugs, doors, etc. So, while loss of use of the leased property might not be tangible property under Golden Eagle, the loss of PCCP's school equipment and improvements to the leasehold likely would be."

The court was persuaded by case law involving restaurant leases – where tenants brought claims against landlords, for loss of improvements to property and loss of use of tenant's property that remained in a restaurant after it was forced to close. In these cases, the courts found that the potential for coverage for "property damage" existed.

[The *La Roca* court discussed but did not resolve, whether the loss of a leasehold interest per se is loss of use of tangible property or is it simply an economic loss, lost profit, or loss of the benefit of a bargain – an issue on which California appellate courts may disagree.]

So we all know that when property is damaged, and needs to be fixed, it is "property damage." But it turns out that "property damage" can also involve property has been improved.

When it comes to commercial general liability coverage, sometimes things are not always what they seem.

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