

Permanent Loss of Cash Not Covered Under CGL Policy's 'Loss of Use' Provision

Insurance Law Update

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California Court of Appeal for the Fourth District

In *Advanced Network, Inc. v. Peerless Ins. Co.*, 190 Cal.App.4th 1054 (December 10, 2010), the California Court of Appeal for the Fourth District held that an underlying suit against Advanced Network (ANI) for the replacement of cash stolen by an ANI employee was not covered under ANI's commercial general liability (CGL) policy because the underlying suit alleged damages in connection with the replacement value of the stolen cash rather than damages for the "loss of use" of the cash.

ANI had contracted with Mission Federal Credit Union to service the cash distribution machines at the credit union's branches. It was discovered that an ANI employee had stolen approximately \$2 million in cash from Mission Federal. After the theft was uncovered, ANI submitted a claim to its fidelity insurer, which agreed to pay nearly \$2 million for the loss. The fidelity insurer then sued ANI in federal court for equitable subrogation, breach of contract and negligence. ANI tendered its defense to its CGL carrier, Peerless Insurance Company, but Peerless denied the tender. Thereafter, ANI sued Peerless for breach of contract based on the denial. Following a trial, Peerless was ordered to pay ANI nearly \$2 million in damages for failure to indemnify, punitive damages and other awards.

The Peerless CGL policy covered "loss of use" of tangible physical property. The Court of Appeal noted, "Peerless's CGL Policy does not define 'loss of use,' but it is established in California that the term cannot reasonably be interpreted to include permanent loss of property through conversion." The court examined the trial record and found that it was undisputed that the cash ANI's employee stole from Mission Federal was irretrievable, and that the fidelity insurer's suit against ANI was for the replacement value of the cash. Further, the court found "the [suit by the fidelity insurer] did not

seek any ‘loss of use’ damages.” According to the court, “loss of use” and “loss” are not interchangeable for insurance purposes: “Coverage for ‘loss of use’ does not apply to an underlying action in which the claimant seeks only the replacement value of converted property.” Therefore, because the fidelity insurer did not seek true “loss of use” damages, the court reversed the trial court’s judgment in favor of ANI and held that Peerless had no duty to defend or indemnify ANI.

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