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March 31, 2010

Brett Hogan
Property Technical Specialist
Travelers Insurance Company
P.O. Box 15439
Sacramento, California 95851

Re:	**Insureds:**	**Family Investments**
	Claim No.:	**EGZ0941**
	Location:	**4120 Fountain Ave**
		Los Angeles, California 90029
	D/L:	**01/21/2010**
	Company:	**Travelers Casualty Insurance Company Of America**

Dear Mr. Hogan:

Please be advised that this office was retained by Tony Yarijanian on behalf of Family Investments LP to respond to your coverage analysis letter dated March 11, 2010 regarding the referenced loss. In particular, I was retained to address your apparent denial of coverage concerning the replacement or repair of the subject hoists. As I understand the progress of the loss adjustment, the insureds and Travelers have agreed to most of the other items.

I have reviewed an exemplar of the Travelers ***Business Owners Policy MP T1 30 02 05*** and the various endorsements geared towards a garage keeper, including the Equipment Breakdown Coverage Extension. I note the unusual discussion in your letter under the "**Hoist Replacement**" portion of your letter wherein you defer to an apparent coverage decision made by Boiler & Machinery Claims.

It appears that Boiler & Machinery Claims undertook an investigation at your insistence and only gave consideration of the insureds' claim under the Equipment Breakdown Coverage Extension. With that limitation, you conclude that you "find no applicable coverage ***under the Equipment Breakdown coverage*** extensions 7-I for this claim." (***Emphasis added***.) Not only do I disagree with your conclusion regarding the Equipment Breakdown Coverage Extension, but I do not consider that your insureds are constrained to presenting a claim solely under that extension of "additional" coverage.

To the contrary, I have concluded that your insureds our covered by the broader grant of coverage for property damage to Covered Property and that arguable limitation in an additional extension of coverage is of no effect. Therefore, I have concluded that Travelers must pay for the direct physical loss or damage to the hoists.

The Business Owners Property Coverage Special Form provides, in pertinent part:

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from a Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this Coverage Form, means the type of property described in this Paragraph **A. 1.**, and limited in Paragraph **A. 2.**, Property Not Covered, if a limit of insurance is shown in the Declarations for that type of property.

a. Building, meaning the building or structure described in the Declarations, ***including***:

. . .

(5) ***Permanently attached:***

(a) Machinery; and
(b) Equipment.

(Emphasis added.)

I have personally examined the building described in the Declarations and found that its primary purpose was for the operation of an automobile repair facility. As part of that facility, two large capacity hoists were built into the cement foundation. There are glide holes in the cement in which the lift portion of the heavy-grade steel hoists can raise and lower. There are hydraulic controls attached to the inner walls. It is my understanding that these hoists have been part of, and integrated in to, this building from as early as the 1950s. This somewhat antiquated configuration provides certain benefits over more modern electric hoists, including a flush under-surface which eliminates tripping hazards when the hoist is in the lift position.

The existing hoist configuration is not mobile personal property. It cannot be disassembled and moved to another location. Its use, value and utility is uniquely integrated and made part of the building. Even if one wanted to remove the hoists in order to use them at another location, it would require destruction of an integral part of the insured building. Moreover, the hoists would have to be then physically built into the desired new location and would invariably become part of that building. There can be no reasonable argument proffered that these particular hoists were not "Permanently attached (a) Machinery; and Equipment."

This interpretation is supported by statute and case law. Civil Code § 660 defining fixtures, provides:

"A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods."

Modern authority considers this statutory definition to be a rule for general guidance, which establishes a rebuttable presumption of affixation. Crocker National Bank v. City and County of San Francisco, 49 Cal. 3d 881, 264 Cal. Rptr. 139, 782 P.2d 278 (1989). Thus, in determining whether an article constitutes a fixture in a given case, four criteria or tests must be taken into consideration: (1) the manner of its annexation to the realty; (2) its adaptability to the use and purpose of the realty; (3) the intention of the party making the annexation; and (4) the relation of the parties to the annexed property. San Diego Trust & Savings Bank v. San Diego County, 16 Cal. 2d 142, 105 P.2d 94, 133 A.L.R. 416 (1940)

Because the insureds both owned the building and operated a garage at the location, it is beyond dispute that the actual intent was for the hoists to be a permanent fixture.

