



Weekly Law Resume

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Edited by David Blinn and Mark Hazelwood



WEEKLY LAW RESUME™

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Insurance Coverage - "Loss of Use"

Advanced Network, Inc. v. Peerless Insurance Company
Court of Appeal, Fourth District (December 10, 2010)

The term "property damage" is defined by most CGL policies to include the "loss of use" of physical or tangible property. This case considered whether an underlying action for conversion of monies qualified as "property damage" for the loss of use of the monies taken.

Advanced Network, Inc. (ANI) contracted with Mission Federal Credit Union (Mission) to service cash distribution machines in Mission's stores. In October of 2004, it was discovered that an ANI employee had been stealing cash from Mission's machines, which he concealed by filing false records. Ultimately, the employee pled guilty in a federal criminal case to misappropriating almost \$2,000,000 between 2000 and 2004. Mission made a demand against its fidelity bond holder, Cumis Insurance Company (Cumis), which reimbursed the entire amount, less Mission's deductible. Thereafter, in August of 2005, Cumis filed suit against ANI in federal court for equitable subrogation, negligence, breach of contract and respondeat superior.

ANI had a CGL policy with Peerless Insurance Company, with \$1,000,000 limits per occurrence, along with a \$250,000 crime policy with Chubb Group of Insurance, and a \$3,000,000 commercial umbrella policy with Golden Eagle Insurance. The CGL policy issued by Peerless defined "property damage" as (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." ANI tendered to all three carriers. Peerless denied coverage on the basis that money is not considered "tangible property" and the theft of money is not considered an occurrence because it is not an "accident." In late 2006, ANI settled with Cumis for \$1,000,000, including the \$250,000 of Chubb's policy, but with no contribution from Peerless.

In September of 2007, ANI sued Peerless for breach of contract and breach of the duty of good faith and fair dealing. Both parties brought summary judgment motions. The trial court denied Peerless' motion, explaining that cash was tangible property and that the theft was an "occurrence" because ANI's employee's theft was "unforeseen and unintended." The matter proceeded to trial, and Peerless argued that the "loss of use" prong of the property damage definition was inapplicable because Cumis'

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lawsuit had been for the loss of and replacement of the cash, not for the loss of use of the cash. The trial court rejected this argument, and ultimately ANI prevailed. Peerless appealed.

The Court of Appeal reversed the judgment for ANI and ordered that judgment be ordered in Peerless' defense. First, the court noted that the law clearly holds that conversion is not itself property damage, but "rather the taking or deprivation of property." As such, the taking of the money by ANI's employee was not "property damage" under a CGL policy's definition of the same. The only question was whether the "loss of use" of the money could be considered property damage. The Court first looked at the definition of loss of use damages. The measure of damages for the loss of use of personal property may be determined with reference to the rental value of similar property that the plaintiff can hire for use during the period when he is deprived of the use of his own property. The Court pointed out that "loss of use" is thus different than the permanent deprivation or loss of that property, and that the two phrases are not interchangeable for insurance law purposes.

Here, the lawsuit brought by Cumis against ANI did not seek recovery for the loss of use of the funds. Rather, Cumis sought recovery for the costs it paid to its insured to replace the permanently lost funds. Because neither the underlying action nor any extrinsic facts showed any claim being made for loss of use, there was no coverage under Peerless' policy and it owed neither a defense nor indemnity to ANI on the action. Hence, the judgment in ANI's favor was reversed.

COMMENT

The Court of Appeal made clear that a conversion claim does not give rise to coverage under a CGL policy under the "loss of use" definition of property damage in the policy. To hold otherwise would render the distinction between "loss" and "loss of use" meaningless.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/D055632.PDF](http://www.courtinfo.ca.gov/opinions/documents/D055632.pdf)

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