It has been held, however, that annexation may be a controlling factor when the mode of annexation is such that the property cannot be removed without practically destroying it, or where part of it is essential to the support or safety of that to which it is attached. W.U. Tel. Co. v. Modesto Irr. Co., 149 Cal. 662, 87 P. 190 (1906). Generally, for a chattel to be considered a constructively annexed fixture, it is sufficient if it is intended to remain where it is placed as long as the land or building to which it is annexed is used for the same purpose. Trabue Pittman Corp. v. Los Angeles County, 29 Cal. 2d 385, 175 P.2d 512 (1946); Collins Electrical Co. v. County of Shasta, 24 Cal. App. 3d 864, 101 Cal. Rptr. 285 (3d Dist. 1972). Accordingly, for an article to be considered a permanent accession to land, its annexation need not be perpetual. It is sufficient if the article appears intended to remain where it is fastened until it is worn out, until the purpose to which the realty is devoted has been accomplished, or until the article is superseded by another article that is more suitable for the purpose. Collins Electrical Co. v. County of Shasta, 24 Cal. App. 3d 864, 101 Cal. Rptr. 285 (3d Dist. 1972).

With respect to the test that looks at the adaptability of the article to the use and purpose of the realty, the question most frequently asked is whether the real property is peculiarly valuable in use because of the continued presence thereon of the annexed property. Specialty Restaurants Corp. v. County of Los Angeles, 67 Cal. App. 3d 924, 136 Cal. Rptr. 904 (2d Dist. 1977); Seatrain Terminals of California, Inc. v. County of Alameda, 83 Cal. App. 3d 69, 147 Cal. Rptr. 578 (1st Dist. 1978) Thus, the fact that articles affixed are necessary for or convenient to the use of a building for the purpose for which it is designed is generally considered to indicate that they are realty. Southern Cal. Tel. Co. v. State Bd. of Equalization, 12 Cal. 2d 127, 82 P.2d 422 (1938); Specialty Restaurants Corp. v. County of Los Angeles, 67 Cal. App. 3d 924, 136 Cal. Rptr. 904 (2d Dist. 1977). In other words, to be deemed to be a fixture under the adaptability test, a chattel must be essential to the ordinary and convenient use of the realty to which it is annexed. M.P. Moller, Inc., v. Wilson, 8 Cal. 2d 31, 63 P.2d 818 (1936). Moreover, if a chattel is placed on land to improve it and make it more valuable, it is deemed to be a fixture. Bell v. Bank of Perris, 52 Cal. App. 2d 66, 125 P.2d 829 (4th Dist. 1942)

Based upon the foregoing, the hoists were "Covered Property." Travelers must pay for the direct physical loss and damage to those hoists.

6. Additional Coverages

Unless otherwise stated, payments made under the following Additional Coverages are in addition to the applicable Limits of Insurance.

. . .

c. Debris Removal

(1) We will pay your expense to remove debris of Covered Property . . . caused by or resulting from a Covered Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.

. . .

m. Pollutant Cleanup and Removal

(1) We will pay your necessary and reasonable expense to extract "pollutants" from land or water at the described premises, if the discharged, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a "specified cause of loss" which occurs:

(a) At the described premises;

(b) To Covered Property; and
(c) During the policy period.

p. Water Damage, Other Liquids, Powder or Molten Material Damage

(1) If loss or damage caused by or resulting from covered water or other liquid, powder or molten material damage occurs, we will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance from which the water or other substance escapes.

We are informed by Universal Auto Lift Repairs that pressure blew up the internal seals of both hoists and the cap of the left hoist. Due to the blow up of the internal seals, hydraulic oil was released underground, creating contamination. That company initially recommended making a 6 foot wide horizontal cut of the work area floor to remove the damaged hoists, contaminated oil, hydraulic and air pipes. It further recommended installing reinforced 10 inch concrete and installing 2 above ground hydro/electric hoists with all the attendant electrical line and breakers for the hoists. This replacement must be immediate in order to minimize contamination and avoid action by the City authorities. Also of note, that company recommended that all floors be cleaned.

The company that was hired to clean the floors and apply epoxy has just recently informed us that ***the porous cement cannot be adequately cleaned sufficient to allow an epoxy overlay.*** To attempt the clean and epoxy will result in a failure of the surface, creating bubbling, pealing and a hazardous surface.

Based upon the above, we contend that under the Travelers policy, the hoists must be removed and replaced as Covered Property; i.e., machinery and equipment integrated into the building. The estimate for this process from Universal was $34,850.75.

In addition, the estimate must be adjusted upwards because all the contaminants must be removed and the entire cement floor must be removed and replaced. It was damaged from the release of the hydraulic fluid. We will provide you with updated estimates as soon as we are in possession of same.

Although I do not believe that it is necessary for me to completely address the arguable limitations contained in the Equipment Breakdown Coverage Extension, as previously stated, I believe there is coverage even under that additional grant of coverage. Your letter fails to include more complete policy language from that section.

7. Coverage Extensions

. . .

i. Equipment Breakdown

(1) When a Limit of Insurance is shown in the Declarations for Building or Business Personal Property at the described premises, you may extend that insurance to apply to direct physical loss of or damage to Covered Property at the premises caused by or resulting from a "breakdown" to "covered equipment."

. . .

(2) Under this Coverage Extension, the following coverages also apply:

. . .

(b) "Pollutants"

(i) In the event of direct physical loss of or damage to Covered Property caused by or resulting from a "breakdown" to "covered equipment", we will pay for the additional cost to repair or replace Covered Property because of contamination by "pollutants". This includes extra expenses to clean up or dispose of such property. Additional costs mean those beyond what would have been required had no "pollutants" been involved.

G. PROPERTY DEFINITIONS

. . .

2. "Breakdown"

a. Means:

(1) Failure of pressure or vacuum equipment;

. . .

that causes physical damage to "covered equipment" and necessitates its repair or replacement; and

b. Does not mean:

(1) Malfunction, including but not limited to adjustment, alignment, calibration, cleaning or modification;

(2) Leakage at any valve, fitting, shaft seal, gland packing, joint or connection;

. . .

4. "Covered Equipment"

a. ***Means the following type of equipment:***

(1) ***Equipment designed and built to operate under internal pressure or vacuum other than weight of contents;***

. . .

(4) ***Hoists*** and cranes;

b. Does not mean any:

. . .

(5) Pressure vessels and piping that are buried below ground and require excavation of materials to inspect remove, repair or replace;

(***Emphasis added***.)

The definition of "Breakdown" in this additional extension of coverage means, specifically, the "***Failure of pressure or vacuum equipment***." That is exactly what happened in this case. For some reason, the definition of "Breakdown" is missing from your letter. Instead, you include in your letter what a "Breakdown" does not include. Apparently, you suggest that some calibration malfunction occurred or, perhaps, a "leakage" of a valve. Clearly, the definition of what is a breakdown is more precise than what was not a breakdown in this case.

The definition of "Covered Equipment" in this additional extension of coverage means, specifically, "***Equipment designed and built to operate under internal pressure or vacuum . . ."***

That is exactly the equipment at issue in this loss. If that definition were not enough, "Covered Equipment" is specifically listed in this policy as "***Hoists . . .***" For some reason, the specific and peculiar definition of "***Hoists***" as "Covered Equipment" is missing from your letter. Instead, you include in your letter what "Covered Equipment" does not include. Apparently, you suggest that the vague general description of vessels and pipes somehow trumps the specific description of "***Hoists***." Moreover, those "***Hoists***" were specifically "***Equipment designed and built to operate under internal pressure or vacuum . . . .***"

In a strange twist of interpretation, you conclude that the damaged equipment is a "hydraulic tank" rather than "***Hoists***". Based upon that "twist", you conclude that the "hydraulic tank" is not "covered equipment." Of course, the hydraulic tank is an indivisible part of the damaged "***Hoists***." We have no information, in particular that the hydraulic tank, as opposed to the "***Hoists***" was damaged.

We contend that the canons on insurance contract interpretation favor the specific description of covered property over the vague partial limitation language which would render the grant of coverage illusory. Moreover, because the hydraulic tank is an indivisible smaller portion of the larger more specifically named hoist system; such limitation cannot be used to defeat coverage.

Notwithstanding the actual policy language, Travelers knew that it was selling a garage keepers policy to a relatively unsophisticated auto mechanic. It was objectively reasonable for an auto mechanic to assume that his "***Hoists***" were covered when they were specifically listed under "Covered Property." Any doubt whether the fact that the ***Hoists*** were hydraulic powered would affect coverage would also be reasonably interpreted that as "***Equipment designed and built to operate under internal pressure or vacuum . . . .***" --- also, specifically described as "Covered Equipment."

The limitation proffered about buried pressure vessels is also not plain, conspicuous or where one would find an exclusion of a specifically itemized piece of "Covered Property."

An insurer is obligated to read and interpret the policy giving equal weight to the insureds'

Very truly yours,

BARRY P. GOLDBERG
A PROFESSIONAL LAW CORPORATION

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Enclosures